

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT

219 South Dearborn Street
Chicago, Illinois 60604

January 3, 2007

FRANK H. EASTERBROOK
Chief Judge

No. 06-7-372-46

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

An anonymous complaint charged a judge with acting unethically by (a) using his judicial title in litigation, pending in state court, that is unrelated to his federal office, and (b) allowing the litigation to continue even though state records imply that some of the allegations made on his behalf in the state case are false. (In particular, the complaint filed in the judge's name describes him as a member of a charitable organization's board, while state records imply that he is not a board member.)

Anonymous complaints are not handled under the Judicial Conduct and Disability Act of 1980 and its implementing regulations. But when information from any source implies that judicial misconduct may have occurred, a chief judge may and should identify a complaint under 28 U.S.C. §351(b). See also Rule 2(j) of the Rules of the Judicial Council for the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability. I did this and notified the judge about the allegations. I also asked the judge to consider whether his service on the governing board of the organization is consistent with all ethical requirements (including the rule that judges not participate in fundraising, which potentially adds an official imprimatur to private activity and misuses the power of the office). Finally, I invited the judge to propose and take any appropriate corrective action.

The judge has replied that, before the state litigation began, he was unaware that the lawyer representing him (and other members of the charity's governing board) planned to use his judicial title or refer to him as "honorable." After the case had been under way for some time, the judge read the pleadings, recognized the impropriety, and instructed counsel to correct the papers. Counsel, who had been unaware that a judge's office or title should not be used with respect to activities in a private capacity, promised the judge that corrections would be made but failed to follow through. When the judge repeated his directive, counsel again promised—and again failed to correct the pleadings.

In December 2005 the judge resigned from the charity's governing board. At this point he should have been dismissed as one of the plaintiffs in the litigation. Repeating the pattern, counsel failed to accomplish this ministerial task. The judge's resignation explains why a check of state records during 2006 failed to show the judge's position on the board. He was no longer a member—though papers filed in state court continued to assert that he was.

After receiving my letter (which also conveyed a copy of the anonymous complaint), the judge once again instructed counsel to dismiss him from the litigation as a party and to correct earlier pleadings. The judge's letter to me contains an acknowledgment from counsel that she will do this—and that she, rather than the judge, is at fault not only for including improper language in the filings but also for not correcting these filings earlier.

It is unfortunate that the judge did not monitor counsel more closely, first to ensure that no improprieties occurred in the litigation and second to ensure that recognized ethical lapses were corrected immediately. A judge should review pleadings before they are filed rather than afterward, when inappropriate characterizations already are matters of public record. Moreover, a judge who knows that his lawyer has failed to carry out his instructions, and that inappropriate statements and false allegations remain on file with a state court, must act effectually rather than allow the problem to fester.

Nonetheless, by instructing counsel to dismiss him as a party, and to correct pleadings on file, the judge has taken appropriate corrective action. Given counsel's failure to carry out these tasks earlier, it is vital to ensure that the judge's instructions are at last implemented. I have decided to close this matter based on counsel's written undertaking to act, coupled with acknowledgment that the fault lies with her, but it remains the judge's responsibility to achieve compliance, if necessary by hiring another lawyer who will be more responsive to direction. Simply dismissing the judge as a plaintiff will not suffice; the earlier pleadings and any other papers filed in the litigation must be amended to delete any reference to "judge," "the honorable," and other terms indicating an official capacity. The inappropriate use of the prestige of an official position will persist for as long as the original papers remain on file.

With respect to membership on the boards of charitable organizations: the judge's resignation from this board in December 2005, and from another board after receiving my letter, constitute corrective action. The judge informs me that he remains a member of the board of two other private charitable organizations. He plans to resign from one of these boards during the next month and to remain on the second. There is no impropriety in membership, see Canon 5(B)(2), provided that the judge refrains from engaging or assisting in fundraising, ensures that his official position is not mentioned in connection with the organization's activities, and does not allow the time required for the organization's activities to interfere with the prompt administration of judicial duties. See Advisory Opinions 2, 12, and 28 issued by the Committee on Codes of Conduct. The judge tells me that he will take care to follow these requirements, so there is no basis for any current concern.

Finally, the judge tells me that he participates in two organizations that advance the study and public understanding of law. This participation is compatible with Canon 4(C) and raises no ethical concerns.