April 8, 2011

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Clerk
United States Court of Appeals for the First Circuit
Joseph Moakley United States Courthouse
One Courthouse Way – Suite 2500
Boston, MA 02210
(617) 748-9057

Re PETITION FOR REVIEW Of Chief Judge's ORDER dismissing Complaint No. 01-10-90023

Clerk,

I hereby petition the judicial council for review of the March 24, 2011 dated Chief Judge (Lynch) Order dismissing my complaint of September 24, 2010 against District Judge William G. Young. The petition should be granted for the following three general reasons and several specific reasons:

1) MISSTATEMENT OF FACTS – Chief Judge Lynch's Order misstates the facts of the case, including those directly provided by the Complainant. The misstated facts improperly served as a basis for dismissal of the Complaint.
    a. Lynch Page 3, "*it [Young's Court] promptly informed parties of the subject matter of the communication and offered them an opportunity to respond <u>See</u> Code of Conduct, Canon 3(A)(4).*" ACTUALLY, Judge Young did not cite the communication that attorney Pfaff made with the Court (actually numerous communications), so there could not possibly have been an informing of the "*subject matter of the communication*". NOTE: The Court initiated communications with attorney Pfaff on March 9, 2010, of which the Plaintiff Clemens was again NOT informed. Judge Lynch seems to be confusing an email that Plaintiff Clemens wrote with the email communication with the Court…attorney Pfaff had his own – ex parte - email communications with the Court, of which the Young Court never informed Plaintiff Clemens.
    b. Lynch Page 2, "*At the hearing, the court heard from both parties in full before dismissing the case solely on the basis of the improper communication*." ACTUALLY, no Civil Defendant, including attorney-alleged-victim Pfaff, made any statement ever, as the record shows, about abuses or threats.
    c. Lynch Page 3, "*The communication was not initiated by the judge, did not address the "substance" of the case, and was made for "emergency purposes*". ACTUALLY, there

were court initiated emails withheld (until after the Appellant Brief was filed), the attorney Pfaff communication DID include a 12 paragraph email segment addressing the substance (attorney misconduct) in the case, and there is NO emergency defined.

d. Additional lacking information and misquotes are contained in the Supplemental Pleading of Jeffrey L. Clemens attached herein. The documents speak for themselves – the relevance and support for a review are obvious.

2) INCOMPLETE REVIEW – Lynch Page 3 states "*My staff and I have reviewed the record* - …" but does not disclose any inquiry to the subject Judge, associated Clerks, or the series of emails communicated ex parte between the Court (Young) and attorney Pfaff. The Chief Judge review of this matter steered clear of any process that could discover and reveal further evidence of misconduct. At a minimum, the review should have addressed ALL ex parte communication, which it did not do, for (let's hope not) the simple reason that the Code of Judicial Conduct has specific concern over such communication.

3) DISPUTABLE FINDINGS – Lynch Page 4 states "*there is no evidence of illicit judicial motivation*", when the so-called threatening email clearly notes Judge Young's connection to one of the Civil Defendants, no small matter considering that Judge Young got assigned the case from Judge Stearns upon a disqualification for the same reason. Lynch Page 4 also states "*This [Plaintiff's response to the show cause order] pleading…indicates that the plaintiff was fully aware of the communication at issue*." Wrong, but regardless – and this is an important regardless – the real point is the Judge's failure to give such notice to the Plaintiff and not whether or not the Plaintiff was aware. In any case, the Plaintiff was not aware of the Pfaff ex parte communication to the court. Lynch Page 5 states "*The court's orders and the transcript of the hearing contain no criminal accusations by the judge….the factual premise for the claim [of unfounded and prejudicial criminal accusations against the plaintiff] being refuted,….*" The Code of Judicial-Conduct (Canons) recognize as misconduct that "conduct prejudicial to the effective and expeditious administration of the business of the courts." Therefore, Judge Young's Show Cause Order accusing the Plaintiff of sending "threatening communications" is an allegation prejudicial, and by implication, a criminal one. If it was not a criminal allegation, then there would not be the "emergency" that Judge Lynch cites on Page 3. [Read the last sentence again.]

Given these issues, there is a potential for the disqualification of the Chief Judge in this judicial review, per Rule 25 of the "Rules for Judicial-Conduct and Judicial Disability Proceedings".

An inquiry – apparently not completely done by Chief Judge Lynch – is essential, as the Canons of Judicial Conduct call for impartiality, independence, and diligence in all judicial actions and the taking of six months to decide a complaint, belies any insistence that a baseless complaint was submitted. Four months after conclusion of the associated civil appeal, and six months after submittal of the misconduct complaint, is a long time to complete the review, showing not diligence but an indifference to the appearance of propriety. It is not lost on the complainant that the time took to review the misconduct complaint (six months) assures that the associated criminal trial occurs before a review is complete, thus prejudicing the associated criminal proceedings. In fact, Judge Lynch signed the dismissal on March 24, the scheduled date of the start of pre-trial conferences and the end of the status conferences. Judge

Young is a material witness in that trial, as he accused the Plaintiff Clemens of threatening the victim, an accusation made prior to the FBI seeking an arrest warrant in the associated criminal case and before the US Attorney went to the Grand Jury. Do we have to wait 6 months to find out whether or not a civil court judge improperly influenced a criminal action against a civil plaintiff? That length of time sets up a circumstance of undue prejudice. Could that lead to a withholding of ex culpatory evidence surrounding communications between the court, victim, and FBI? An inspection of the associated criminal case record will show that within a month of the alleged email threat, the civil plaintiff turned criminal defendant identified false statements by the FBI agent seeking an arrest warrant, in a complaint drawn up after knowing that Judge Young had made an accusation of a threat. That same FBI agent also testified at the Grand Jury, with the court record also showing that the FBI agent made false statements at the Grant Jury. False statements can be argued as prejudicial, and Judge Young played no small part in setting up that circumstance.

Is the Court trading the appearance of propriety for the assurance of independence of the judiciary (the primary reason for the Canons)? The only way to fully assure the independence of the judiciary is to never make accountable the conduct of lawyers and judges, but then why would there be a code of judicial conduct? Are litigants expected to investigate suspected misconduct before appealing their case?

Judges – those sworn to impartiality, independence, and diligence – are in the best position to identify what is right or wrong in their conduct, therefore, discipline is required or appropriate when a judge fails to make that determination correctly. In this case, Judge Young took less than a few hours to determine a conclusion of an abuse of the civil justice system on the part of the Plaintiff – without due diligence, as evidenced by a show cause order issued before the Plaintiff was given notice of an ex parte communication and before an opportunity to object to or oppose such an ex parte communication – while the Chief Judge took 6 months to determine that the judge's conduct was in compliance with the code of conduct. Hmm. The show cause order is not a notice of ex parte communication, and is only an allegation to which to show cause. If the FBI had brought the email to the judge's attention, the judge would have been relieved of his noticing obligation. But, the FBI did NOT disclose the email. Because of the ambiguity in Judge Young's show cause order, the Civil Plaintiff Clemens was unable to know whether or not the FBI had presented something to the judge, thus, Clemens could not even logically deduce that an ex parte communication had occurred. How disingenuous of Judge Young.

There is a saying in engineering that "you can't check in quality". That means that you do not wait until the end of the process (i.e., the appeal) to check for the quality, as statistically you will produce errors and failures. Is it the goal of the Canons to make sure errors and failures happen in legal proceedings? No, as it is the goal to prevent them. It is the goal, though, of the Rules for Judicial-Conduct and Judicial-Disability Proceedings to "check in" detection of such errors and failures of conduct to prevent an injustice.

Ex parte communication begins to look like partiality.

The failure to give notice of ex parte communications begins to look like a lack of diligence.

The hinting at criminal accusations begins to look like a lack of independence.

The insistence of an "emergency" begins to look like an "ignorancy" of those beginnings of partiality, lack of diligence, and lack of independence.

If there was any "emergency" then it was the impact of misconduct on the part of the defendant attorney subverting the rules - for representing co-defendants (a conflict) and initiating ex parte communications are prima facie violations of the Rules of Professional Conduct.

It is a deep irony that a pro se civil litigant presumes the integrity of the courts and the following of conduct rules, only to find out that the rules are not really rules, thus allowing his transformation to the status of a criminal defendant, while the original civil defendant is relieved of being an accused criminal. The Commonwealth uses the authoritative "shall" in its conduct codes (Canons), while the US uses the less than authoritative (and not automatically subject to discipline) "should" in its Canons. Does this mean that the US has a lower standard of judicial conduct than the Commonwealth of Massachusetts? That would be truly inconsistent with the fact that the Rules of Professional Conduct (RPCs) of the US Courts subject the practicing attorneys to the RPCs of the Commonwealth, a precondition for approval to practice in the US Courts.

A lot of rhetorical questions have been presented above. Let us present a specific conduct question – Why did Judge Young deny answering a Plaintiff Clemens request to identify the communication deemed a threat? It seems like a fair question. The Canons say that the Judge should take appropriate action when confronted with ex parte communication, which includes providing notice to all parties, yet Judge Young did not do that, even when requested. This circumstantially means that the Judge took parts of the communication and deemed it an emergency or threat or something to justify an exception to the conduct rule, while also ignoring parts of the same communication addressing issues of substance – attorney misconduct, a claim in the civil lawsuit – thus violating the conduct rule.

Multiple reasons exist for review of the Chief Judge's Order dismissing the Complaint of judicial misconduct. A review is appropriate.

Sincerely,

Jonathan A. Clemens

ATTACHMENTS

April 6, 2011 Letter to Judge Lynch from Jeffrey L. Clemens

April 8, 2011 Petition For Review – Supplemental Pleading of Jeffrey. L. Clemens for Jonathan A. Clemens