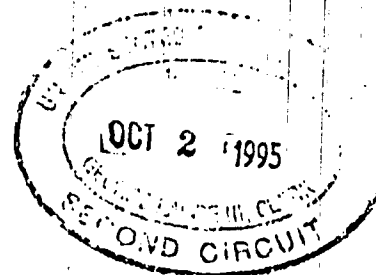


JUDICIAL COUNCIL OF THE
SECOND CIRCUIT



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In re
CHARGE OF JUDICIAL MISCONDUCT

95-8528

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AMALYA L. KEARSE, Acting Chief Judge:

On August 10, 1995, Complainant filed the above-captioned complaint with the Clerk's Office pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act, 28 U.S.C. § 372(c) (the Act), and the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers (the Local Rules), charging a circuit court judge of this Circuit (the Circuit Judge) with misconduct.

Background:

Complainant heads a corporation that was sued by a bank in a foreclosure action. The bank's successor, a federally-chartered institution, continued the suit and the district court judge entered a decree of foreclosure in April 1994. The corporation appealed to the Court of Appeals for the Second Circuit. While the appeal was pending, the district court judge who decided the case was nominated for an appellate judgeship. Complainant opposed the nomination in a letter to the Senate Judiciary Committee.

EX "Q"

The corporation's repeated requests for postponements delayed the progress of the appeal. At counsel's request, the corporation sought and received extensions of three filing deadlines and a postponement of oral argument, which had been set for May 17, 1995. When oral argument was rescheduled for June 21, the corporation's counsel again asked for an adjournment because of another court appearance. The Circuit Judge denied that request and a subsequent request for reconsideration.

On the morning of June 21, Complainant filed a motion seeking a change of venue, appeared at the oral argument, and told the panel that counsel could not be present because of another court appearance. The Circuit Judge, who was presiding, stated his understanding that counsel had agreed to appear. Complainant said that was incorrect. With the Court's permission, Complainant addressed the panel at the outset and again in rebuttal after the appellee. Complainant told the panel he was not prepared to argue the merits and objected to the case being heard in the absence of the corporation's counsel. Subsequently, the Court of Appeals affirmed the district court's decision, and the corporation petitioned for reconsideration.

Allegations:

Complainant asserts that he and the corporation were victimized by the Circuit Judge's prejudicial conduct. Specifically, Complainant accuses the Circuit Judge of depriving the corporation of counsel by (a) denying the request to postpone

argument, (b) proceeding with oral argument in the absence of counsel, and (c) interrupting Complainant's presentation to the panel. Complainant further alleges that the Circuit Judge deliberately misled the appellate panel by stating falsely that the corporation's counsel had promised to appear at oral argument, and by concealing the change of venue motion that was filed by Complainant immediately before the oral argument. Complainant attributes the alleged bias of the Circuit Judge to the influence of the former district judge, who now sits on this Court, claims that all the circuit judges are similarly biased, and requests that his complaint against the Circuit Judge should be dealt with by another circuit.

Disposition:

Complainant's claim that the Circuit Judge deprived the corporation of counsel is contradicted by the record, the Local Rules, and the Federal Rules of Appellate Procedure. Motion papers reflect that counsel's requests to postpone oral argument were based on other court appearances, not on emergencies, and one adjournment was granted. A second adjournment was properly denied because, as Local Rule 34(c) states, "Engagement of counsel in courts (other than the Supreme Court of the United States) or administrative hearings will not be considered good cause for postponement." It was proper, too, for oral argument

¹ Local Rule 34(c) provides as follows: Postponement of argument. Except in the event of an emergency, such as unforeseen illness of counsel, an application to postpone the

to proceed in the absence of the appellant-corporation's counsel. Rule 34(e) of the Federal Rules of Appellate Procedure provides that "If the appellant fails to appear, the court may hear argument on behalf of the appellee, if present." Moreover, upon review of the audiotape of the oral argument, it is evident that Complainant was permitted to address the panel at length and speak again in rebuttal, and was treated courteously by the Circuit Judge. Interruptions by judges are common in oral advocacy and, when made as they were here, do not constitute discourtesy or misconduct. Accordingly, these portions of the complaint are dismissed for failure to allege misconduct and as unsupported, pursuant to 28 U.S.C. §372(c)(3)(A)(i) and (iii) and Local Rule 4(c)(1) and (3).


Complainant's allegation that the Circuit Judge intentionally misled the panel is unfounded and devoid of any support. There is no evidence whatever that the Circuit Judge's statement about counsel's attendance was anything other than a mistake or that the venue motion, filed minutes before argument, was concealed. This portion of the complaint is hereby dismissed as unsupported and frivolous, pursuant to § 372(c)(3)(A)(iii) and Local Rule 4(c)(3).

Finally, Complainant's claim that the Circuit Judge was

date for oral argument will ordinarily not be favorably entertained. Engagement of counsel in courts (other than the Supreme Court of the United States) or administrative hearings will not be considered good cause for postponement. The date for oral argument may not be postponed by stipulation.

influenced by the former district judge (and that the other circuit judges were as well) is entirely unsubstantiated. This portion of the complaint is hereby dismissed as frivolous, pursuant to 28 U.S.C. § 372(c)(3)(A)(iii) and Rule 4(c)(3) of the Local Rules.

The Clerk is directed to transmit copies of this order to the complainant and to the Circuit Judge who is the subject of the complaint.


AMALYA L. KEARSE
Acting Chief Judge

Signed: New York, New York
September 27, 1995