

## CASE NOTES

### Bankruptcy Court's Refusal to Appoint Financial Group as Estate Professional Is Not Misconduct

By Marcos A. Ramos

[\*In re Complaint of Judicial Misconduct\*](#), --- F.3d ---, 2014 WL 3824249 (9th Cir. Aug. 5, 2014)

In *In re Complaint of Judicial Misconduct*, the United States Court of Appeals for the Ninth Circuit rejected a complaint for judicial misconduct filed by the principal owner of a financial group against a sitting bankruptcy judge who refused to approve the appointment of the financial group based on the judge's view that the financial group had disregarded the terms of retention orders entered by the judge in other cases.

Complainant principal owner of a financial group had been appointed as an advisor to a bankruptcy estate by the bankruptcy judge pursuant to multiple orders that included a monthly cap on fees. The complainant exceeded the monthly cap and the judge refused to approve payment of fees in excess of the cap. The complainant appealed and ultimately prevailed, although the reviewing court noted that the judge might have been able to limit the payment of excess fees to the complainant if the judge had relied on a different code section.

After the appeal was concluded, the judge refused to appoint the complainant in other cases on the grounds that (1) the complainant had violated his orders; (2) the complainant had appealed and prevailed on a technicality, and (3) the judge did not have confidence in the complainant because the judge believed that the complainant had violated the terms of his prior orders. Complainant thereafter filed its complaint alleging judicial misconduct.

The court noted that the decision to approve (or not) the appointment of a bankruptcy professional is a "merits ruling that is not normally second-guessed in a judicial misconduct proceeding." However, such ruling could constitute misconduct if it was "influenced by an invidious factor or an impermissible motive."

Here, the complainant argued that the judge denied its applications because the complainant had successfully appealed from the judge's prior orders and the "judge's unhappiness with the financial group's failure to adhere to the caps is unreasonable and constitutes personal animus."

The court disagreed. First, while the judge's statements regarding the complainant were blunt, they also were measured and not rude or intemperate. Second, the judge reasonably can rely on its prior experience with the complainant when considering a later, discretionary decision of whether to approve the complainant's retention in a different case. Third, the judge reasonably could conclude from the earlier appellate decision that the judge's inclination to limit payment of

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the complainant's excess fees could have been justified under a different section of the code; therefore, the Judge had a basis to believe that his underlying judgment was sound.

Accordingly, “[i]t was not misconduct, or even wrong, for the judge to consider the [complainant's] repeated refusal to abide by the financial limits he set in a past case in making future appointments. Indeed, it would have been irresponsible for the judge to disregard the [complainant's] prior record.”

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