

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-10-90003

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a district judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled *Rules for Judicial-Conduct and Judicial-Disability Proceedings* (the “Misconduct Rules”); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 *et seq.*, and 3) the “Breyer Report,” a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled *Implementation of the Judicial Conduct and Disability Act of 1980*. The Breyer Report may be found at: <http://www.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To the extent that any relevant prior decisions of the full Judicial Council of this circuit consistent with those authorities exist, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit’s web page at: <http://www.ca10.uscourts.gov/misconduct.php>. In accord with those rules, the

names of the complainant and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant, a former criminal defendant, alleges that, on or about August 15, 2006, the subject judge held a “secret meeting” during complainant’s criminal proceedings outside the presence of the prosecuting attorney. Complainant’s counsel was allegedly present for the meeting and complainant states that a court reporter may have been present. Complainant contends that the judge was angry during this meeting, and yelled at and intimidated complainant. Complainant asserts that the judge told complainant several times during the meeting to plead guilty and threatened to give complainant a sentence of life in prison if complainant did not plead guilty. Complainant takes issue with the sentence ultimately imposed by the judge and also makes various allegations against counsel.

To the extent that complainant challenges the judge’s rulings and makes allegations against counsel, those allegations may not be considered here. Challenges to a judge’s rulings are “directly related to the merits of a decision or procedural ruling,” are not cognizable as misconduct and may be dismissed . *See* Misconduct Rule 11(c)(1)(B). As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. *See* Breyer Report, App. E., ¶ 2. Allegations

against persons other than federal judges do not fall within the purview of the misconduct procedures. *See* Misconduct Rule 4.

The allegations of ill treatment by a judge do fall within the definition of misconduct. *See* Misconduct Rule 3(h)(3)(A). In light of complainant's allegations, I conducted a limited inquiry into this matter by reviewing transcripts of the relevant criminal proceedings and by asking for response from the subject judge, complainant's counsel, and the court reporter assigned to the case. *See* Misconduct Rule 11(b).

From my review of the transcripts, it is clear that the "secret" meeting complainant alludes to was a hearing held by the subject judge following complainant's motion for new counsel. This motion was considered months before complainant entered his guilty plea. It is the judge's practice to hold hearings on motions for new counsel outside the presence of prosecuting counsel or other witnesses so that the defendant can speak freely about his or her attorney. The hearing was transcribed by the court reporter. My review of the hearing transcript indicates that there is no support for complainant's allegations that the subject judge 1) yelled at or intimidated complainant and counsel; 2) told complainant to plead guilty; or 3) threatened complainant with a life sentence unless complainant plead guilty. At a later sentencing hearing, the judge did criticize complainant's counsel for not being prepared for the hearing, but the transcript of that hearing does not support complainant's claims of intimidation or

threat by the judge. I also note that, by the time of the sentencing hearing, complainant had already plead guilty. I conclude that complainant's claims of mistreatment by the judge are unsupported and, as such, fail to give rise to an inference that misconduct may have occurred. Misconduct Rule 11(c)(1)(D).

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the respondent judge and the Judicial Conference Committee on Judicial Conduct and Disability. *See* Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id.*

So ordered this 8th day of November, 2010.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge