

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-10-90006

Before **BRISCOE**, Chief Judge.

ORDER

Complainants have filed four separate complaints of judicial misconduct against a district judge in this circuit. The complaints were consolidated for review.

My consideration of these complaints 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 these complaints.

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

Four identical complaints were filed by separately named individuals, complaining about the subject judge's conduct during a revocation hearing regarding the supervised release of a third party. I first note that all four of these identical complaints appear to be filled out in the same handwriting and two of the signatures of separately named complainants appear to be in that same handwriting. Misconduct Rule 6 states that complainants "must sign the complaint" and verify "in writing under the penalty of perjury" the truth of statements made in any complaint. While there is no basis in the Misconduct Rules to question a complainant's ability to bring claims of misconduct, and while further investigation of these complaints is not necessary, as discussed below, complainants are warned against signing a misconduct complaint on behalf of someone else.

To the extent that these identical complaints challenge rulings by the subject judge as to the revocation of the third party's supervised release, those claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." 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.

The complaints also allege that the federal public defender stated to the third party that the defender, the judge, and the prosecuting attorney had all agreed – before any evidence was heard at the hearing – that they were going to send the third party back to prison. Allegations of conspiracy can state a valid claim for misconduct even when the alleged conspiracy relates to a judge’s ruling, *see* Commentary to Misconduct Rule 3. I conducted a limited inquiry on this allegation pursuant to Misconduct Rule 11(b) by reviewing a transcript of the hearing in question and by seeking a response to this allegation from all identified persons at the hearing, which included the subject judge, the court reporter, a court deputy, the federal public defender, the government prosecutor, a Secret Service agent, and a probation officer.

My review of the hearing transcript indicates that the alleged conversation did not occur on the record. The responses to my limited inquiry all denied that the reported conversation took place as alleged in the complaints. Commentary to the Misconduct Rules states that, when transcripts and all witnesses other than the complainant(s) support the subject judge, there is no reasonable dispute of fact and the claim may be dismissed. Commentary to Misconduct Rule 11. In light of the responses to my inquiry, I conclude that the allegations lack sufficient

evidence to give rise to a reasonable inference of misconduct. *See* Misconduct Rule 11(c)(1)(D).

Accordingly, these complaints are dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainants 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, complainants 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 18th day of November, 2010.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge