

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-10-90029 through 10-10-90034

Before **LUCERO**, Circuit Judge.

ORDER

This is a complaint of judicial misconduct filed against six circuit judges in this circuit. As the most senior active judge not disqualified by the allegations of this complaint, this matter has been assigned to me pursuant to Misconduct Rule 25(f). 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 there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

The complainant in this matter 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 judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant was a party in an underlying appeal. This complaint was filed against two judges on the “motions panel” that handled matters early on in the appeal process; the three judges on the merits panel that ultimately decided the merits of the appeal; and a former chief judge, who complainant contends “probably” had knowledge of the events as alleged, and approved of them. The following allegations are set out in this misconduct complaint: 1) that the merits panel – the panel of appellate judges assigned to decided the appeal – was not randomly drawn; 2) that the original “motions panel” – and specifically one named subject judge who reportedly had an unidentified interest in the outcome of the case – manipulated assignment of the merits panel's participants; 3) that this specific subject judge also directed the merits panel how to rule on the appeal; 4) that the merits panel agreed and carried through as directed; and 5) that two of the

subject judges “intercepted” complainant’s petition for *en banc* review by prohibiting its distribution.

I conducted a limited inquiry on these allegations by examining how the panels of judges were assigned to complainant’s underlying appeal. *See* Misconduct Rule 11(b). Court of Appeal records indicate that the “motions panel” complainant alludes to was comprised of the judges on the court’s pre-determined standing motions panel. The case was randomly screened to one of the court’s pre-set merits panels for review and decision. One of the judges on that merits panel recused from the case, and a third judge was substituted on the appeal. Nothing in the court’s records supports complainant’s allegations of manipulation of the panel or its ultimate decision. Similarly, there is no evidence supporting the claim that complainant’s petition for rehearing *en banc* was not properly distributed according to the court’s rules. And complainant has provided no factual allegations or evidence in support of complainant’s speculation that a former chief judge “probably” knew and approved of the alleged manipulation of the panel and its ultimate decision. The allegations in the misconduct complaint on these points are speculative at best, and may be dismissed because they are not supported by factual allegations which would give rise to an inference of misconduct. *See* Misconduct Rule 11(c)(1)(D). The Misconduct Rules require complainants to support their allegations with “sufficient evidence to raise an inference that misconduct has occurred.” *Id.* My limited inquiry similarly failed

to reveal support for these claims. Conjecture in the form of the allegations set out in this complaint does not comprise sufficient evidence.

In the complaint, complainant also states that the substitute judge assigned to the merits panel has not authored a decision in over five years and “apparently allows his name to be used at the request of one or another judge whenever a third vote is needed in a particular case and one of his colleagues asks him to do so as a favor.” These assertions are similarly unsupported by factual allegations or other evidence. This speculation on complainant’s part therefore fails to give rise to an implication of judicial misconduct on the part of the substitute judge. *Id.*

The misconduct complaint also complains of a delay of several months before the appeal was decided after complainant’s motion to expedite the appeal was granted. Allegations of delay may constitute misconduct, but only where improper motive is alleged, or complainant asserts habitual delay in a significant number of related cases. Misconduct Rule 3(h)(3)(B). No statements implicating either of these points are included in the complaint.

The complaint also contains an allegation that a “senior staff member” of the Clerk’s Office told complainant that “the appeal would be decided ‘as soon as they can find three judges who can agree on how to decide it,’” and later described this conversation as indicating “that the case [was] assigned to several judges who wanted to decide the case differently.” These assertions do not implicate misconduct on the part of the subject judges, and the misconduct

procedures do not apply to persons other than federal judges. *See* Misconduct Rule 4. In any event, as noted above, complainant has provided no evidence that the panel was pre-determined or directed how to decide the appeal, and the court's records indicate no irregularity in the assignment of the merits panel.

Finally, the complaint discusses the underlying district court case and subsequent appeal in some detail, challenging rulings made by both the standing motions panel and merits panel. These 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.

In light of the above, 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 subject judges 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 16th day of November, 2010.

/s/ Carlos F. Lucero

Honorable Carlos F. Lucero
Circuit Judge