

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

Nos. 10-10-90035 through 10-10-90037

Before **LUCERO**, Circuit Judge.

**ORDER**

Complainant has filed a complaint of judicial misconduct against one district judge and two magistrate judges in this circuit. Because it is related to a separate misconduct complaint which was filed against various appellate judges, and because I am the most senior active judge who was not disqualified from considering the related complaint, this matter was submitted 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.

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

This misconduct complaint challenges rulings made by all three subject judges in connection with an underlying district court case removed from a state court proceeding which was brought by complainant pro se. To the extent that the complaint challenges the rulings themselves, the allegations are not cognizable as misconduct claims 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 complaint also alleges that one of the magistrate judges engaged in *ex parte* communications with opposing counsel, as evidenced by a statement made during a hearing, and that the judge was abusive towards complainant at that same hearing. In a limited inquiry pursuant to Misconduct Rule 11(b), I have reviewed

the transcript of the hearing in question and the court's docket sheet regarding the underlying case.

The contention that the judge engaged in *ex parte* communications is based solely on the a statement made by the subject judge at the hearing in question. The judge said that it had "come to the Court's attention" that complainant had acted in a belligerent and abusive manner towards court staff and had "made inaccurate statements to defense counsel about the status of proceedings in this matter including that immediate evidentiary hearings were going to be scheduled." First, I note that the standards applicable to *ex parte* communications in the case setting are different from those set out in the Misconduct Rules. The Misconduct Rules do not define all *ex parte* communications as misconduct; they define misconduct to include "having improper discussions with parties or counsel for one side in a case." The judge's statement that inaccurate statements about the scheduling of evidentiary hearings had come to the judge's attention do not give rise to a reasonable inference that the judge had improper communications with opposing counsel. The complaint contains no other support for this claim, and I conclude it may be dismissed. *See* Misconduct Rule 11(c)(1)(D).

The complaint also contains allegations that the judge threatened, abused, and bullied complainant during the hearing in question. My review of the hearing transcript belies this claim. The judge, facing fourteen motions filed by

complainant and reports of abusive behavior by complainant, calmly but firmly issued a ruling staying proceedings, disallowing further pleadings by complainant. The judge allowed complainant to ask questions and answered them, but then stopped complainant from asking further questions and making further objections. My review of the complaint indicates that complainant is clearly unhappy with the judge's rulings, including later findings of contempt and sanctions imposed against complainant, but the judge's conduct at the hearing did not rise to the level of misconduct, i.e., "treating litigants in a demonstrably egregious and hostile manner." Misconduct Rule 3(h)(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 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