

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-10-90054

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

Complainant presents two main claims of misconduct, both in connection with the judge's handling of an underlying case brought by complainant, proceeding pro se. The first is a claim of ex parte communication on the part of the judge. This claim is premised on a statement made by the subject judge that complainant is a disbarred attorney and therefore not truly a pro se party. Complainant contends that the judge is wrong on the facts and argues that the statement, made in a written ruling by the judge, is professionally damaging. However, the only support provided for the claim of ex parte communication is complainant's supposition that the judge "heard from someone ex parte that I was a lawyer and a disbarred lawyer at that." The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). Complainant's speculation that the judge must have heard this information from an ex parte source does not provide sufficient factual support for a reasonable inference of misconduct.

Complainant's second main issue involves a court judgment on which the subject judge apparently relied in ruling on the underlying case. Complainant contests the existence and/or the legal validity of this judgment and contends that

the judge's use of, and reliance on, the judgment are violations of judicial ethical standards. This claim is not cognizable as misconduct because it is "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. To the extent that complainant alleges wrongdoing or misconduct with regard to the contested judgment on the part of persons other than the subject judge, those claims cannot be considered here. *See* Misconduct Rule 4.

Related to the issue about the contested judgment, complainant also alleges that the subject judge is biased against complainant and in favor of the party opposed to complainant in the underlying suit, and should have recused from considering that case. While claims of bias can be cognizable as misconduct, *see* Commentary to Misconduct Rule 3, this bias claim is based solely on the merits of the judge's rulings. As such, it is also not cognizable as a misconduct claim. *See* Misconduct Rule 11(c)(1)(B).

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 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 24th day of January, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge