

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-11-90020

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a magistrate 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 takes issue with discovery rulings by the subject judge, and also complains that motions filed for review of the judge's rulings and for reassignment of the underlying case have not been addressed. 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.

Complainant also contends that, during a motions hearing, the judge and opposing counsel mentioned a meeting about the case, which complainant asserts as support for a claim of ex parte communication. Complainant says that ex parte communication is also shown by the judge's striking of certain documents without a motion to strike from either party, in light of a request from the opposing party that complainant file a motion to strike. In a limited inquiry pursuant to Misconduct Rule 11(b), I have reviewed a transcript of the motions hearing in question before the subject judge. There was no mention of a meeting during the hearing. Similarly, the allegation that the judge's striking of certain documents following a request by opposing counsel for a motion to strike, does not give rise to a reasonable inference of ex parte communication. The judge explained in an

order that those documents, filed by complainant, failed to follow court rules and were not properly served on opposing parties.

Complainant contends that the judge's discovery rulings amount to harassment because the judge required complainant to send duplicative copies of materials to the opposing parties. My review of the hearing transcript belies this claim. Finally, complainant alleges that the judge's limitation on the number of interrogatories allowed showed prejudice. The judge ruled that complainant had adequate notice of the allowed number of interrogatories; no wrongful motive is apparent in the ruling or the judge's discussion of that issue.

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 6th day of June, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge