

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-08-90084

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

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.supremecourtus.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 this complaint.

Complainant has received or has access to a copy of the misconduct rules. 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 contends that the subject judge has granted special treatment to a state government defense attorney, as demonstrated by alleged *ex parte* communications with the attorney and the judge's subsequent rulings in favor of the defendant in an underlying prisoner civil rights suit. The government attorney had electronically filed a motion to dismiss but had not accompanied the motion with a legal memorandum as required by local court rule. Complainant contends, and the government attorney's later pleadings admit, that the judge's chambers had contacted the attorney about the missing memorandum. Complainant contends that this contact was improper *ex parte* communication and, together with the judge's ruling in favor of the defendant, indicates a "special friendship" between the government attorney and the judge. Complainant also takes issue with the court's public posting of the resulting order, saying that it placed the plaintiff in the underlying suit in jeopardy.

To the extent that complainant either challenges the subject judge's rulings or uses the merits of those rulings as evidence of misconduct, these claims are not proper under the applicable rules. Claims that are "directly related to the merits of a decision or procedural ruling" are not cognizable as misconduct, and must be dismissed. Misconduct Rules 3(h)(3)(A) & 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's allegations of *ex parte* communications fail to rise the level of misconduct. *Ex parte* communications are "tolerated of necessity" when they are about purely procedural or administrative matters, and do not involve merits-related issues. *See, e.g., Torres v. Amerada Hess Corp.*, 240 Fed. Appx. 946, at **9 (3d. Cir. July 17, 2007) (unreported opinion) (quotation omitted). It is not unusual that chambers staff and court clerk's offices contact litigants about administrative details such as filing requirements, missed deadlines, and other procedural matters. I cannot conclude that this contact with the government attorney by the judge's chambers rises to the level of improper *ex parte* communications or judicial misconduct. *See* Misconduct Rule 11(c)(1)(A). I also conclude that this contact alone does not demonstrate a "special friendship" with the subject judge. The misconduct rules require that complainants support their claims of misconduct with allegations sufficient to give rise to a reasonable inference of misconduct. Misconduct Rule 11(c)(1)(D). Complainant sets out no further allegations to support the implied claim of bias on the part of the judge.

Finally, complainant's assertion that the court's publication of the judge's order resulted in jeopardy to the plaintiff in the underlying suit is not a proper misconduct claim because it does not implicate conduct or a duty on the part of the subject judge. Subsequent to the posting of the order in question, upon inquiry by complainant, plaintiff was apparently instructed on how to request that

the record in the underlying suit be sealed and reportedly made such request thereafter to the court.

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 respondent 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 11th day of November, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge