

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 2008-10-372-05

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

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 Council of the Tenth Circuit, entitled *Rules Governing Complaints of Judicial Misconduct and Disability*; 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 exist, prior decisions of the full Judicial Council of this circuit consistent with those authorities may also govern my consideration of this complaint.

Complainant has received or has access to a copy of this circuit’s 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 4(f)(1).

Complainant contends that the respondent judge's conduct in settlement conferences on civil rights claims constitutes misconduct. Complainant alleges that the judge assessed the cases negatively, opined that complainant would not prevail on the claims, and made attempts to settle the cases. Complainant asserts that the judge called him a "liar" during a settlement conference, contradicting complainant's statements about the amounts of money for which complainant had settled past cases. Complainant contended that the judge conducted independent negotiations with both complainant's counsel and counsel for defendants without authorization, that is, without complainant's permission or knowledge, and that the resulting settlement was reached "under duress." Finally, complainant asserts that the respondent judge acted as an advocate for defendants during a settlement conference and was part of a conspiracy with complainant's counsel.

Most of these claims fail to rise to the level of misconduct, because they describe conduct that is properly a part of a magistrate judge's duties. As a main player in the settlement process, magistrates assess the strengths and weaknesses of cases before the court, advise both litigants and counsel (independently as well as together), and attempt to reach some settlement of the claims. Even the claim that the judge called complainant a liar fails, by itself, to rise to the level of conduct that is "prejudicial to the effective and expeditious administration" of the business of the courts. As the Breyer Report notes, "[i]t cannot always be clear what degree of alleged discourtesy transcends the expected rough-and-tumble of

litigation and moves into the sphere of cognizable misconduct.” Breyer Report, App. E, ¶ 3. I conclude that this single allegation does not.

The claim that settlement was reached “under duress” is not cognizable here, to the extent that complainant seeks to challenge the settlement itself. Such a claim would be “directly related to the merits” of a case, and therefore not the proper subject for a misconduct claim. *See* Misconduct Rule 4(c)(2).

The final claims listed above, contending that the judge acted as an advocate for defendants, and was part of a conspiracy with complainant’s counsel, also fail. These claims lack sufficient supporting evidence such that a reasonable inference of misconduct could be made. Lacking such support, I must conclude that these claims are frivolous, as that term is defined in the misconduct rules. *See* Misconduct Rule 4(c)(3). To the extent that the conspiracy claim complains of conduct by complainant’s counsel, that claim is not cognizable here. The circuit’s misconduct rules apply solely to federal judges in the circuit. *See* Misconduct Rule 1(c).

Accordingly, this complaint is dismissed. The Circuit Executive is directed to transmit this order to complainant and a copy to the respondent judge. To seek review of this order, complainant must file a petition for review by the Judicial Council. As set out in the misconduct rules, the petition should be in the form of a letter, and need not include a copy of the original complaint or this order. *See* Misconduct Rule 6.

The petition must be filed with the Office of the Circuit Executive, at the address set out in the rules, within 30 days of the date of the letter transmitting this order.

Id.

So ordered this 19 day of February, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge