

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

No. 2008-10-372-14

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*; 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 conspired with others to cover up an obstruction of justice, namely, complainant's allegedly wrongful prison sentence. Complainant avers that racial bias is the basis for this alleged misconduct. Claims of conspiracy and bias can be cognizable as misconduct. *See* Commentary to Misconduct Rule 3(h)(3)(A). Nonetheless, such claims must be supported by "sufficient evidence to raise an inference that misconduct has occurred," *see* Misconduct Rule 11(c)(1)(D). Because complainant fails to provide any factual evidence in support of these claims, they must be dismissed.

Complainant specifically avers that the judge has knowledge of wrongdoing in the sentencing phase of complainant's underlying state criminal trial, and that the judge failed to allow named individuals to testify as witnesses to this wrongdoing in a subsequent federal proceeding. Complainant states that other named judges and Assistant U.S. Attorneys will corroborate these allegations. However, these claims are "directly related to the merits" of the judge's procedural and substantive rulings, or a challenge to the merits of rulings in other courts, and therefore not cognizable as misconduct. *See* Misconduct Rule 3(h)(3)(A). The policy behind this rule is that "the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings." Breyer Report, App. E., ¶ 2. As explained in the commentary to Misconduct Rule 3, "[t]his exclusion preserves the independence of judges in the exercise of judicial power." Challenges to the legal sufficiency of rulings or proceedings in other

courts are not claims against the subject judge, regardless of their characterization as matters within the judge's knowledge, and must be dismissed as "not appropriate for consideration under the [misconduct statute]." *See* Misconduct Rule 11(c)(1)(G).

Complainant filed a supplement to the complaint containing various documents designed to support complainant's claims of judicial error. In that supplement, complainant suggests that I should recuse from this matter because, according to complainant's allegations, I am aware of the alleged conspiracy. This speculative allegation is not a proper basis for recusal in these matters, and I decline to recuse from the consideration of this complaint. *See* Misconduct Rule 25 and related commentary.

Our files indicate that this is complainant's second misconduct complaint. The earlier complaint, filed in 2005, makes many of the same arguments posited here, albeit against other judges. Complainant's efforts to gain review of the substantive rulings in underlying state and federal proceedings are not cognizable as misconduct claims. Complainant should be aware of Misconduct Rule 10(a), which sets out procedures and standards for the imposition of limitations on complainants who file repetitive, harassing, or frivolous complaints.

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 3rd day of June, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry  
Chief Circuit Judge