

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

No. 10-08-90073

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 personal bias against complainant, as shown by the judge's allowing certain conduct by an Assistant U.S. Attorney and complainant's court-appointed counsel in connection with proceedings in complainant's underlying criminal case. Specifically, complainant alleges that the AUSA: 1) withheld evidence until after complainant took a guilty plea; 2) informed the judge's staff that complainant had made threats towards the AUSA; 3) acted vindictively towards complainant; 4) had complainant placed in segregation; and 5) directed prison personnel to steal complainant's personal items. Complainant also contends that the AUSA operates an unspecified RICO enterprise out of the courthouse, involving unnamed judges, marshals, and prison employees. Complainant charges court-appointed counsel with 1) being in a conspiracy with the AUSA; 2) failing to follow complainant's directions; 3) threatening and pressuring complainant to take a guilty plea; and 4) failing to be present when a polygraph test was administered. Complainant contends that the judge will not allow withdrawal of the guilty plea, denied a motion to recuse, and denied requests for new counsel.

Complainant's arguments about the subject judge's rulings, including procedural rulings, are not cognizable as misconduct claims under the applicable rules. *See* Misconduct Rule 3(h)(3)(A) (stating that misconduct does not include allegations that are "directly related" to the merits of the judge's rulings, including a failure to recuse). Therefore, to the extent that complainant takes

issue with the judge's rulings, those claims are dismissed. *See* 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.

The balance of the claims involve conduct by other persons, namely an AUSA and complainant's court-appointed counsel. These misconduct procedures cover only conduct by federal judges, *see* Misconduct Rule 4. Despite complainant's allegations that the judge "allowed" the complained-of conduct by these individuals, there are no factual allegations supporting complainant's contentions of bias or collusion with these individuals, or the implication that the judge is somehow responsible for their conduct. Without factual allegations sufficient to give rise to an inference of misconduct, these claims must be dismissed. *See* Misconduct Rule 11(c)(1)(D).

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 20th day of October, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry  
Chief Circuit Judge