

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-08-90105

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a bankruptcy 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 has submitted a lengthy complaint and two separate letters with supplemental materials and attachments. The claims set out therein arise from the subject judge's handling of adversary proceedings brought against complainant and complainant's ex-wife - a Chapter 7 debtor - and associated counterclaims asserted by them against the bankruptcy trustee. The majority of the misconduct allegations arise out of a June 5, 2008, hearing on these matters held before the subject judge. The claims set out in this matter may be summarized in these broad categories: 1) claims against the bankruptcy trustee and counsel; 2) challenges to the judge's rulings or based upon the merits of the judge's rulings, both substantive and procedural; 3) claims of improper motive, conspiracy, and general claims of *ex parte* communication; and 4) a specific claim of *ex parte* communication in connection with the June 5, 2008, hearing.

Claims against the Trustee and Trustee's Counsel

Complainant levels several claims against the bankruptcy trustee and the trustee's attorneys. Claims against the trustee include "failure to perform official duties," "intentional acts of misconduct," physically threatening complainant, conflict of interest, wrongful intent with regard to the handling of certain property, and conspiracy. Claims against the trustee's counsel include allegations of conspiracy, challenges to their handling of the cases and claims involving complainant and the debtor, and speculation about their intent and/or the legal and practical options which would motivate them. None of these claims are cognizable

here, because the misconduct proceedings and rules apply only to federal judges.
See Misconduct Rule 4.

Claims involving the Subject Judge's Rulings

Complainant takes issue with various rulings by the judge, including: the dismissal of counterclaims asserted by complainant and the debtor, an alleged *sua sponte* decision to suspend proceedings without notice to other parties, an alleged *sua sponte* ruling striking certain pleadings, the denial of requests for a jury trial, the denial of complainant's request to participate in a discovery scheduling conference, and rulings on various discovery requests made by complainant. Complainant also contends that the judge didn't allow complainant to participate in the pre-trial portion of the June 5, 2008, hearing, and complains about the judge's procedural approach to the subsequent trial, arguing that the judge should have consolidated the varying actions and trials. Further, complainant makes general allegations questioning the advisability of the adversary action in general and specific rulings or approaches by the judge in particular, speculating about the judge's reasons for proceeding with the case. Finally, complainant uses the judge's rulings as a springboard for speculation as to the judge's motivation, unsupported assertions of conspiracy between the judge and others, and conclusory allegations about bias and ill motive on the part of the judge. To the extent that these claims seek to challenge the judge's rulings or are based on the merits of the judge's rulings, they 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.

Claims of Bias, Conspiracy, and General claims of Ex Parte Communications

Complainant contends that the judge is biased against complainant and the debtor and biased towards the bankruptcy trustee. Complainant has also set out various allegations of conspiracy by the judge, and general claims of repeated and ongoing *ex parte* communications between the judge, the bankruptcy trustee, and trustee’s counsel. The claims asserting bias and conspiracy and general claims of *ex parte* communication are numerous, largely speculative, and often interwoven with claims about the merits of the judge’s rulings. They fall into two categories: those that are based on the judge’s comments at the June 5, 2008, hearing, and those that are not.

1. Claims Based on Hearing Comments

In the category of allegations based on the judge’s comments at the hearing, complainant repeatedly asserts that the judge admitted to not reading pleadings filed by complainant and the debtor, contending that the judge’s facial expressions during the hearing also indicated that the judge had not read complainant’s pleadings. This claim is a good example of how complainant

distorts the judge's comments and the proceedings to support allegations of misconduct.

Initially, I note that a judge's failure to read pleadings in advance of a hearing is not per se judicial misconduct. Although rare, reasons or exigencies may exist that suggest deferring the reading of confusing or prolix pleadings until the actual hearing where they can be discussed with the parties. But we need not evaluate this possibility here because the allegation that the judge did not read the pleadings prior to the hearing is belied by my review of the partial hearing transcript supplied by complainant and further investigation. In the hearing, the judge stated that he had "sufficiently read the pleadings." Transcript at 40. The only statement that could form a basis for the allegation that the judge admitted to not reviewing complainant's pleadings is the judge's subsequent comment, after some argument on a pending motion to strike, that the judge "had not looked at as carefully, or as completely" at those pleadings "as [the judge had] others." Transcript at 43. There was no indication that the pleadings in question were only those filed by the debtor or by complainant. The judge simply noted that the pleadings on the motion to strike deserved more careful and complete analysis.

Id. To the extent that complainant bases claims of bias, conspiracy, and *ex parte* communications on this allegation, I conclude that the claims are not sufficient to give rise to a reasonable inference of misconduct.

Complainant's assertion that the judge's facial expressions supported this allegation is also insufficient to support a claim of misconduct. The Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). A look of astonishment and disgust, coupled with a frantic searching of the file - as reported by complainant - does not give rise to a reasonable inference that the judge had not read the pleadings in question. Similarly, this allegation also fails to support complainant's claims of bias, conspiracy, and general claims of *ex parte* communication.

Another comment at the hearing that the complainant makes much of is the judge's statement that the "facial [counter]claims [set out against the bankruptcy trustee by complainant and the debtor] are initially, preliminarily, not groundless or frivolous." Complainant contrasts this statement with the judge's later ruling dismissing the claims, contending that the ruling is evidence of bias. Complainant characterizes the judge's comment as a "finding" and an "opinion," and speculates about the motivation of the trustee and trustee's counsel in the face of this statement. This is another example of the complainant's taking comments out of the record and mischaracterizing them to support claims of misconduct. The judge's comment that complainant's and debtor's claims against the trustee were "facially," "initially," and "preliminarily" neither groundless or frivolous indicated the need to continue litigating the adversary proceeding to determine

those claims. It was neither a final legal finding nor a binding opinion. That the judge later ruled against those claims does not indicate bias any more than would any other negative legal ruling. Similarly, the statement in question does not support complainant's presumptions and conjecture about conspiracy or the existence of prior *ex parte* communications.

The last major allegation in support of claims of bias, conspiracy and general *ex parte* communications based on comments at the hearing is complainant's assertion that the judge coerced the debtor into giving up her claims against the trustee in order to obtain a bankruptcy discharge. Complainant points to comments by the judge characterizing complainant's tactics as "scorched-earth litigation" and "interminable," as well as the judge's questioning of the debtor about whether she had entertained thoughts of settlement. Again, my review of the partial transcript belies the claim of coercion. At no time did the judge suggest that he would deny the debtor a discharge if she did not settle. Instead, the judge was concerned that the litigation would go on for a long period of time, and that, if the debtor could not get a discharge at the end of that time period, she would pay the price for the delay both figuratively and literally, in light of the possibility that attorney's fees could be assessed against her. The judge did not, as complainant would have it, threaten complainant or the debtor with the assessment of fees against them. The judge was clear at the end of argument on this point: "I'm . . . not even suggesting there is a settlement here.

That is the trustee's decision to make They are the ones who either pursue the case or don't pursue the case." Transcript at 42-43.

Complainant also generally supports the claims of conspiracy and bias by characterizing many of the judge's statements at the hearing as disrespectful, sharp, and personal. My review of the partial transcript does not support this characterization. The judge was clearly - and justifiably - concerned that complainant's prolix filings would lead to protracted litigation.¹ The judge was also concerned that complainant, not the debtor, was directing the course of litigation as to both sets of counterclaims against the trustee, and that the debtor would pay a price for complainant's litigation tactics, including delay and the possible failure to get a bankruptcy discharge. The judge both questioned the debtor and warned complainant on this point. These comments did not evidence bias or ill motive, and do not support claims of conspiracy or the general claims of *ex parte* communications.

¹ Although, as complainant notes, few pleadings had been filed prior to the June 5, 2008, hearing, the judge had already struck two of complainant's pleadings for failure to comply with Fed. R. Civ. P. 8. The order noted that these pleadings were "almost exclusively a discussion of random legal theory, history, and legal arguments and opinion" which "set forth an extended and unnecessary recitation of purported events and personal attacks on [the bankruptcy trustee.]" Order dated March 18, 2008, at 1. The first pleading was 39 pages in length and, aside from answering the adversary complaint, set out 82 allegations in support of 12 separate counterclaims against the trustee. The second answer was 47 pages in length, setting out 84 allegations supporting 13 separate additional claims. After these pleadings were struck, complainant filed a third, which was only 29 pages in length, but set out 118 allegations in support of 10 claims against the trustee.

2. Claims Based on Other Allegations

Besides those claims based on the judge's rulings or comments during the June 5, 2008, hearing, complainant levels additional claims of bias, conspiracy, and *ex parte* communications at the subject judge. Complainant contends that the judge is biased against complainant because complainant is proceeding pro se. However, the main support for this claim is pure conjecture. Complainant admits that such bias "cannot be conclusively determined," but argues that "it is not too difficult to believe" that the judge is biased against complainant and the debtor because they lack counsel, alleging again that the judge failed to read their pleadings or consider their arguments. As noted above, there is no evidence supporting this allegation. Indeed, my review of the complaint and attached materials belies all of complainant's allegations of personal bias on any ground, including complainant's pro se status. Complainant attempts to bolster the claims of bias and resulting prejudice with pages of rampant speculation about the judge's possible intent, legal options, and rulings. None of the discussion of the merits of complainant's counterclaims or complainant's conjecture about why the judge might have wanted to rule a certain way or make a particular statement are grounds for a reasonable inference of misconduct.

Similarly, complainant's claims of conspiracy are based on unsupported allegations about the judge's state of mind, the judge's intentions to support the trustee in what complainant contends is pointless and illegal litigation, and the

judge's defensiveness in the face of the claims brought by complainant and the debtor. These theories have no basis in any factual allegation set out in the complaint or in any of the materials complainant attaches in support of the claims.

While allegations of improper motive and conspiracy can state a valid claim for misconduct even when the alleged motive or conspiracy relates to a judge's ruling, *see* Commentary to Misconduct Rule 3, these claims, together with the general claims of *ex parte* communications, fail because they are unsupported by factual allegations that would reasonably give rise to an inference of misconduct. *See* Misconduct Rule 11(c)(1)(D).

Ex Parte Communications

Complainant contends that the subject judge engaged in *ex parte* communications with the bankruptcy trustee and the trustee's counsel just before the June 5, 2008, hearing. Complainant's allegations in support of this claim are specific and numerous. Complainant contends that, just prior to the scheduled hearing, complainant was in a hallway of the courthouse and overheard voices in a room marked as the judge's chambers. Complainant identified the voices as those of the trustee and the trustee's counsel. Complainant further stated that the trustee and counsel came into the hearing room from the back of the room just prior to the judge's late entrance. Complainant asserts that these circumstances and timing lead to the logical deduction that the judge engaged in *ex parte* communications with the trustee and counsel prior to the hearing. Complainant

also asserts that the judge's conduct of the hearing and attendant rulings demonstrate the subject of the alleged *ex parte* communications, namely, an intent to prejudice the judge against complainant and the debtor, and actual prejudice resulting from those communications.

Because these allegations were specific enough to support a reasonable inference that *ex parte* communications may have occurred, I conducted a limited inquiry on this claim. *See* Misconduct Rule 11(b). I sought written responses from the bankruptcy trustee, both of trustee's counsel, the subject judge, and the judge's staff. The bankruptcy trustee and trustee's counsel deny that they were in the judge's chambers prior to the hearing. They also deny that any *ex parte* communications took place at any time as to the adversary proceedings against complainant and the debtor. The judge and the judge's staff similarly deny the presence of either the trustee or trustee's counsel in the judge's chambers prior to the hearing and deny knowing about any *ex parte* communications. I cannot determine matters reasonably in dispute, *see id.*, and, generally speaking, a judge's denial is not enough, on its own, to refute a factually sufficient allegation of misconduct. However, Commentary to the Misconduct Rules is clear that I may dismiss a claim if, upon inquiry of all possible witnesses to alleged misconduct, all witnesses support the subject judge's denial. *See* Commentary to Misconduct Rule 11 (citing to the Breyer Report, at 243). That is true in this instance. I conclude that the allegations of *ex parte* communications prior to the

June 5, 2008, hearing are not reasonably in dispute and are unfounded. This claim is dismissed pursuant to 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.*

Finally, I would like to warn complainant about making further similar complaints of misconduct. This complaint, together with supplemental letters, totals some 42 typewritten pages. Complainant's allegations are speculative, repetitive, prolix, misleading, and disorganized. Complainant essentially attempts to create the specters of bias, conspiracy, and ill motive by challenging, twisting, and inflating both the judge's statements and the judge's rulings, adding creative conjecture and unsupported personal attacks, amounting to little more than innuendo built upon innuendo. It has taken many hours to sift through the complaint, read the accompanying attachments, conduct the limited inquiry compelled by complainant's factual allegations, and address the major claims

asserted here. I conclude that this type of complaint constitutes abuse of the misconduct procedures under Misconduct Rule 10(a).

So ordered this 10th day of September, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge