

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-09-90012 & 10-09-90017

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Complainants have filed similar complaints of judicial misconduct against a district judge in this circuit. The complaints revolve around a single district court case in which both complainants are involved to some extent. The complaints are herewith consolidated for decision.

My consideration of these complaints 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 these complaints.

Complainants have received or have access to a copy of the misconduct rules. In accord with those rules, the names of the complainants and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Both complainants take issue with the judge's rulings, procedural and substantive, in the underlying case. They argue extensively about the merits of the case and contend that the judge's rulings are factually and legally wrong. They seek the judge's recusal or a new trial. To the extent that any of complainant's claims are "directly related to the merits of a decision or procedural ruling," those claims are not cognizable as misconduct. 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.

One complainant contends that the judge is biased and is in a conspiracy with opposing counsel. Other than the substance of the judge's rulings, complainant offers the following allegations to support these claims:

1) speculation that, due to the judge's "political nature," the judge may know the opposing company's largest stockholder, described as a "wealthy and influential attorney;" 2) unsupported allegations that the judge is abusing the judge's position for the purpose of insuring that the opposing company, which is a local entity, collects damages in the case; 3) a merits-based challenge to the judge's questioning of previous counsel for the opposing company and attempts to show

that previous counsel's testimony was error; 4) speculation about the appearance of a "cooperative" relationship between the judge and opposing counsel; and 5) conjecture that, because the judge erroneously made a campaign contribution, the judge is also "capable of applying partisan justice in a deceitful manner." While claims of bias and conspiracy can state a valid claim for misconduct even when the alleged conspiracy relates to a judge's ruling, *see* Commentary to Misconduct Rule 3, these claims fail because they are unsupported. 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). No such support has been presented here; complainant's speculations and legal challenges do not raise an inference of misconduct.

One complainant characterizes statements by the judge as "inappropriate and threatening." The statements are not identified and my review of the accompanying materials indicates no statements which can be described as such. That same complainant alleges that the judge advised opposing counsel to "re-open a dead case" for the sole purpose of bringing complainant to the judge's jurisdiction. The quoted transcript portion fails to support this claim. As with the previously-discussed claims, these claims fail for lack of support sufficient to raise an inference of misconduct.

After the initial complaints were filed, complainants filed identical supplements to their complaints. The supplement contends that the judge's spouse is associated with a law firm that has represented the opposing company in matters that bear some relevance to the underlying case. They argue that, therefore, the judge's spouse has a financial interest in the case, and allege that the spouse attended the trial. The supplement also contends that the judge erred in filing the required Financial Disclosure Reports as to the judge's spouse's income for the years 2003, 2005, 2006, and 2007. Because these allegations state facially valid claims, I conducted a limited inquiry on these matters by requesting a response from the subject judge and by doing independent research into the issues presented.

The judge's response indicates that the judge's spouse is not associated with the firm in question to the degree alleged by complainants. The judge states that the spouse is "of counsel" to the firm and is essentially an independent contractor, representing the firm in one matter only - a suit unrelated to complainants and to the subject matter of the underlying case in which complainants are involved.¹ The spouse is paid only when the firm's client in that

¹ The spouse's "of counsel" status was confirmed by reference to Martindale Hubble, a resource listing attorneys by name, practice areas, and firm associations. Regrettably, and as complainants note in their supplement, the firm's own website did not make this distinction, listing the judge's spouse as "a member of the firm's litigation department." After my limited inquiry, the website was changed to more correctly reflect the spouse's association with the
(continued...)

unrelated suit is billed and makes payment. The spouse receives no benefits from the firm and does not share in firm profits. I conclude from these facts that the judge's spouse has no financial interest in complainants' underlying case or in the law firm's representation of the opposing company. *See* 28 U.S.C. § 455(b).

There is no allegation that the spouse has a direct role in the underlying case, other than attending trial, an opportunity afforded to any member of the public.

Further, the judge has advised that, when it is known that this law firm is involved in a case, the judge's practice is to have the Clerk of Court send a letter to the parties allowing the parties and their counsel to either request reassignment of the case or consent to proceed with the judge as assigned. Here, the judge was unaware of any connection between the law firm and the opposing company in the underlying case until well after the jury's verdict, when complainants first filed a motion for new trial. Regardless, however, the degree of connection between the firm and the judge's spouse in this matter would not have required the judge to follow the usual practice of allowing the parties to request recusal. I conclude that there is no conflict of interest on the part of the judge as a result of the judge's spouse's connection to the firm, and therefore no misconduct.

As to the financial disclosure claim, my limited inquiry resulted in the judge's realization that, as of 2005, the judge's financial disclosure reports

¹(...continued)
firm as "of counsel."

incorrectly listed “none” in the space for spouse’s income. Prior to 2005, the “none” designation was correct because the judge’s spouse then worked for a federal governmental agency. The instructions on the Financial Disclosure Form contain an exception that does not require the reporting of income derived from employment by the United States. In 2005, the judge’s spouse moved into private practice, but the judge failed to note the change on subsequent annual disclosure forms. The judge has acknowledged the error and has corrected the appropriate Financial Disclosure Reports with the Administrative Office of the U.S. Courts. I conclude that this claim may be terminated because the judge has taken voluntary corrective action, which I have verified, that fully remedies the problem as raised in these complaints. *See* Misconduct Rule 11(d)(2).

After the identical supplements were filed, one of the complainants filed a second supplement, again taking issue with the judge’s procedural rulings on the underlying case. As noted above, claims “directly related to the merits” of a judge’s rulings are not cognizable here, and these claims are dismissed pursuant to Misconduct Rule 11(c)(1)(B).

Accordingly, this complaint is dismissed pursuant to Misconduct Rules 11(c) and 11(d). The Circuit Executive is directed to transmit this order to complainants 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, complainants 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 August, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge