

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90045

Before **HENRY**, Chief Judge.

ORDER

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* (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 takes issue with a statement made by the subject judge during complainant's sentencing hearing. Specifically, the judge determined not to upwardly depart, but commented that, should the appellate court disagree with the judge's ruling and remand the case for resentencing, the judge would have to seriously reconsider the upward departure factors. Complainant contends that the statement was meant to have a chilling effect on his right to appeal from the judge's ruling, and that it shows that the judge was not focused on the sentencing proceeding, but on a possible appeal. Complainant attached a single page of the sentencing hearing transcript in support.

I conducted a limited inquiry on these claims, *see* Misconduct Rule 11(b) by reading the judge's entire ruling in the sentencing transcript. Therein, while analyzing complainant's objections to the presentence report, the subject judge referred to the appellate court and its case authority numerous times. The judge made it clear that the court was bound by this precedent. The judge thoroughly analyzed and discussed all of complainant's objections to the presentence report and addressed both upward and downward departure arguments. My review of the transcript leads me to the conclusion that the statement complainant takes issue with does not, when viewed in light of the judge's sentencing ruling as a whole, constitute evidence sufficient to support a reasonable inference that the judge intended to discourage or deter complainant from taking an appeal from the sentencing ruling. *See* Misconduct Rule 11(c)(1)(D). It also does not support

complainant's allegation that the judge was focused on the possibility of remand on appeal, and not on the sentencing proceeding itself. *Id.* Therefore, I also conclude that the conduct complained of, while true, does not rise to the level of misconduct. *See* Misconduct Rule 11(c)(1)(A).

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 November, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge