

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90048

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 was a plaintiff in two underlying cases against the same defendant; both cases were assigned to the subject judge. Complainant contends that the subject judge is biased, characterizing the judge's rulings as both partial and hostile. The complaint also suggests that the judge may have been involved in various conspiracies with the defendant via defendant's counsel. Complainant essentially asserts that the judge had a conflict of interest in the underlying cases because defendant's counsel works for the same firm which formerly employed the judge. Complainant says that this association with the firm may have inspired *ex parte* communications and resulted in rulings favorable to former colleagues and friends. Finally, complainant asserts that the judge has had records removed from the district court in order to cover up the association with defendant's counsel's firm.

Although complainant states that the merits of the judge's rulings are not being challenged here, complainant does rely in part on the judge's rulings to support these claims. Specifically, complainant takes issue with 1) the judge's statement that defendant did not have to respond to certain motions; and 2) the judge's characterization of the second suit filed by complainant against the same defendant. Complainant also states that the underlying cases should have been reassigned to another judge. To the extent that complainant relies on the judge's rulings and appears to seek relief with regard to the outcome and rulings in the underlying cases, these claims 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.

Of course, allegations of bias and conspiracy can state valid claims of misconduct even when the allegations relate to a judge’s ruling, *see* Commentary to Misconduct Rule 3. However, complainant’s claims of bias and conspiracy 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). Nothing in the quoted statements by the judge supports complainant’s description of them as partial or hostile and complainant offers no other support for these claims.

As to the claims involving the alleged conflict of interest, complainant sets out the following allegations in support: 1) the subject judge formerly worked for the law firm that represented the defendant in complainant’s underlying lawsuit; 2) the courthouse and the firm’s headquarters are located within walking distance; 3) there is potential for *ex parte* communications because of the judge’s former association with the firm; and 4) there are no records of the judge’s work with the firm in cases filed with the district court, although there is record of the judge’s work on an appeal coming out of the district and on cases in nearby districts. Complainant filed a motion to recuse with the judge based on the alleged conflict.

The judge declined to recuse, and stated in partial response that the judge had not worked for the firm since 1998, some 11 years prior.

Conflict of interest is governed by the Code of Conduct for United States Judges. Canon 3C(1)(b) states that disqualification is required when a judge or a member of the judge's former law firm handled the same case when the judge was at the firm. Disqualification is not required where, as in this matter, the judge has not worked for a firm for many years and members of the firm did not handle the case or related cases during the judge's tenure at the firm. Complainant has not alleged a personal connection between the judge and the attorney handling the case on behalf of the judge's former firm or the facts of the case itself. *See* Canon 3C(1)(a). Complainant speculates that the judge has colleagues or friends at the law firm, speculates about the "real potential" for *ex parte* communication, and points to the close distance between the firm headquarters and the court. This is not factual support that would lead to a reasonable inference of conflict of interest or other misconduct on the part of the judge. Similarly, the lack of court records naming the judge as counsel does not lead to an inference that the judge has somehow removed court records to cover up the judge's association with the firm. These claims fail pursuant to Misconduct Rule 11(c)(1)(D) for lack of support.

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 14th day of August, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge