

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-09-90053 through 10-09-90056

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a second complaint of judicial misconduct against three circuit judges and one 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’s initial complaint against the subject judges was written in light of this court’s previous misconduct rules. That complaint was dismissed.

Upon receipt of a copy of the current Misconduct Rules, complainant has elected to file a second complaint with a more complete discussion of the claims and supporting evidence. In accord with the current Misconduct Rules, the names of the complainant and subject judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant contends that the subject judges' rulings in an underlying case were the product of bias. Complainant sets out a lengthy chronology of the underlying case, discussing the pleadings that were filed and the rulings thereon. Complainant argues in detail that those rulings were contrary to law, indicated an ignorance of the stated facts, and failed to address complainant's legal claims. Although complainant contends that this complaint is not about the merits of those rulings, I feel compelled to reiterate that claims "directly related to the merits of a decision or procedural ruling" are simply 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.

Complainant next sets out to show that the judges' rulings were based on ill motive. Complainant correctly notes that rulings based on ill motive, including bias, are not merits-related and do fall within the purview of judicial misconduct. *See* Commentary to Misconduct Rule 3. Complainant speculates as to the

possible reasons behind all these allegedly erroneous rulings, coming to the conclusion that the judges must not have read complainant's pleadings.

Complainant further speculates as to why this might be so, and concludes that it must be bias. Finding no other basis for such bias, complainant ultimately determines that the reason for the bias must be that complainant proceeded *pro se* in the underlying case.

Initially, I note that the assignment of cases to an appellate panel of judges is accomplished by random computer assignment. Similarly, the make-up of any appellate panel, i.e., which judges sit on a panel together, is also randomly assigned. Further, as I explained in my previous order dismissing complainant's earlier complaint, 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). Speculation and conjecture as to the motive behind the ruling of a randomly selected panel of appellate judges, to which complainant's underlying case was randomly assigned, is not evidence sufficient to support a reasonable inference of misconduct. Despite complainant's assurances that this complaint is not about the merits of the judges' rulings, the upshot of the bias claim is this: because the rulings are allegedly erroneous on the law and the facts, something other than a contrary view of the law and the facts must be behind those rulings. To allow this reasoning as the basis for a

misconduct claim would essentially invalidate the Misconduct Rules' provision prohibiting claims based on the merits of judges' rulings.

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 judges 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 19th day of October, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge