

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-09-90063 & 10-09-90064

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against two district judges 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 judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant is a federal prisoner, having been convicted following guilty pleas in criminal proceedings which were initiated in 2002. Complainant has since filed numerous civil cases in district court seeking to overturn the conviction. Complainant has also submitted multiple misconduct complaints towards that same goal.

In this misconduct complaint, complainant contends that the subject judges, one of whom handled the underlying conviction and the other of whom decided one of complainant's numerous civil cases, were in a conspiracy with other judges and various court personnel and attorneys to deny complainant fair and impartial review of claims, both in the district court and matters on review in the appellate court. Complainant focuses on the district court's efforts to determine if complainant was competent to stand trial in the criminal proceedings, and, specifically, on a single competency evaluation report which complainant has been trying to obtain.

In a supplement to the misconduct complaint, complainant attached a motion seeking my disqualification and the disqualification of various other named appellate judges under Misconduct Rule 25 because we decided past appeals and other matters against complainant. Complainant contends that this situation constitutes extraordinary circumstances such that this misconduct complaint should be transferred to another circuit, pursuant to Misconduct Rule 26. However, the Misconduct Rules are clear that claims involving the merits of

underlying litigation (including other misconduct complaints) are not cognizable, *see* Misconduct Rule 11(c)(1)(B), and suggest that judge participation in underlying decisions does not provide a valid basis for disqualification, *see* Commentary to Rule 25. Complainant alleges actual bias but fails to support this allegation with evidence other than the contrary rulings and complainant's own conjecture. Accordingly, I deny as meritless the motion to disqualify myself, and further decline to request that the Chief Justice transfer this matter to another circuit.

Complainant's allegations against the subject judges fall into two categories: 1) those that are related to or arise from the judges' ruling in complainant's underlying cases, and 2) unsupported claims of conspiracy. As noted above, claims related to the merits of judges' rulings are not cognizable as misconduct. *See* 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.

And, while allegations of conspiracy can state valid claims of misconduct even when the alleged conspiracy relates to a judge's ruling, *see* Commentary to Misconduct Rule 3, these conspiracy claims fail because they are completely 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 supporting factual allegations meeting this standard have been offered here. Further, to the extent that complainant’s allegations implicate persons who are not federal judges, including appointed criminal counsel and the district court Clerk, misconduct procedures may not be used to pursue those claims. *See* Misconduct Rule 4.

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 21st day of December, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge