

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-09-90065

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).

This complaint sets out allegations against two district judges; however, because one of them has since resigned, the claims against that judge cannot be considered here. *See* Misconduct Rule 4. A large number of the allegations take issue with various rulings in complainant's underlying cases, dealing with matters such as complainant's sentence and the denial of various motions. Such 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.

As to the remaining claims, it is unclear which judge is implicated by many of complainant's allegations. However, many of the claims are unrelated to any specific allegations against a judge, such as the general complaints about the adequacy of the court's jury wheel and Bureau of Prison policies. These claims are unsupported by factual allegations and do not demonstrate misconduct by the subject judge. Similarly, allegations about individuals other than the subject judge, such as the Assistant U.S. Attorney and Federal Public Defender, cannot be considered here pursuant to Misconduct Rule 4.

Complainant expressly alleges that the subject judge has conspired, although the complaint does not say with whom or how. While allegations of 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, this conspiracy claim fails because it is 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).

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 21st day of December, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge