

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 2008-10-372-02

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Introduction

Complainant has filed a complaint of judicial misconduct against a magistrate 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*; 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 this circuit's 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 4(f)(1).

Complainant has set out myriad claims against the subject judge. Some are implicated by an attached letter from complainant to the subject judge's chief judge, complaining about the judge being assigned to various matters brought by complainant or in which complainant had an interest. The letter also alleged conflict of interest on the part of the subject judge, and asked that the judge be recused from all cases addressing specific legal issues. Other misconduct claims are implicated by an attached affidavit from a third party complaining about the judge's conduct in connection with a copyright infringement case brought by the affiant. In addition to this misconduct complaint, complainant attached both the letter and affidavit to one of complainant's filings in an underlying lawsuit.

After my initial review of the allegations, I conducted a limited inquiry pursuant to Rule 4 of the former misconduct rules of this circuit, by asking for a response from the subject judge. Subsequently, I also asked for responses to particular claims from a local organization implicated by the allegations and the affiant's co-plaintiff in the infringement lawsuit referenced above. Based on the subject judge's written response and a response from the organization (affiant's co-plaintiff did not respond to my inquiry), I conclude that this complaint should be dismissed. My analysis follows:

Complaint Letter to the Chief Judge

Complainant, in the letter to the chief judge referenced above, contended that the assignment of the subject judge to certain cases appeared to be non-random. This allegation does not implicate misconduct by the judge in any way, and therefore need not be addressed here. The clerk of court responded directly to complainant.

Complainant alleges that the subject judge gave a presentation to a local organization, which complainant characterizes as a lobbying group. Complainant contends that "some or all" defendants in cases cited in his complaint "are or were defendants in those cases [assigned to the subject judge] and are members of the [organization]." Complaint, Attachment 1, at 1. Complainant states that the judge recommended dismissal of the cases in which the organization's members were defendants "for reasons that do not appear to be based on an intellectually honest application of current jurisprudence." *Id.* at 2. In other words, complainant claims that the judge improperly spoke to a lobbying group which contained defendants in cases before the judge and that the judge's rulings on those cases must have been the result of some connection between them or perhaps bias by the judge. These claims are not set out explicitly in the complaint, but flow from and are implied by complainant's letter to the chief judge. In that letter, complainant also sought a copy of the materials used by the judge in giving the presentation, implying that the judge was somehow speaking

on behalf of the federal district court. The letter sought the judge's disqualification from "further assignments of cases consisting of [state] domestic relations matters." *Id.*, Attachment 2 at 5.

The organization identified in the complaint is a non-profit group; its mission statement says that its purpose is "to promote professions involved in helping children and parents through the process of divorce." In its response letter, the organization describes itself as a charitable group comprised of some 250 members; its primary activity is providing monthly educational lunches. The subject judge was invited to give a presentation to the organization about a legal issue with federal/state implications. The judge, in his response, asserts that he agreed to speak consistent with Canon 4 of the Code of Conduct for United States Judges.

One aspect of these allegations is essentially a conspiracy claim, based on the implied connection between the judge and the organization and/or its members. The judge's response denies any connection with the organization, and the complaint provides no factual allegation that would tie the judge to the organization other than the single speaking engagement. The misconduct rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." Misconduct Rule 11(c)(1)(D). A single speaking engagement does not provide the basis for concluding that a

conspiracy existed between the judge and the organization or its members. This claim is dismissed as lacking evidentiary support. *Id.*

A second aspect of the allegations is the inference that the judge's presentation to the organization was improper because of the alleged membership of two defendants who had appeared before the judge. In the letter to the chief judge, complainant identified five cases assigned to the judge; four of the cases involved two named defendants who apparently are child and family investigators. Complainant contended that one of these named individuals was a past secretary and then-current board member of the organization. The organization's response letter acknowledges that both named individuals were members at the time that the judge gave the presentation, although its records indicate that only one of them attended the presentation. However, according to the district court's records regarding the four cases involving these two individuals, one was dismissed almost two years prior to the judge's presentation, one was completed one year before the presentation, one was dismissed seven months before the presentation, and the last one was concluded one month before the presentation.

Therefore, records indicate that neither of the listed individuals was a defendant in a case before the judge when the presentation occurred. Further, Advisory Opinions 87 and 105 from the Judicial Conference Committee on Codes of Conduct suggest that, under these circumstances, the judge was free to address

the organization. In light of the organization's status as a non-profit, and because the judge was not compensated for the presentation (see discussion below), the usual restrictions against speaking about practice before the judge's court disappear. *See* Advisory Opinion 87. I conclude that this claim lacks evidentiary support which would give rise to reasonable inferences of misconduct, either that the judge was influenced in case decisions by the choice to make a presentation before the organization or any resulting contact with the organization's members, or that the judge improperly spoke to an audience which included current defendants. *See* Misconduct Rule 11(c)(1)(D).

Finally, in the complaint itself, complainant contends that the judge has committed misconduct by failing to list compensation for the presentation in the appropriate financial disclosure form. This claim is negated by responses from both the judge and the organization which state that the judge was not compensated in any way. Complainant offers no evidence that the judge was compensated. I conclude that, under these circumstances, any lack of disclosure on a financial form under does not constitute misconduct. This claim is dismissed as lacking factual support. *See id.*

Third Party Affidavit

The subject judge was assigned to handle pre-trial matters in the copyright infringement case brought by the affiant. The affidavit attached to the complaint

was originally intended to be an exhibit in a subsequent case brought by the affiant against counsel for a defendant in the earlier infringement case. As a result of this history, much of the affidavit is not about the subject judge. The allegations that specifically relate to the judge can be divided into the following groups:

1. Merits-related claims. Affiant challenged several of the judge's rulings in the infringement case, which affiant characterized as being biased. Similarly, affiant discussed at some length the judge's conclusion that affiant was ghost writing for affiant's co-plaintiff in the infringement suit. Affiant contended that the judge refused to believe affiant's denial and challenged the judge's ruling on affiant's written objection. To the extent that complainant intends to challenge these decisions, the allegations are "directly related to the merits of a ruling or decision" by the subject judge. As such, they are not cognizable as misconduct claims and must be dismissed. *See* Misconduct Rule 11(c)(1)(B). The policy behind this rule is that "the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings." Breyer Report, App. E., ¶ 2.

2. Claims regarding bias or attitude. Affiant accused the judge of bias, and of "exhibit[ing] an extreme negative attitude." Affiant also contended that the judge's rulings demonstrated this bias. Claims of bias are cognizable misconduct claims, even where a judge's rulings are involved. *See* Misconduct Rule 3(h)(3)(A) and related Commentary. However, misconduct claims require

factual support, *see* Misconduct Rule 11(c)(1)(D). Affiant neither identified the reasons or basis for the alleged bias, nor provided evidence of the bias outside of the rulings themselves and affiant's own legal arguments about why the rulings were wrong. Without some proof of bias or examples of conduct which would support affiant's characterization of the judge's attitude and also constitute misconduct, these claims must be dismissed. *See id.*

3. Settlement Conference Claims. The majority of claims in the affidavit involving the subject judge have to do with affiant's complaints about the judge's conduct during a settlement conference in the infringement case.

a. Affiant claimed that the judge made plaintiffs wait for fifteen minutes in a conference room, an alleged "tactic" that affiant viewed as "abusive, intimidating and coercive." I cannot conclude that making a party wait for fifteen minutes during a settlement conference is misconduct. As the judge states in response, having parties wait in separate rooms while the judge talks to each side is a common settlement conference practice.

b. Affiant claimed that the judge tried to pressure plaintiffs to drop their suit, telling them that pro se litigants never win in the district court. While a closer call, I cannot conclude that this statement constitutes coercion. It may be a true statement, and does not, by itself, support a conclusion of bias.

c. Affiant stated that the judge threatened plaintiffs by saying that the case could be dismissed and plaintiff charged with defendants' costs and

attorney fees. The judge stated that he advised both plaintiffs "as to costs that could be awarded to the prevailing party." While I cannot determine reasonably disputed facts in a misconduct complaint, *see* Misconduct Rule 11(b), I can determine whether facts, if true, rise to the level of misconduct. Again, I cannot conclude that these alleged statements, even if true, constitute misconduct.

Affiant acknowledged that, as a magistrate judge, the subject judge could not dismiss the case but could only recommend dismissal to the district court judge.

Affiant also acknowledged that the judge did not ultimately recommend awarding defendants costs and attorney fees.

d. Affiant contended that the judge refused to believe affiant's statements about a state court judge who, it was alleged, denied affiant due process in a state court hearing. Affiant stated that the subject judge based his opinion about the state court judge on personal knowledge. Affiant contended that this opinion demonstrated bias for the defendants in the infringement suit. This argument is both illogical and fails to demonstrate any misconduct on the part of the judge.

e. Affiant complained that the judge "attempted to minimize the injury" that gave rise to the infringement case, and opined that plaintiffs brought the suit for the money. Affiant said that the judge "scoffed" at plaintiff's contentions that they were being altruistic, and viewed the judge's opinion as "offensive, insulting, and condescending." Again, occurring during a settlement

conference, these statements and perceived opinion on the part of the judge do not rise to the level of misconduct. Magistrate judges are regularly put in the position of having to gauge the relative merits of the cases before them in settlement, and of trying to get parties to settle their cases. They are not required to agree with parties or be on their side. That the judge did not appear to credit affiant's declared motive does not constitute misconduct. Using words like "offensive" and "insulting" does not create a misconduct claim without examples or supporting allegations that would give rise to a reasonable inference of misconduct.

f. Affiant contended that the judge advised her to violate a state court order which prohibited contact with affiant's co-plaintiff. This claim apparently arose out of discussion of a state court order in which the state court judge, concluding that affiant was practicing law without a license, prohibited affiant from contact with affiant's co-plaintiff during the state case. Once again, viewing the allegations as true because I cannot determine factual matters, *see* Misconduct Rule 11(b), I cannot conclude that the alleged statements during a discussion about the basis for affiant's federal suit amount to misconduct. I note that, in the Tenth Circuit opinion affirming the district court's dismissal of the infringement case, the court relied on the *Rooker-Feldman* doctrine to conclude that affiant could have appealed the state court decision rather than bring a

federal lawsuit. I'm not willing to conclude in this setting that this allegation rises to the level of misconduct.

g. Affiant characterized the settlement conference as threatening and coercive, giving rise to fears that plaintiffs would not be treated fairly in federal court. Affiant contended that the defendants were "smug and smirking" when plaintiffs returned to the courtroom. These emotional speculations do not give rise to reasonable inferences of misconduct, nor are they supported by factual allegations. In response, the judge stated that plaintiffs "refused to accept any of my input concerning the legal and factual strengths and weaknesses of their case." None of the allegations about the settlement conference, discussed above, either singly or in concert, rise to the level of misconduct. Therefore, these claims are dismissed pursuant to Misconduct Rule 11(c)(1)(A).

4. Miscellaneous Claims. Affiant alleged that transcripts of proceedings in the infringement suit were altered and that recordings disappeared. However, the transcripts and recordings were not identified, and affiant did not set out any allegations which would tie these claims to the judge. Similarly, affiant's stated belief that the judge must have obtained information *ex parte* from the defendants in the infringement case is not supported by adequate factual allegations such that an inference of *ex parte* communication is reasonable. I note that affiant's position in this matter was rejected by the state supreme court in a

subsequent opinion. These claims are dismissed as lacking evidentiary support.
See Misconduct Rule 11(c)(1)(D).

Conclusion

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 29th day of October, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge