

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

No. 10-11-90013

Before **BRISCOE**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a circuit 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.supremecourt.gov/publicinfo/breyercommitteereport.pdf>. To the extent that there are any relevant prior decisions of the full Judicial Council of this circuit which are consistent with those authorities, they may also govern my consideration of this complaint.

Complainant has been provided with a copy of the Misconduct Rules, and the Rules are also accessible on the Tenth Circuit’s web page at:

<http://www.ca10.uscourts.gov/misconduct.php>. 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 contends that the subject judge refused to file - and also directed the Clerk of Court to refuse to file - “new evidence” in a case in which the appeal was closed in 2002. Complainant argues that the court may reopen any case at any time when new evidence is discovered. Complainant also alleges that the 2002 opinion, authored by the subject judge, was the ultimate product of a verbal threat allegedly made by the subject judge to complainant in 1986. Complainant contends that this threat was witnessed by another judge’s secretary.

To the extent that these claims take issue with the appellate decision in 2002, they 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.

Allegations of improper motive can state a valid claim for misconduct even when the claim relates to a judge’s ruling, *see* Commentary to Misconduct Rule 3. Nonetheless, this claim - that the 2002 appellate opinion was improperly motivated by a threat made in 1986 - fails because it lacks factual or evidentiary support. This claim alleges conduct that reportedly occurred some 25 years ago,

resulting in a court opinion sixteen years later. The other judge mentioned in the complaint is no longer alive and that judge's unnamed secretary (who reportedly witnessed the conduct) is no longer reasonably available. I conclude that the allegations about conduct that allegedly occurred in 1986 "are incapable of being established through investigation." *See* Misconduct Rule 11(c)(1)(E) and related Commentary ("Dismissal is . . . appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation."). The allegation that the 2002 order was improperly motivated finds no other factual support in the complaint. Similarly, the claim that the subject judge recently directed the Clerk of Court to refuse to file complainant's "new evidence" is without factual support. 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 subject 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 24th day of March, 2011.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge