

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: COMPLAINT UNDER THE
JUDICIAL CONDUCT AND
DISABILITY ACT

Nos. 10-12-90019 and 10-12-90020

Before **BRISCOE**, Chief Judge.

ORDER

Complainants have filed similar complaints of judicial misconduct against a district judge in this circuit. The complaints involve conduct in a single district court case assigned to the subject judge. The complaints are herewith consolidated for decision. My consideration of these complaints 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.

Complainants have 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 complainants and subject judge shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainants assert that the subject judge has engaged in intentional delay in ruling on a single request, made in the underlying case, for access to a sealed hearing transcript. Although acknowledging that the Misconduct Rules preclude delay in a single case as a cognizable claim, *see* Misconduct Rule 3(h)(3)(A), complainants contend that the alleged two-month delay is the product of bias, characterizing it as a refusal to rule. In support for this claim, one complainant points to a lack of delay in a separate judge's rulings on opposing counsel's requests. The other complainant speculates that the only reason for the delay is to hide bias and misconduct by another, unidentified, judge.

I conclude that a delay of slightly over two months in ruling on a single request does not support a reasonable inference of bias or a refusal to rule such that it would constitute a valid misconduct claim. Statistics about a separate judge's rulings do not support this claim. Speculation about the reasons for bias does not give rise to a reasonable inference of improper motive.

Further, although complainants appear to recognize that substantive issues cannot be challenged in these proceedings, their allegations compel me to remind

them that claims “directly related to the merits of a decision or procedural ruling” are 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.

Accordingly, these complaints are dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainants 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, complainants must file a petition (or petitions) for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition(s) 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 27th day of July, 2012.

/s/ Mary Beck Briscoe

Honorable Mary Beck Briscoe
Chief Circuit Judge