

**JUDICIAL COUNCIL OF THE  
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL  
MISCONDUCT

No. 2008-10-372-07

Before **HENRY**, Chief Judge.

**ORDER OF DISMISSAL**

Complainant has filed a complaint of judicial misconduct against a district judge and a magistrate judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Council of the Tenth Circuit, entitled *Rules Governing Complaints of Judicial Misconduct and Disability*; 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 contends that the respondent magistrate judge has had *ex parte* communications with defendants because the judge referenced a prison account statement that complainant contends was not filed with the court. I have undertaken a limited inquiry on this claim by reviewing the pleadings in the underlying case. Contrary to complainant's allegations, the docket indicates that complainant did file a prison account statement - albeit an old one - with a pleading dated January 9, 2008. Therefore, the magistrate judge's reference to this document cannot provide support for any reasonable inference that *ex parte* communications occurred.

Complainant makes a general claim that both respondent judges engaged in *ex parte* communications with certain named defendants, which consisted of "legal advice from the Court to ensure positive rulings." Although, as noted in the Breyer Report, a complaint identifying witnesses to misconduct may compel me to perform a limited inquiry by questioning those witnesses, *see* Breyer Report, App. E., ¶ 4, I conclude that more is needed than a list of names and a summary allegation of misconduct. To survive dismissal, complainant must provide evidentiary support sufficient "to raise an inference that some kind of cognizable misconduct has occurred." Misconduct Rule 4(c)(3). A summary allegation of *ex parte* communication, without further support, is not sufficient. Accordingly, this complaint is dismissed.

The Circuit Executive is directed to transmit this order to complainant and a copy to the respondent judges. To seek review of this order, complainant must file a petition for review by the Judicial Council. As set out in the misconduct rules, the petition should be in the form of a letter, and need not include a copy of the original complaint or this order. *See* Misconduct Rule 6. The petition must be filed with the Office of the Circuit Executive, at the address set out in the rules, within 30 days of the date of the letter transmitting this order. *Id.*

So ordered this 10th day of March, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry  
Chief Circuit Judge