

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-08-90029 through 10-08-90037

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Complainant has filed a complaint of judicial misconduct against seven circuit judges and two district judges 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 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).

Complainant first requests that this complaint be transferred to another circuit, in light of complainant having filed a petition for rehearing with suggestion for rehearing en banc. Complainant contends that this petition somehow “pollutes” all circuit judges in this circuit from considering and ruling on this complaint. However, judges who are not subjects of the complaint are not automatically disqualified under the Misconduct Rules. *See* Misconduct Rule 25(a). Judges are given discretion to determine if the circumstances warrant disqualification. Commentary to Misconduct Rule 25 recognizes that, despite the ambiguous wording of 28 U.S.C. § 359(a), it was clearly not the intent of the Judicial Conduct and Disability Act to require a judge to disqualify his or herself because of involvement in a complainant’s underlying cases. After review of this complaint, I decline to disqualify myself from this matter. I also decline complainant’s request that I ask the Chief Justice of the United States Supreme Court to transfer this matter to another circuit. Pursuant to Misconduct Rule 26, such transfers are to be made in “exceptional circumstances.” My review of this complaint indicates that such circumstances are not present here.

Complainant alleges that the subject judges have conspired among themselves and with others in order to preclude litigation in the federal courts on the issue of prison overcrowding. The sole evidence complainant offers in support of this claim is the various judges’ rulings in underlying cases and appeals brought by complainant and others. As noted in the Misconduct Rules,

complaints which fail to provide evidentiary support “sufficient to raise an inference that misconduct has occurred” must be dismissed. Misconduct Rule 11(c)(1)(D). These rulings do not, by themselves, support a reasonable inference of conspiracy. Beyond the rulings themselves, complainant asserts that the rulings are wrong, either on the law or on the facts. Claims that are “directly related to the merits of a decision or procedural ruling” cannot constitute misconduct. Misconduct Rule 11(c)(1)(B); Commentary to Misconduct Rule 3. Therefore, to the extent that these claims also challenge the subject judges’ rulings, they must be dismissed. Misconduct Rule 11(c)(1)(B).

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 judges 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 June, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge