

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-08-90072 & 10-08-90074

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Complainant has filed complaints of judicial misconduct against two district judges in this circuit, arising out of the same underlying case. The two 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*; 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 these complaints.

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 judges shall not be disclosed in this order. *See* Misconduct Rule 11(g)(2).

Complainant takes issue with rulings and statements made by the subject judges in an underlying criminal proceeding. Complainant contends that the judges' rulings are contrary to law, a "gross abuse of discretion," and violative of complainant's rights. Complainant contends that the judges distorted the facts in the underlying case, acted as a witness for the prosecution, and held *ex parte* communications.

Complainant's challenges to the rulings themselves are not cognizable as misconduct claims because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). That is because such claims do not constitute misconduct. Misconduct Rule 3(h)(3)(A). 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.

While assertions of improper *ex parte* communications can state valid claims of misconduct, *see* Misconduct Rule 3(h)(1)(C), the facts alleged must support such claims. Here, complainant contends that one judge's discussions with his own courtroom deputy and the other judge's communications with complainant's own counsel constitute *ex parte* communications. However, the

rule against *ex parte* communication is meant to protect parties from communications or other acts which are “done or made at the instance and for the benefits of one party only, and without notice to, or argument by, any person adversely interested.” See *United States v. Abreu*, 202 F.3d 386, 390 (1st Cir. 2000)(quoting *Black’s Law Dictionary*). The judge’s own courtroom deputy is not a party, and complainant cannot contend that the judge’s communications with complainant’s own counsel adversely affected complainant. As a matter of law, these alleged communications were not *ex parte*, and therefore these claims do not rise to the level of misconduct. See Misconduct Rule 11(c)(1)(A).

Accordingly, these complaints are 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 18th day of August, 2008.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge