

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

No. 10-08-90104

Before **HENRY**, Chief Judge.

ORDER OF DISMISSAL

Complainant has filed a complaint of judicial misconduct against a district 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.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 has submitted a lengthy complaint asserting claims in connection with a case brought by complainant that was ultimately assigned to the subject judge. The judge recused from the case shortly before trial after a witness list revealed that one of the defense witnesses was an acquaintance of the judge. The case was subsequently assigned to a different district court judge and, shortly thereafter, settled. There was no trial and no further court proceedings of any kind.

I.

First, complainant asserts that the circumstances infer that there must have been *ex parte* communications between the judge and the intended witness. Complainant states that the witness's name had not been disclosed in any earlier pleadings in the case, but contends that the judge's rulings prior to the filing of the witness list were somehow tainted by the conflict that ultimately led to the judge's recusal. Complainant contends that the asserted *ex parte* communications, together with the judge's previous rulings adverse to complainant demonstrate both the judge's lack of impartiality and the existence of a conspiracy to deny complainant's right to a fair trial.

To the extent that complainant's discussion of the merits of the underlying case seeks to challenge rulings by the subject judge, these claims 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.

Complainant’s assertions that *ex parte* communications must have taken place are speculative and not supported by the circumstances complainant argues or the judge’s rulings themselves. 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). The argument that the judge’s personal relationship with a witness named shortly before a scheduled trial tainted rulings made years earlier lacks merit. Similarly, while claims of conspiracy can state a valid claim for misconduct even when the alleged conspiracy relates to a judge’s ruling, *see id.*, complainant’s conspiracy claim fails because it is based on rank speculation and unreasonable inferences.

Complainant contends that the judge leveled “hostilities” at complainant in various rulings in the underlying case. Complainant quotes from orders in which the judge stated that arguments posited by complainant “f[e]ll clearly below the standards of advocacy required and observed in this district,” and were “inapposite,” “irresponsible,” “fanciful,” and abusive of the laws on which they were based. It is clear that the judge was not pleased with complainant’s arguments, but these statements do not constitute the “demonstrably egregious

and hostile manner” that the Misconduct Rules characterize as misconduct. *See* Misconduct Rule 3(h)(1)(D). Complainant’s further arguments about the judge’s attempts to explain the frustration behind these comments do not reasonably implicate a lack of integrity, improper ulterior motive, or intent to coerce complainant into settling the underlying case, as complainant argues. I decline complainant’s offer to re-evaluate the parties’ pleadings to determine whether the judge’s comments were valid; again, the misconduct proceedings are not a vehicle to examine the merits of a judge’s rulings. *See* Misconduct Rule 3(h)(3)(A).

Complainant asserts that the judge concealed the personal relationship with the intended witness for a two-month period between the filing of the proposed witness list and the judge’s order of recusal. Complainant attempts to show prejudice resulting from this delay, but, as there were no rulings by the judge in that time period, I cannot agree that the delay constituted misconduct. *Cf.* Misconduct Rule 3(h)(3)(B). The allegations of improper motive behind the delay and complainant’s conjecture that the judge hoped the case would settle so that disclosure of the relationship would not be required lack any evidentiary support. *See* Misconduct Rule 11(c)(1)(D).

Complainant later asserts that the witness was prepared to give perjured testimony in the underlying case. Complainant once again invites scrutiny of the merits of the underlying case, and claims that the witness felt secure in offering

the perjured testimony because of the alleged conspiracy with the judge. This claim is totally unsupported. *See id.*

II.

Complainant contends that the judge violated Canon 7 of the *Code of Conduct for United States Judges* by making a campaign contribution to the intended witness in a previous campaign for local office. The judge's own recusal order noted the possibility of such a contribution.

I am precluded from making findings of fact in misconduct matters. *See* Misconduct Rule 11 (b) and related Commentary. Accordingly, I conducted a limited inquiry on this claim by asking the subject judge for a response. *See* Misconduct Rule 11(b). The judge has admitted making two small campaign contributions to candidates for local office in non-partisan elections - one in 2001 and a second in 2003. The judge was unaware at the time that this conduct violated Canon 7, believing that contributions to non-partisan candidates were allowed, but has since realized that all political contributions violate the Canon. The judge stated that, after the recusal order in the underlying case, the judge determined to make no further contributions to any elections, including those of religious and civic organizations.

The judge's acknowledgment of the violation of Canon 7, together with the judge's reported and previous determination to cease any such contributions and

the *de minimis* nature of these contributions made several years ago, lead me to conclude that “appropriate voluntary corrective action that acknowledges and remedies” the claim raised here have taken place. *See* Misconduct Rule 11(d)(2).

Complainant also asserts that the judge and the intended witness conspired to violate local election laws, alleging that no contributions by the judge are recorded in connection with the campaign, and speculating that the judge could have concealed the contribution by making a check out to the witness’s law firm. Complainant further speculates that the motivation behind this asserted conspiracy is their shared religious faith. These claims are totally unsupported. The judge is not responsible for the recording of campaign contributions and no reasonable inference either connects the judge’s religious faith with his conduct in this matter or supports complainant’s allegations of conspiracy and ill motive. *See* Misconduct Rule 11(c)(1)(D).

III.

The majority of the claims in this complaint are not only rank speculation, but border on the frivolous - especially those claims that the judge conspired against a litigant on the basis of shared religious belief or affiliation with a personal acquaintance. Baseless conjecture about improper motives underlying a judge’s rulings in a case cannot support a claim for misconduct. These unsupported claims must be dismissed. *See id.* The claim about the campaign

contributions made in violation of Canon 7 is also dismissed, on the grounds noted above. *See* Misconduct Rule 11(d)(2).

Accordingly, this complaint is dismissed pursuant to Misconduct Rules 11(c) and 11(d). The Circuit Executive is directed to transmit this order to complainant and copies to the respondent 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 9th day of February, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge