

**JUDICIAL COUNCIL OF THE
TENTH CIRCUIT**

IN RE: CHARGE OF JUDICIAL
MISCONDUCT

Nos. 10-09-90067 & 10-09-90068

Before **HENRY**, Chief Judge.

ORDER

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

Complainant contends that the subject judges were biased against complainant in an underlying civil suit, and not only favored the defendant but were secretly working to represent the defendant. Complainant alleges intentional delay by the judges in ruling on a motion for summary judgment, contending that the delay was meant to torture complainant. Complainant also takes issue with other specific rulings by the judges, asserting that they violated the law. Complainant alleges that the judges had an unidentified personal interest in the case, which, together with rulings contrary to complainant, further demonstrated the judges' bias.

Complainant seeks mandamus relief in what I construe as a request to the Judicial Council. Mandamus relief is not available under the misconduct procedures. *See* Misconduct Rule 11 (setting out possible rulings by Chief Judge).

To the extent that complainant challenges the judges' rulings, 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.

Claims of bias are cognizable misconduct claims, however, even when the alleged ill motive relates to a judge's ruling, *see* Commentary to Misconduct Rule

3. Nonetheless, these claims of bias and ill motive fail because they are unsupported. 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). Rulings contrary to complainant cannot, by themselves, support a claim of bias.

Complainant’s claims of intentional delay likewise fail because of the lack of factual allegations which would reasonably give rise to an inference of judicial misconduct. Delay is generally not misconduct, except in those cases involving “improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.” Misconduct Rule 3(h)(3)(B).

Complainant’s speculative and unsupported allegations of personal interest and ill motive are not sufficient to support a reasonable inference intentional delay. *See* Misconduct Rule 3(h)(3)(B). In light of the definition of misconduct set out in the Misconduct Rules, I conclude that the alleged delay, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts. *See* Misconduct Rule 11(c)(1)(A).

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 5th day of January, 2010.

/s/ Robert H. Henry

Honorable Robert H. Henry
Chief Circuit Judge