JUDICIAL COUNCIL OF THE TENTH CIRCUIT

IN RE: CHARGE OF JUDICIAL MISCONDUCT

Nos. 10-09-90075 & 10-09-90076

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against two district judges 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.supremecourt us.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 first takes issue with rulings by the subject judges in an underlying case. 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.

The balance of the complaint is difficult to understand. Other than a claim of "ex parte communications" between the two subject judges, no conduct is alleged which could form the basis for a misconduct claim. The claim of "ex parte communications" is not legally valid because ex parte communications are communications between counsel and the court, see Black's Law Dictionary, 296 (8th ed.). Complainant makes no factual allegations which support a claim of ex parte communications. 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 21st day of December, 2009.

/s/Robert H. Henry

Honorable Robert H. Henry Chief Circuit Judge