

**RULE 4 | MISCONDUCT AND DISABILITY DEFINITIONS**

(a) Misconduct Generally. Cognizable Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Cognizable misconduct includes, but is not limited to, the following:

(1) Violation of Specific Standards of Judicial Conduct. Cognizable misconduct includes:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) engaging in improper ex parte communications with parties or counsel for one side in a case;

(D) engaging in partisan political activity or making inappropriately partisan statements;

(E) soliciting funds for organizations; or

(F) violating rules or standards pertaining to restrictions on outside income or knowingly violating requirements for financial disclosure.

(2) Abusive or Harassing Behavior. Cognizable misconduct includes:

(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault;

(B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or

(C) creating a hostile work environment for judicial employees.

(3) Discrimination. Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability;

(4) Retaliation. Cognizable misconduct includes retaliating against complainants, witnesses, judicial

employees, or others for participating in this complaint process, or for reporting or disclosing judicial misconduct or disability;

(5) Interference or Failure to Comply with the Complaint Process. Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules; or

(6) Failure to Report or Disclose. Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge any reliable information reasonably likely to constitute judicial misconduct or disability.

A judge who receives such reliable information shall respect a request for confidentiality but shall nonetheless disclose the information to the relevant chief district judge or chief circuit judge, who shall also treat the information as confidential. Certain reliable information may be protected from disclosure by statute or rule. A judge's assurance of confidentiality must yield when there is reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary.

A person reporting information of misconduct or disability must be informed at the outset of a judge's responsibility to disclose such information to the relevant chief district judge or chief circuit judge.

Reliable information reasonably likely to constitute judicial misconduct or disability related to a chief circuit judge should be called to the attention of the next most-senior active circuit judge. Such information related to a chief district judge should be called to the attention of the chief circuit judge.

(7) Conduct Outside the Performance of Official Duties. Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including

a substantial and widespread lowering of public confidence in the courts among reasonable people.

(b) Conduct Not Constituting Cognizable Misconduct.

(1) Allegations Related to the Merits of a Decision or Procedural Ruling. Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse.

If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision.

(2) Allegations About Delay. Cognizable misconduct does not include an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(c) Disability. Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively.

### Commentary

The phrase “prejudicial to the effective and expeditious administration of the business of the courts” is not subject to precise definition, and subsection (a) therefore provides some specific examples. 28 U.S.C. §351(a). The Code of Conduct for United States Judges sets forth behavioral guidelines for judges. While the Code's Canons are instructive, ultimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules. See also Rule 24 (Public Availability of Decisions).

Even where specific, mandatory rules exist — for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations — the distinction between the misconduct statute and these specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

Rule 4(a)(2)(A) provides expressly that unwanted, offensive, or abusive sexual conduct by a judge, including sexual harassment or assault, constitutes cognizable misconduct. The Rule recognizes that anyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct.

Under Rule 4(a)(4), a judge's efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process constitute cognizable misconduct. The Rule makes the prohibition against retaliation explicit in the interest of promoting public confidence in the complaint process.

Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. See Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.").

Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under Rule 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause. The Commentary on Rule 13 provides additional discussion regarding Rule 4(a)(5). The Rules contemplate that judicial councils will not consider commencing proceedings under Rule 4(a)(5) except as necessary after other means to acquire the information or enforce a decision have been tried or have proven futile.

All judges have a duty to bring to the attention of the relevant chief district judge or chief circuit judge reliable information reasonably likely to constitute judicial misconduct or disability. See Rule 4(a)(6). This duty is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate action as necessary. Public confidence in the integrity and impartiality of the judiciary is promoted when judges take appropriate action based on reliable information of likely misconduct. Appropriate action depends on the circumstances, but the overarching goal of such action should be to prevent harm to those affected by the misconduct and to prevent recurrence. See Code of Conduct for United States Judges,

Canon 3B(6) & cmt. These Rules incorporate those principles while allowing for appropriate, expeditious, fair, and effective resolutions of all such complaints.

The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability. By statute and rule, the chief circuit judge administers the misconduct and disability complaint process, including the authority to investigate an allegation and, if warranted, to identify a formal complaint. See Rule 5. Disclosures made to or otherwise brought to the attention of the appropriate chief district judge of reliable information of misconduct or disability that threatens the safety or security of any person or that is serious or egregious such that it threatens the integrity and proper functioning of the judiciary warrant communication to and consultation with the chief circuit judge in light of the chief circuit judge's statutory responsibility for overseeing any required final action.

In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.

A person who seeks to report information of misconduct or disability on a confidential or anonymous basis may proceed through various alternative avenues within the judiciary, including the Office of Judicial Integrity and/or comparable offices within the circuits.

Rule 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties.

Rule 4(b)(1) tracks the Act, 28 U.S.C. §352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial authority by ensuring that the complaint procedure is not used to collaterally call into question the substance of a judge's decision or procedural ruling. Any allegation that calls into question the correctness of an official decision or procedural ruling of a judge — without more — is merits-related. The phrase “decision or procedural ruling” is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation

that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it “relates” to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — “the merits” — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge’s rulings is not at stake. An allegation that a judge treated litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges’ independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper *ex parte* communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions.

Because of the special need to protect judges’ independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge’s language in a ruling reflected an improper motive. If the judge’s language was relevant to the case at hand — for example, a statement that a claim is legally or factually “frivolous” — then the judge’s choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11(b) is necessary.

With regard to Rule 4(b)(2), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, i.e., assigning a low priority to deciding the particular case. But, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an improper motive, is not merits-related.

Rule 4(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available. A mental disability could involve cognitive impairment or any psychiatric or psychological condition that renders the judge unable to discharge the duties of office. Such duties may include those that are administrative. If, for example, the judge is a chief judge, the judicial council, fulfilling its obligation under 28 U.S.C. §332(d)(1) to make “necessary and appropriate orders for the effective and expeditious administration of justice,” may find, under 28 U.S.C. §45(d) or §136(e), that the judge is “temporarily unable to perform” his or her chief-judge duties. In that event, an appropriate remedy could involve, under Rule 20(b)(1)(D)(vii), temporary reassignment of chief-judge duties to the next judge statutorily eligible to perform them.

Confidentiality as referenced elsewhere in these Rules is directed toward protecting the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules. Nothing in these Rules concerning the confidentiality of the complaint process or the Code of Conduct for Judicial Employees concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct or disability. See Rule 23(c).