

complaint as merits-related. Our research data will not permit us to make that causal link. Nonetheless, we can assess whether there are any possible shortfalls in applying the merits-related standard by looking at problem matters where it is at least arguable that a potentially meritorious complaint was dismissed as merits-related.

*Problematic dismissals because of availability of appellate remedy*

One source of confusion in applying the merits-relatedness standard is the interplay between a "direct relationship" to the merits and the availability of an appellate remedy. Many chief judges have recognized that the availability of some appellate remedy may not, ipso facto, render a complaint dismissible under the Act. Former Chief Judge Wald made the following statement in a report to the Judicial Conference:

One substantive question is not altogether clear from the Act or the Illustrative Rules. If a judge is accused of conduct "prejudicial to the effective and expeditious administration of the business of the courts," which he has allegedly committed in the course of a judicial proceeding, may it nonetheless be a legitimate subject of a complaint, even though it might have been asserted as the subject of an appeal under the broad rubric of lack of due process? So far, we have operated on the assumption that if a complainant had requested and been denied recusal of a judge, that decision could have been appealed in the regular judicial process and so could not form the basis of a complaint. But I gather by reading some decisions in other Circuits, there may indeed be conduct by a judge, in the course of proceedings, that while possibly appealable, is still considered a legitimate subject of complaint. Since the vast majority of complaints we receive come out of judicial proceedings, some clarification in this area would be most helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?<sup>1</sup>

Another chief judge made a similar statement to us:

[T]here can be matters raised on appeal that are appropriate subjects for discipline. An allegation that a judge's decision was the result of a bribe

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<sup>1</sup>. Memorandum from Chief Judge Patricia M. Wald to Judge Elmo B. Hunter, Chairman, Court Administration Committee of the Judicial Conference of the U.S. (September 25, 1987) [hereinafter *Wald Memo*].

makes this conduct absolutely immune to consideration through the discipline process. To the contrary, it might well be that formal discipline would be a valuable addition to reversal, particularly if reversal were not coupled with criticism of the judicial conduct involved.<sup>110</sup> Hence, this approach to the merits-relation question can unduly narrow the ambit of the discipline process.<sup>111</sup>

Another problem with the "fallback" approach is that there may be judicial decisions that are not subject to appellate review, so that the unavailability of appellate review might be urged to indicate that a judge's resolution of a merits or procedural issue is not "merits-related" for purposes of the Act. Consider, for example, the following complaint:

- Complainant, an attorney, was a forensic document examiner in a case before the district judge. When complainant applied for fees under the CJA, the judge drastically reduced the amount. The chief judge dismissed the complaint, which asserted that the reduction in the fee was wrong. He pointed out that although no appellate review of the fee order was available to complainant, nevertheless the complaint was a challenge to the correctness of the judge's ruling and therefore not cognizable under the Act.

Thus, the "fallback" theory could, if followed slavishly, unduly constrict the merits-relation criterion as well as overextending it.

As an alternative to the "fallback" theory, one could draw on the presumed purposes for this limitation on the discipline authority. One purpose is to ensure that complaints are not treated as an alternative to appeal. Thus, whenever the proper course would be appeal, and the problem could be fully remedied by appellate review, the complaint

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<sup>110</sup> There have been instances, described in section IV A above, in which discipline proceedings were aborted in light of criticism of the judicial conduct in appellate opinions.

<sup>111</sup> In her 1987 report on the Act, Chief Judge Wald invited attention to this issue. She explained that "I gather by reading some decisions in other Circuits, there may indeed be conduct by a judge in the course of proceedings, that while possibly appealable, is still considered a legitimate subject of complaint. Since the vast majority of complaints we receive come out of judicial proceedings, some clarification in this area would be most helpful." Memorandum to Judge Elmo B. Hunter from Chief Judge Patricia Wald, Sept. 25, 1987, at 6.

Ex A-2

3. The conduct must not be directly related to the merits of a decision or procedural ruling

An operating assumption of the Act, expressed in §372(c)(3)(A)(ii), is that if judicial misconduct relates to the merits of a judge's decision or ruling, the problem is better addressed by the appellate process than by the disciplinary process. Complaints relating to the merits of decisions and rulings are therefore routinely dismissed. The Administrative Office of U.S. Courts reports that of the 195 proceedings terminated by Chief Judges in 1991, 162, or 83% were dismissed on the grounds that they directly related to the merits of a judicial proceeding.<sup>26</sup>

At least two distinct questions of scope are presented by that provision of the Act authorizing the chief judge to dismiss complaints relating to the merits of a decision. The first arises in situations that present an extant, though remote, opportunity for appeal: "Is anything that arose in the course of a proceeding out of bounds for a complaint", asked former Chief Judge Patricia Wald, of the D.C. Circuit, "or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?"<sup>27</sup> The D.C. Circuit, the chief judge explained, "operated on the assumption that if a complainant had requested and been denied recusal of a judge, that decision could have been appealed in the regular judicial process and so could not form the basis of a complaint."<sup>28</sup> On the other hand, she added, "I gather by reading some decisions in other Circuits, there may indeed be conduct by a judge in the course of proceedings, that while possibly appealable, is still considered a legitimate subject of complaint."<sup>29</sup>

The other problem of scope relates, once again, to the issue of delay. As previously discussed, isolated instances of excessive decision-making delay might conceivably be dismissed on two grounds: 1) the statute does not reach failures to act; and 2) absent a pattern of delay, tardy decisions in individual cases are not prejudicial to judicial administration. To these two, may be added a third: mandamus, and not disciplinary proceedings, is the proper remedy for decisional delay.

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<sup>26</sup>Annual Report of the Director, Administrative Office of the United States Courts 116-117 (1992).

<sup>27</sup>Memorandum to Judge Elmo Hunter from Judge Patricia Wald, Re: Report on Experience Under Judicial Conduct and Disability Act 7 (Sept. 25, 1987).

<sup>28</sup>*Id.* at 6.

<sup>29</sup>*Id.*

EX A-3