JUDICIAL COMMENTS ON PENDING CASES: THE ETHICAL RESTRICTIONS AND THE SANCTIONS—A CASE STUDY OF THE MICROSOFT LITIGATION

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In our legal system, the most authoritative figures are the judges. Yet, despite the increased demands and offers for media commentary that judges must be receiving, in the following article, Professor Ronald Rotunda explains that judges are ethically prohibited from providing ex parte commentary about ongoing cases. He argues that the prohibition is and should be absolute—whether dealing with print or electronic media. This is especially true if the judge is presiding over the case. Professor Rotunda draws his primary examples from the recent media coverage surrounding the Microsoft antitrust trial; but he contends that the rules apply across the board.

I. INTRODUCTION

As a matter of routine, judges typically instruct jurors not to discuss the case with each other until the end of the trial. As a matter of fairness, we do not want jurors to start deliberating with themselves as to what the verdict should be until both sides have had the opportunity to present all of their evidence. In addition, if a juror (let us call him Juror Loquacious) starts explaining to (and trying to persuade) a fellow juror why he thinks one side should win, his explanations may start to appear like arguments and later, Juror Loquacious may be reluctant to back off, admit that he had been in error, and that he should change his mind when faced with other evidence.

When the jurors have rendered their verdict, judges typically thank them for their services and then may instruct them that they are not obligated to disclose to the curious what they said in the jury room. What Bismarck is supposed to have said about laws (like sausage, it is best not

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to see how they were made) may also apply to jury deliberations. Jurors may talk if they want to, but sometimes it may be best not to know exactly how the sausage has been made.

These principles apply to judges too, particularly in bench trials. As a matter of fairness, we do not allow judges to comment publicly about pending cases outside the courtroom and to announce their views prior to the close of the evidence. If Judge Loquacious (our counterpart to Juror Loquacious) talks to reporters about a case pending personally before him, he may also talk himself into a mind set. Like Juror Loquacious, he may well be reluctant to admit that he had misjudged some testimony, or that he had been in error in asking the parties to explore a particular issue, or that his initial instincts were fatally wrong.

In addition, judges are normally fiercely protective of their deliberative process. Like Bismarck, judges ordinarily do not want us to see the sausage being made. But the purpose of the rule forbidding judges from engaging in conversations about pending cases outside the presence of the counsel for both parties is not simply to protect judges from broadcasting their deliberative processes. Judges do not have the right to "waive" the proscription because the purpose of the prohibition against ex parte communications is not to protect the judge; it is to protect the parties and the system of justice.

If the judge discussed his deliberative processes, or his thought-process, or his evaluation of the evidence with a reporter, those statements are part of the published newspaper interview, but are not part of the record. Should a party be able, on appeal, to argue that the judge's factual assumption was wrong, or the party should have a right to have the case remanded so that it can counter the judge's evaluation of the evidence, as reported in the newspaper interview? If so, should the other party be able to show (by cross-examining the judge or the reporter) that the judge never really relied on that thought-process or evaluation to the extent or in the way that the reporter believed? Or, should the appellate court determine that it should ignore what the judge said, even though the trial judge apparently told several reporters the same story?

Judge Loquacious's ex parte communications during the trial are more troubling than Juror Loquacious's ex parte communications for another reason. Juror Loquacious will be talking to other jurors. But Judge Loquacious will be communicating with reporters, and these reporters, unlike the jurors, will have been exposed to information that is outside the record. The problem is not simply that the judge is talking to reporters; it is that reporters are talking to the judge. If Judge Loquacious engages in conversations with reporters about the pending case, the very nature of a "conversation" is that there is give and take. The judge will not only be communicating information to the reporters, they will be communicating information to him. A conversation is a dialogue, a spoken exchange.

The reporters will, at the very least, be asking questions and those questions may include information that is not part of the record. For example, a reporter might say, "Judge Loquacious, did you know that Expert Witness Number 1 acted very nervous in the hallway after his cross-examination?" Or, "I overheard a lawyer for the defendant admit that she is unhappy with the way that they are presenting the testimony of their witness yesterday afternoon. Are you surprised?" No party can respond to, and refute, the information that a reporter may have given the judge, because the lawyers were not present. Those conversations, after all, are ex parte and not on the record. We will never know—after the trial—exactly what was said months earlier when the judge engaged in ex parte communications with reporters whom the judge favored by granting interviews.

These reporters may also relay to the lawyers for one party or the other some of the information gleaned from the judge, thus granting that party an advantage in the litigation. The reporter's communications with the lawyers for one of the parties is also off the record, so we will never really know precisely what was said. The reporter's remarks may be inadvertent, and the lawyers with whom they discuss the case may not even be aware of the origins of the reporter's insights about the trial judge. But the other lawyers will still have been disadvantaged.

Canon 3B(9) of the *ABA Model Code of Judicial Conduct* reflects these concerns. It offers an important admonition regarding a judge's public comments about cases:

> A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.[1]

1. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

This section replaces Canon 3A(6) of the 1972 version of the ABA Model Judicial Code. That section read:

> (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Id. Canon 3A(6) (1972). The Commentary to this section read:

> "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by D.R. 7-107 of the Model Code of Professional Responsibility and by Rule 3.6 of the Model Rules of Professional Conduct.

II. THE CONTOURS OF THE PUBLIC COMMENT RESTRICTIONS OF ABA CANON 3B

A. Judge as Private Litigant

Note how precisely the drafters crafted the no public comment restrictions of Canon 3B. The breadth of the prohibition is reflected and emphasized in the Canon's carefully articulated and charily granted exceptions. A prime exception is the case of a judge who is suing or being sued in a personal capacity. That person has the same rights of any other litigant in a proceeding to comment outside the courtroom. Yet even then this rule makes clear that if the judge is party to litigation in her official capacity, such as in a mandamus action (where the judge is technically a litigant), "the judge must not comment publicly."[2]

B. Time Period

The rule also demarcates the time period for this restriction. The no comment rule comes into play even before a party files a complaint; the prohibition begins when the case is about to be brought or its filing is imminent (it is "impending"). And it continues as long as the case is not final (it is "pending").

A proceeding is not final if the time for appeal has not yet passed. Thus, the official ABA Comment to this section explains that the "requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition."[3]

C. The Court in Which the Case Is Pending

The language of the no public comment rule uses the phrase, "any court." Perhaps one might argue that "any court" only refers to any court in the judge's jurisdiction. However, the policies behind this no

Id. cmt. These provisions of the 1972 Judicial Code were not amended between 1972 and 1990, when the ABA replaced the old model code with the new one. The main difference is that the word "should" is replaced with "shall." The 1972 Rules consistently used "should," but they really meant "shall."

2. *Id.* Canon 3B(9), cmt. (1990). The Comment makes this point quite clearly. Thus, if the judge is suing because someone crashed into her car, she is a litigant in a personal capacity. If a party is suing the judge in order to comply with the rules of mandamus, the judge is not being sued in a personal capacity and the broad "no comment" rules apply: "This section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, *the judge must not comment publicly*." *Id.* (emphasis added).

3. *Id.*

comment rule are so strong that it is easy to find case law that interprets "any court" to mean "any court."[4]

At some point, there may be free speech concerns in reading this language too broadly.[5] But, after reviewing the case law, a judge who does not wish to push the envelope and risk sanction or litigation should not make public comments about cases pending in courts outside of her jurisdiction. Consider, for example, the incident where a municipal court judge in New Jersey appeared as an uncompensated guest commentator on Court TV and CNBC to discuss the O.J. Simpson murder trial, which was pending in California.[6] The state supreme court, in the case of *In re Broadbelt*,[7] ruled that this conduct violated Canon 3B(9), i.e., it constituted commentary on a pending case, albeit one that could never have come before that judge. The court argued that it should read the ethics prohibition so broadly because the judge's comments could have had special weight in view of his position as a judge and "had the potential to compromise the integrity of the judiciary in New Jersey."[8]

Similarly, a New York judicial ethics opinion interpreted "any court" to include any court. It reasoned that a judge's comments and observations about a pending case "could prove troublesome" because of the "immediacy" of the ongoing litigation. "These comments and observations are being made solely in the context of and with special reference

4. *See In re* Broadbelt, 683 A.2d 543, 546 (N.J. 1996); *In re* Hey, 425 S.E.2d 221, 222–24 (W. Va. 1992) (*Hey I*). Both cases concluded that the phrase "any court" includes courts other than commenting judge's court.

See also DAVID M. ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK 1–39 (1990) (arguing that judicial comments on cases pending in courts of other jurisdictions could affect outcome, could appear to exert pressure on the judge to decide a certain way, and could undermine public confidence in judicial decisions); RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 60-14 (1st ed. 2000); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 598 (1989).

5. *Cf.* LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 21–22 (1992). Milord points out that the revised ABA Judicial Code does not intend to prevent judges "in their extrajudicial teaching and writing" to "refer to pending or impending cases in other jurisdictions" when doing so does not diminish "the fairness of those cases or the appearance of judicial impartiality." *Id.* at 21. The way the revised Judicial Code takes care of this issue is by adding the language, "that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990). Note that, as discussed below, the CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(6) does *not* adopt the same limiting language—"might reasonably be expected to affect its outcome." *See infra* note 19 and accompanying text.

6. *See* Ronald D. Rotunda, *Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts*, 3 COMM. L. & POL'Y 295 (1998) (discussing the O.J. Simpson murder trial and its press coverage).

7. 683 A.2d 543 (N.J. 1996). This case described Judge Broadbelt as a well-respected municipal judge, who appeared as a guest commentator on *Court TV* in excess of fifty times since 1992. "Since November 1994, [he] appeared on CNBC on three occasions to provide guest commentary on the O.J. Simpson case. He also appeared on a local television program in 1994 to discuss generally the jurisdiction and procedures of the municipal courts. Judge Broadbelt did not receive compensation for any of those television appearances." *Id.* at 544–45.

8. *Id.* at 548. In addition, the court maintained that the judge's conduct violated Canon 2B because his regular appearances caused him to become identified with the programs and used the prestige of his judicial office to further the interests of the television producers. *See id.* at 550.

to an ongoing litigation," which had been telecast that day. Laypeople might see the judge's remarks "as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined. Such remarks would constitute public comment about a pending matter and, therefore, are not permitted."[9]

Given these cases, it should be clear that a judge should not engage in extrajudicial comments about cases that are pending before the judge or before court where the judge sits.

D. Public Comments as Part of Official Duties and to Explain the Procedures of the Court

The restriction on public comments is written in such an absolute fashion that the drafters of the rule decided that they must specifically allow judges to make "public statements in the course of their official duties," and to explain "for public information the procedures of the court."[10] For example, the judge may say to the press, "the defendant has 30 days to file a notice of appeal." The judge may also repeat to the media what she has already said in open court.[11]

The purpose of the "official duties" is not to give a judge *carte blanche* authority to say whatever he or she wants. As the Alabama Supreme Court concluded, a "judge is strictly prohibited from public comment on the merits of a pending case. On the other hand, a judge is encouraged to explain a pending case in *abstract terms*. Obviously, judges walk a fine line between the duties and prohibitions of [this canon]."[12] In that case, the Alabama Court suspended the judge for two months without pay for, among other things, making some comments to a reporter (who had called him in the evening before a hearing) about the merits of a case over which this judge was presiding.[13]

In the New Jersey case discussed above, where the state judge commented on television about the O.J. Simpson murder trial in California, the fact that the judge's appearances were educational did not excuse the violations.[14] This education exception only authorizes the judge to

9. N.Y. Advisory Comm. on Judicial Ethics, Op. 93-133 (1994).

10. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (1990).

11. *See* United States v. Yonkers Bd. of Educ., 946 F.2d 180, 184–85 (2d Cir. 1991).

12. *In re* Sheffield, 465 So. 2d 350, 355 (Ala. 1984) (emphasis added).

13. *See id.* at 354–55. The court held that: (1) clear and convincing evidence did not establish that the judge acted in bad faith in issuing a show cause order or in erroneously finding an individual guilty of contempt of court, but, (2) the judge's failure to abstain from public comment about a pending proceeding and his failure to disqualify himself where impartiality might be questioned warranted two months' suspension without pay. *See id.* at 359.

14. *In re* Broadbelt, 683 A.2d 543, 547 (N.J. 1996).

explain legal terms and procedures; it does not authorize judges to comment on the merits of a pending case.[15]

More recently, the Arkansas Supreme Court ordered the clerk of the court to forward a copy of its opinion to the Arkansas Judicial Discipline and Disability Commission to investigate a state judge who made statements to news outlets defending his conduct in a case involving the rape prosecution of a former Boy Scout leader. The judge, in an effort to defend himself, made extrajudicial statements to several television stations and the victims.[16] The proper way for the judge to explain his rulings and to educate the public and news media is to write an opinion, not to give press conferences or engage in extrajudicial comments.

III. THE FEDERAL RULES

A. The Code of Conduct for United States Judges

Many people are unaware that, like most state judiciaries, the U.S. Judicial Conference has adopted its own *Code of Conduct for United States Judges*[17] to govern the ethical conduct of federal judges.[18] This Code, just like most state judicial codes, is derived from the ABA Model Code of Judicial Conduct. With respect to the no public comment provision, the federal rule roughly parallels the ABA model rule, although its prohibition is even stricter.[19]

Canon 3A(6), of the *Code of Conduct for United States Judges*, states:

15. "While *judges may not comment on the merits of a pending case*, a judge may and should *explain legal terms, and concepts, procedures*, and the issues involved in the case so as to permit the news representatives to cover the case more intelligently. . . . Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media." *In re* Sheffield, 465 So. 2d at 355 (emphasis added) (quoting from the NATIONAL CONFERENCE OF STATE TRIAL JUDGES COMMITTEE ON NEWS REPORTING AND FAIR TRIAL, JUDICIAL GUIDELINES FOR DEALING WITH NEWS MEDIA INQUIRIES AND CRITICISM (5th Draft, 1984)).

16. *See* Walls v. State, 20 S.W.3d 322, 325 (2000). The trial judge spoke to the media concerning appellant's case and reportedly met with appellant's victims apart from appellant's counsel. After remand of the sentence, the judge again spoke to the media concerning the case. Then he denied appellant's motions to recuse, to withdraw his pleas, and to have a hearing in which appellant showed evidence of the judge's media comments. The court, however, refused to overturn the sentence, which was within the statutory limits, because the trial judge's extrajudicial comments reflected disagreement with the appellate court, not bias by the particular judge. The court, however, did refer the matter to disciplinary authorities.

17. The latest version of this Code is reprinted in 175 F.R.D. 364 (1998).

18. These federal judicial ethics rules apply to all federal judges other than those on the Supreme Court. *See* 175 F.R.D. 363 (1998). "This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges." *Id.*

19. The ABA language requires that the extrajudicial statement "might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." MODEL CODE OF JUDICIAL CONDUCT Canon 3B(9) (2000). However, the CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 6A(6) does *not* adopt that limiting language—"might reasonably be expected to affect its outcome." *See* 175 F.R.D. at 367; MILORD, *supra* note 5, at 21–22.

> A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.[20]

Recently, commentators have turned to this federal prohibition on extrajudicial comments in light of publicity and criticism[21] surrounding interviews that Judge Jackson has given the press in connection with his bench trial of the United States' civil antitrust prosecution of Microsoft Corporation.[22]

One of Microsoft's issues on appeal is based on these extrajudicial statements to the press. The issue is, "whether the district court's extrajudicial communications with members of the press require that the judgment below be reversed and, if the cases are remanded, that they be assigned to another district judge."[23] The Justice Department, in response, has not defended the propriety of the judge's extrajudicial comments; rather it has argued only that they do not justify reversal.[24]

Let us take this example as a case study. I do not mean to focus on a particular judge but rather on particular questions—when are extrajudicial comments improper, and what should be the appellate remedy if a judge has engaged in improper extrajudicial comments in high profile trials.

In the *Microsoft* case, for example, the district court responded to the criticism by arguing, first, that these extrajudicial remarks and interviews to the press were "off the record" and, by agreement with the newspapers, would not be disclosed until after he had decided the case.[25]

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20. 175 F.R.D. at 367.

21. *E.g.*, Paul Davidson, *Judge Might Inspire Appeal: Microsoft May Use Jackson's Words Against Him*, USA TODAY, June 13, 2000, at 1B ("Jackson's interviews violate judicial canons that say judges should avoid comments on a pending case, says Steven Lubet of Northwestern University Law School."); James V. Grimaldi, *Hearsay; From the Bar: A Resounding 'Shhh!'*, WASH. POST, June 12, 2000, at F31 (quoting, e.g., Professor Steven Gillers of New York University Law School, a noted legal ethics expert, who said: "I was dumbfounded . . . I think it is a lapse of judgment. A judge is not supposed to speak publicly about matters pending in any court, especially his own."); Leonard Orland, *Jackson's Unethical Press Talks*, NAT'L L.J., Aug. 14, 2000, at A17. Professor Orland teaches at the University of Connecticut Law School.

22. United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), *cert. denied and remanded*, Microsoft Corp. v. United States, 121 S. Ct. 25 (Sept. 26, 2000). Justice Breyer filed the only dissent. Chief Justice Rehnquist issued a separate statement on his decision not to disqualify himself because his son is a lawyer in a firm that Microsoft has hired in another case.

23. *See* Brief of Microsoft, Jurisdictional Statement to U.S. Supreme Court, Microsoft Corp. v. United States, 121 S. Ct. 25 (2000) (No. 00-139), *available at* http://www.microsoft.com/presspass/trial/appeals/07-26jurisdictional.asp (last visited Mar. 26, 2001).

24. Brief for the United States in Response to the Jurisdictional Statement at 20 n.18, Microsoft Corp. v. United States, 121 S. Ct. 25 (2000) (No. 00-139), *available at* http://www.usdoj.gov/atr/public/appellate/appellate.htm (last visited Mar. 26, 2001).

25. The *Microsoft* trial judge said that he spoke to the journalists "on an embargoed basis." In other words, the reporters agreed not to publish their stories until he issued his opinion. He said: "Until the embargo is lifted, what was said to the journalists was simply never said." Drew Clark, *An-*

Second, the district court has defended these remarks by arguing that the judge needed to talk to reporters to "correct some of the public distortions" of the facts by "one or both of the parties."[26]

Do these arguments justify the extrajudicial comments? And if they do not, what should be an appropriate remedy in such cases?

B. The Extrajudicial Comments in the Microsoft Matter

Judge Jackson, the *Microsoft* trial judge, discussed the *Microsoft* case extensively with newspaper reporters when the case was before him, *sub judice*, awaiting his decision, and also after he published his opinion breaking up Microsoft on June 7, 2000. In these circumstances, the case was pending before him. Even after he issued his main opinion ordering the break-up of the company, he had to decide post-trial motions presented after this opinion and before the parties filed the appeal. Once the parties filed their appeals, the case was still pending, in the appellate court, either the D.C. Circuit or the U.S. Supreme Court. As this article goes to press, the case is still pending.

The most dramatic of these interviews occurred during trial, when the *Microsoft* judge granted a series of interviews to the *New York Times*. The extrajudicial comments included the following:

1. THE NEW YORK TIMES, *Retracing the Missteps of the Microsoft Defense*, June 9, 2000. This article explained that Judge Thomas Penfield Jackson, the trial judge, "agreed to be interviewed several times after testimony in the trial had ended, with the understanding that his comments could not be published until the case had left his courtroom. The discussions, beginning last September [1999], were friendly, informal and unstructured." The article quoted extensively from these interviews. When the reporter asked the judge about restructuring Microsoft, he "said in February [2000], in a *rare audience with a sitting Judge during the course of a trial*, 'I am not sure I am competent to do that. . . . I just don't think that is something I want to try to do on my own. I wouldn't know how to do it.'" The judge said that he was incompetent to restructure Microsoft; later, that was the very remedy he imposed. The article also reported that "in another interview late last month [May, 2000], he sounded very different. He said Microsoft's recent behavior had helped change his mind." The article also recounted that the judge—on the final day of trial—rejected Microsoft's bid for a hearing on the government's remedy proposal: "In the interview the next day, Judge Jackson observed: 'I am

titrust: Judge Jackson Defends Microsoft Breakup Order, NAT'L J. TECH. DAILY, Oct. 27, 2000. Of course, after he released his opinion, there were still post-trial motions and the appeal. The case was still pending.

26. *Microsoft Judge Says He May Step Down from Case on Appeal*, WALL ST. J., Oct. 30, 2000, at B4 (quotations from Judge Jackson in comments to a law school symposium on the Microsoft trial, where the Judge was one of the speakers).

not aware of any case authority that says I have to give them any due process at all. The case is over. They lost.'"[27]

2. THE WALL STREET JOURNAL, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue, in an Interview, Jackson Says Microsoft Did the Damage to Its Credibility in Court*, June 8, 2000. The article is based on what it called "an extraordinary interview for a sitting federal judge." The interview took place in the *Microsoft* judge's chambers on June 7, and he explained how, in his view, Microsoft's credibility problems in the courtroom compromised its defense. The article extensively quoted the judge's comments about the case. It reported the judge as saying, among other things, "if someone [referring to Microsoft] lies to you once, how much else can you credit as the truth?" And, "Things did not start well for them." Referring to his refusal to allow Microsoft time to argue against the breakup, he compared Microsoft to the Empire of Japan after its defeat in World War II: "are you aware of very many cases in which the defendant can argue with the jury about what an appropriate sanction should be? Were the Japanese allowed to propose the terms of their surrender? The government won the case." The judge understood the case was still pending (although he had issued his opinion), for he acknowledged that legal wrangling on appeal could go on for years as it had in the IBM antitrust case, and that "the jury is still out on this case."[28]

3. THE WALL STREET JOURNAL, *Judge Orders Microsoft Broken in Two, Imposes Tough Restrictions on Practice*, June 8, 2000. The article reports that the *Microsoft* judge said "in an interview" why he favored immediate Supreme Court review of the case. He is quoted as saying, "I want this case brought to a definitive conclusion." Thus, his comment about the case reflects his recognition that it is still pending, for it has not yet come to a "definitive conclusion."[29]

4. THE WASHINGTON POST, *Reluctant Ruling for Judge; Jackson Says He Would Still Prefer Out-of-Court Settlement*, June 8, 2000. The article reports that the *Microsoft* judge said, "in an interview with the Washington Post yesterday" that "I would have preferred a conduct remedy. I've always thought the best remedy was the one the parties could have negotiated between themselves." The article includes extensive quotations from the judge about the case and reports that "[i]n an hour long conversation in his chambers, the judge said that rather than see a breakup imposed, the lawsuit could be settled out of court—even now." *The judge also disclosed how he expected to rule on a motion that had not yet been filed*: "Asked if he intended to approve a government

27. Joel Brinkley & Steve Lohr, *Retracing the Missteps of the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at A1 (emphasis added).

28. John R. Wilke, *For Antitrust Judge, Trust, or Lack of It, Really Was the Issue in an Interview, Jackson Says Microsoft Did the Damage to Its Credibility in Court*, WALL ST. J., June 8, 2000, at A3.

29. Ted Bridis & John R. Wilke, *Judge Orders Microsoft Broken in Two, Imposes Tough Restrictions on Practice*, WALL ST. J., June 8, 2000, at A3.

motion to send the case quickly to the Supreme Court, bypassing the U.S. Court of Appeals for the D.C. Circuit, the judge said, 'I am favorably inclined towards it. I'll look at whatever is presented to me.'"[30]

5. THE LOS ANGELES TIMES, *Public Remarks by Judge in Microsoft Ruling Stir Furor*, June 9, 2000. The article reports that "In an interview Thursday [June 8] with the Los Angeles Times, a relaxed U.S. District Judge Thomas Penfield Jackson said he had no idea whether his comments to the press Wednesday might have a negative effect on a higher court consideration of the antitrust case." The judge is reported to explain why he granted the press interviews—"because of the extraordinary amount of attention given to the case. . . . I thought it would be useful to give some sense as to who I am and what I have done. . . . I am not the Wizard of Oz in a black robe or some omniscient wise man."[31]

6. The *Microsoft* trial judge also granted two interviews to National Public Radio as reported in the following broadcasts:

a. NATIONAL PUBLIC RADIO: *All Things Considered; Profile: Judge Thomas Penfield Jackson and His Views on His Standing in the Microsoft Antitrust Case*, June 8, 2000. According to the script, host Linda Wertheimer says, "Today in an interview with NPR, Judge Jackson said a settlement would not have to include a break-up to satisfy him." The script then records Judge Jackson's answers to questions from NPR reporter Larry Abramson about the appeal and the possibility of an out-of-court settlement. Abramson observes that "Judge Jackson has said he supports asking the Supreme Court to hear the case directly without having to go to the appeals court." The script also records Judge Jackson as acknowledging that the case is still pending: "I'm not sure how much of it is behind me. There's a distinct likelihood that it could come back to me again, too, in one form or another. But I'm not prepared to take a vacation yet."[32]

b. NATIONAL PUBLIC RADIO: *Morning Edition; Interview: Judge Thomas Penfield Jackson Discusses The Microsoft Case and His Ruling Against the Company*, June 9, 2000. According to the script, host Bob Edwards says, "in an interview with NPR, the judge discussed his reasons for ordering the breakup of the world's largest software company and why he is confident the ruling will stand up on appeal." The script then records the judge's answers to another round of questions from NPR reporter Larry Abramson discussing his rulings in the case. Abramson observes that the trial judge refused Microsoft's request for hearings on the breakup proposal because "he [the judge] says he didn't expect to learn

30. James V. Grimaldi, *Reluctant Ruling for Judge; Jackson Says He Would Still Prefer Out-of-Court Settlement*, WASH. POST, June 8, 2000, at A1.

31. Jube Shiver Jr., *Public Remarks by Judge in Microsoft Ruling Stir Furor*, L.A. TIMES, June 9, 2000, at C1.

32. *All Things Considered; Profile: Judge Thomas Penfield Jackson and His Views on His Standing in the Microsoft Antitrust Case* (NPR radio broadcast, June 8, 2000).

much from a bunch of experts with conflicting predictions." The judge is recorded as saying, "quite frankly I have found over time that even expert predictions as to the future are not particularly illuminating and very often not very accurate." The judge is also recorded as saying, "I always have moments of doubt. There are on any number of occasions I made rulings in the case which it's entirely possible an appellate court [is] going to find were ill-advised."[33]

After these series of interviews were published, and after receiving criticism from lawyers and academics for granting these interviews about a pending case, in late October, 2000, the *Microsoft* trial judge engaged in extrajudicial comments yet again. He spoke for twenty minutes about the *Microsoft* case and his role in it at an antitrust seminar that George Mason University Law School sponsored. He spoke while his rulings were pending in the D.C. Circuit.[34] In the course of his speech, he conceded that "virtually everything I did may be vulnerable on appeal."[35] He also said: "If I am found to have been egregiously in error, then even if they [the D.C. Circuit] didn't remove me from the case, I might very well think very seriously about removing myself."[36] In January 2001, the *New Yorker* published a summary article describing the Microsoft litigation in part based on still other interviews with Judge Jackson.[37]

C. Applying the Federal Ethics Rules

The extrajudicial statements of the trial judge in the Microsoft case do not appear to fit within any of the established exceptions to the no comment rule. His interviews were not official duties; they went beyond explaining court procedures (e.g., "the next step is for defendants to appeal"); and the comments were not general references to a case as part of any law review article and, even if they were, they still were comments about a *pending* case.

If, as discussed above, a judge violates the public comment restrictions when he discusses a case pending in another court, it should be

33. *Morning Edition; Interview: Judge Thomas Penfield Jackson Discusses the Microsoft Case and His Ruling Against the Company* (NPR radio broadcast, June 9, 2000).

34. *See* Jonathan Ringle, *Inadmissible*, LEGAL TIMES, Oct. 30, 2000, at 3. The reporter's comments were a little sarcastic. He titled this section, *Making His 15 Minutes Last*. The reporter said:

> The appeals court has yet to rule on Judge Thomas Penfield Jackson's handling of the *Microsoft Corp*. case, but the celebrity jurist certainly knows how to size up an audience. "One thing is perfectly clear," Jackson on Friday told about 120 lawyers attending an antitrust seminar at the U.S. Capitol sponsored by George Mason Law Review, "I am not preaching to the choir." Indeed, the audience had just split in a raised-hands vote over whether Jackson's decision to break up the software giant was correct (the bulk of Jackson's supporters came from the table of Department of Justice staffers).

Id.

35. *Trial Judge Comments on Microsoft Ruling*, N.Y. TIMES, Oct. 27, 2000, at C14.

36. James Rowley, *Microsoft Judge Could Stand Down from Case*, TORONTO STAR, Oct. 28, 2000 (1st ed.), Business section, at 3.

37. *See* Ken Auletta, *Final Offer: What Kept Microsoft from Settling Its Case?*, NEW YORKER, Jan. 15, 2001, at 40.

even more serious if the judge engages in public comment about a case that is pending in his court, here, the district court for the District of Columbia. And, if that is a violation of the rules, it should be even worse if he is discussing a case in which he is the presiding judge—i.e., when the case is pending before him personally. That is the situation that applied here.

One does not have to rely on state court interpretations of the analogous state ethics rules, for there is federal law on this very question. The official Comment to Canon 3A(6) of the *Code of Conduct for United States Judges* explicitly states:

> The *admonition against public comment* about the merits of a pending or impending action continues *until completion of the appellate process*. If the public comment involves a case *from the judge's own court*, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A.[38]

The *Microsoft* trial judge has argued that his extrajudicial comments were permissible because his press interviews were "off the record," and by agreement "that they [would] not be published until after the case had been decided."[39] However, the official Comment to Canon 3A(6) makes it clear that a case is pending "until completion of the appellate process." Moreover, the judge earlier acknowledged the likelihood that the case could be returned to him. In an interview on National Public Radio he said: "I'm not sure how much of it is behind me. There's a distinct likelihood that it could come back to me again, too, in one form or another. But I'm not prepared to take a vacation yet."[40]

The reference to Canon 2A, in the Comment to Canon 3A(6) is instructive. Canon 2(A) provides: "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[41] The Comment to Canon 3A(6) advises us that a judge who comments about the merits of a pending case from the judge's own court runs headlong into the requirement that the judge must "respect and comply with the law."[42]

Given the specificity of this language of Canon 3A(6) and the accompanying Comment, it is no surprise that federal case law comes to the same conclusion that the plain language of this rule reaches. In *United*

38. 175 F.R.D. 364, 370–71 (1998) (emphasis added).

39. *Microsoft Judge Says He May Step Down from Case on Appeal*, WALL ST. J., Oct. 30, 2000, at B4.

40. *All Things Considered; Profile: Judge Thomas Penfield Jackson and His Views on His Standing in the Microsoft Antitrust Case* (NPR radio broadcast, June 8, 2000).

41. 175 F.R.D. at 365.

42. *Id.*

States v. Garwood,[43] a trial judge gave press and media interviews to national outlets such as *Nightline*, and the Associated Press. In those interviews, the judge discussed his opinion about the defense's tactical decisions, the relevance of certain discovery items, and his view as to whether the defendant should take the stand in a pending case. The reviewing court found the judge's conduct "inexcusable" and concluded that the judge's comments—even if made with the best intentions—violated the ethics rules governing judges.[44]

The *Microsoft* trial judge also sought to defend his extrajudicial comments by arguing that he had a right to make statements to "correct some of the public distortions" of the facts by "one *or* both of the parties."[45] The case law clearly rejects this purported defense.[46] If those alleged distortions are relevant to the case, he can and should put his version of the facts and the law into his opinion, where the parties can dispute it and the Court of Appeals can review it based on facts in the record. In fact, even if his comments are not relevant, he can still write what he wants in his opinion, where it becomes part of the record. Then, the litigants and the appellate court can respond to it. Or, the judge could wait until the case is no longer pending before engaging in any extrajudicial comments.[47]

What a judge cannot do is engage in extrajudicial comments about a pending case in which he is the trial judge. Please reread this last sentence. It should not be subject to dispute. Accompanying the *Code of Conduct for United States Judges* is a two-volume book that is distributed to every federal judge governed by that Code. That book includes various ethics opinions intended to give guidance to federal judges. And this book categorically states: "It is impermissible for a judge to write an article discussing a particular high-profile case recently completed and still on appeal."[48] If a judge may not write an article about a particular high-profile case, it logically follows that it is equally impermissible for a judge

43. 16 M.J. 863, 868 (N.M.C.M.R. 1983), *aff'd*, 20 M.J. 148 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985).

44. *Garwood*, 16 M.J. at 869.

45. *Microsoft Judge Says He May Step Down from Case on Appeal*, WALL ST. J., Oct. 30, 2000, at B4 (emphasis added).

46. *E.g.*, *In re* Boston's Children First, 239 F.3d 59, 66 (1st Cir. 2001) ("Whether counsel for petitioners misrepresented the facts or not is irrelevant: the issue here is whether a reasonable person could have interpreted [the judge's] comments as doing more than correcting those misrepresentations and creating an appearance of partiality."); *In re* Benoit, 523 A.2d 1381, 1382–83 (Me. 1987) (unethical for a judge, after a case was remanded to him, to write a letter to the editor of a local newspaper defending his original sentences); Shapley v. Tex. Dep't of Human Res., 581 S.W.2d 250, 253 (Tex. Ct. App. 1979) (judge violated Canon when he spoke to reporters about pending case).

47. Wenger v. Comm'n on Judicial Performance, 630 P.2d 954, 965 (Cal. 1981); Goldman v. Nev. Comm'n on Judicial Discipline, 830 P.2d 107, 136–37 (Nev. 1992).

48. GUIDE TO JUDICIARY POLICIES AND PROCEDURES, VOLUME II—THE CODE OF CONDUCT VOLUME, Ch. V (Compendium of Selected Opinions), § 4.2 Writing and Editing, at V-57 (reissued on June 15, 1999).

to say the same words to a reporter who would then include them in his or her story.

IV. THE REMEDY

In a state system, if a judge violates the no comment rules, judicial discipline is often available. State disciplinary authorities might remove a judge[49] or deprive a judge of a salary for a stated period of time.[50] In the federal system, no administrative body has that power, and only Congress can remove a judge after impeachment and a trial in the Senate.[51]

The federal appellate court may disqualify the judge if the extrajudicial comments indicate that his "impartiality might reasonably be questioned."[52] That is what happened in *United States v. Cooley*.[53] In that case, the convicted defendants were abortion protesters found guilty of violating a federal law.[54] The appellate court not only assigned the case to a different judge on remand,[55] it also overturned the convictions and ordered a new trial because of the trial judge's interview on ABC's *Nightline*, a nationally televised evening program. The very fact that the judge had appeared on this show coupled with his other comments, indicated that his "impartiality might reasonably have been questioned."[56]

49. *See* Butler v. Ala. Judicial Inquiry Comm'n, 111 F. Supp. 2d 1241 (M.D. Ala. 2000) (granting state supreme court justice's motion to preliminarily enjoin state judicial disciplinary proceedings against him).

50. *See In re* Sheffield, 465 So. 2d 350, 355 (Ala. 1984) (judge suspended two months without pay).

51. *See* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707 (1988); Am. Judicature Soc'y, *Impeaching Federal Judges: Where Are We and Where Are We Going?*, 72 JUDICATURE 359 (1989) (comments by Ronald D. Rotunda during panel discussion) (examining federal judicial impeachment process).

52. 28 U.S.C. § 455(a) (1994).

53. 1 F.3d 985 (10th Cir. 1993).

54. *Id.* at 987–88. 18 U.S.C. § 1509 provides:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with, or willfully attempts to prevent, obstruct, impede, or interfere with, the due exercise of rights or the performance of duties under any order, judgment, or decree of the United States, shall be fined under this title or imprisoned not more than one year, or both.
>
> No injunction or other civil relief against the conduct made criminal by this section shall be denied on the ground that such conduct is a crime.

Id.

55. *Id.* at 988. See also *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995), where the court directed Judge Edelstein "to recuse himself from further consideration of *United States v. IBM*, Civil Action No. 72-344 (S.D.N.Y.) and to have the case randomly reassigned." 45 F.3d at 645. The court, in finding the need to order recusal in light of the trial judge's possible lack of impartiality, stated, "Judge Edelstein's actions in the aftermath of the stipulation for dismissal extended beyond the courtroom. Notable in this regard were *newspaper interviews given by the Judge* concerning IBM's activities in general and Assistant Attorney General Baxter's role in particular." *IBM Corp.*, 45 F.3d at 642 (emphasis added). The court used its supervisory powers.

56. In addition, the "district judge had appeared on national television with Barbara Walters to talk about the abortion protests in Wichita, and had stated in part that 'these people are breaking the law.'" *Cooley*, 1 F.3d at 990. And, the "district judge had been quoted in national media saying if anyone plans to come to Wichita, 'they had better bring a toothbrush!'" *Id.* The reference to

Cooley cited the relevant provisions of the *Code of Conduct for United States Judges* and warned:

> Two messages were conveyed by the judge's appearance on national television in the midst of these events. One message consisted of the words actually spoken regarding the protesters' apparent plan to bar access to the clinics, and the judge's resolve to see his order prohibiting such actions enforced. The other was the judge's expressive conduct in *deliberately making the choice to appear in such a forum* at a sensitive time to deliver strong views on matters which were likely to be ongoing before him. Together, these messages unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.[57]

Because of the judge's decision to appear "on national television to state his views[,]" a "reasonable person would harbor a justified doubt as to his impartiality in the case involving these defendants."[58]

Even if a judge's extrajudicial comments do not impugn his impartiality, the appellate court, in exercise of its supervisory powers, might still disqualify the judge. Judges have disqualified prosecutors for giving interviews in violation of court rules, even when there is no finding that the remarks could affect a jury.[59] If a court can impose that sanction on a prosecutor, who does not have the same responsibilities as a judge to be impartial, it should be able to impose a similar sanction on a judge.

V. CONCLUSION

In the *Microsoft* case, the appellate court might use its supervisory powers to send the case to a different judge if a remand is appropriate for

toothbrushes was the judge's way of announcing that the judge would make sure that abortion protestors would have to stay overnight in the jail.

57. *Id.* at 995 (footnote omitted) (emphasis added). Similarly, for example, in February, 2000, while the *Microsoft* trial was going on, the judge said, when the reporter asked him about a breakup of the company: "I am not sure I am competent to do that. . . . I just don't think that is something I want to try to do on my own. I wouldn't know how to do it." Joel Brinkley & Steve Lohr, *U.S. v. Microsoft: Pursuing a Giant; Retracing the Missteps of the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at A1. On the final day of trial, the judge rejected Microsoft's bid for a hearing on the government's remedy proposal, and the next day told the reporter: "I am not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." *Id.* The judge explained to another reporter that he did not allow Microsoft to argue against the proposed sanction, because, the judge asked rhetorically: "Were the Japanese allowed to propose the terms of their surrender? The government won the case." Wilke, *supra* note 28. The article reports that when the judge was asked, in an interview, about comments to the press and fairness to the parties, "a relaxed" judge said "he *had no idea whether his comments to the press Wednesday might have a negative effect on a higher court* consideration of the antitrust case." Shiver Jr., *supra* note 31 (emphasis added).

58. *Cooley*, 1 F.3d at 995.

59. *Prosecutor Disqualified in Oklahoma Bomber's Case*, WASH. POST, Oct. 17, 2000, at A34.

other reasons. (Microsoft, after all, has raised other procedural and substantive points.[60]) Even if a reversal is not appropriate for other reasons, the court may decide, either independently or as an alternative holding, to reverse the case based on the trial judge's extrajudicial remarks and then remand to a different judge for a new trial. Reversal solely for an ethical violation is not a typical remedy, because it appears to penalize the party that would otherwise have prevailed were it not for the judge's conduct. On the other hand, judges are routinely reversed for error that is not the fault of either party, just as when a judge who makes prejudicial comments to the jury. Reversal serves to discourage judges from engaging in such conduct in the future. We must remember in this instance that the judge continued to engage in extrajudicial comments, even after commentators openly questioned his series of interviews.[61]

There is another salient fact that should be added to this equation. The remedy of reversal should be more likely in the situation where an appellate court has already warned the judge not to engage in such extrajudicial comments. Unfortunately, that is the situation here—the D.C. Circuit, in an earlier case, admonished this same judge for his extrajudicial statements about a case in which he was the trial judge.[62] In that case, however, the court refused to reverse and remand for a new trial before a different judge.[63]

Although the *Microsoft* judge has also said (in yet another discussion about this pending case) he would likely recuse himself even if the D.C. Circuit did not require the case to be assigned to another judge,[64] the trial judge's belated[65] willingness to disqualify himself—even if it is legally enforceable—does not make removal by the court of appeals a moot point, for an appellate court's adjudication that such conduct is a violation of the rules would serve to curb such extrajudicial statements in future cases.

60. Commentators have also raised important procedural and substantive issues that make a reversal likely. *See* Robert A. Levy & Alan Reynolds, *Microsoft's Appealing Case*, CATO INSTITUTE POLICY ANALYSIS, No. 385 (Nov. 9, 2000), *at* http://www.cato.org//pubs/pas/pa-385es.html.

61. *E.g.*, Davidson, *supra* note 21 (citing Professor Steven Lubet of Northwestern University Law School); Grimaldi, *supra* note 21 (quoting, e.g., Professor Steven Gillers of New York University Law School); Orland, *supra* note 21 (Professor Orland of the University of Connecticut Law School).

62. *See In re* Barry, 946 F.2d 913, 914 (D.C. Cir. 1991).

63. *See id.* at 914.

64. *E.g.*, Rowley, *supra* note 36.

65. Earlier, in an interview on National Public Radio, the judge said: "I'm not sure how much of it is behind me. *There's a distinct likelihood that it could come back to me again*, too, in one form or another. But *I'm not prepared to take a vacation yet*." *All Things Considered; Profile: Judge Thomas Penfield Jackson and His Views on His Standing in the Microsoft Antitrust Case* (NPR radio broadcast, June 8, 2000) (emphasis added).