

Court Review

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EDITOR'S NOTE

Last year, Congress enacted legislation authorizing annual appropriations of up to \$10 million to create up to 125 mental health courts throughout the United States. The legislation included congressional findings, noting that Broward County, Florida, had created a separate mental health court “with positive results.” Although that finding was based largely on anecdotal evidence, our lead article begins the process of presenting a more formal analysis of the effectiveness of this court. In the article, a team of researchers from the University of South Florida present preliminary observations from an exhaustive study, still in progress, of the Broward County Mental Health Court.

We also present an introduction for judges to neuropsychological assessment. I checked a few months ago on an e-mail list serve of judges to see whether there was interest in such a narrowly focused subject; quite a few judges wrote me indicating great interest in having a plain-language introduction to the topic. Let me know whether you find this article of interest and whether you'd like introductory material on other psychological or scientific subjects.

The issue also includes significant and interesting materials on the judicial ethics issues involved when judges comment on pending or impending matters. Noted legal ethics professor Monroe Freedman joins in the debate over the propriety of Judge Richard Posner's book on the Clinton impeachment, which had concluded—well before a plea agreement ended any threat of prosecution—that Clinton had “engaged in a pattern of criminal behavior and obsessive public lying.” Freedman concludes that Posner's comments were ethically proper; Steven Lubet, who raised the issue in his essay in our Summer 2000 issue, replies. In addition, our Resource Page section explores another real-life controversy involving a judge's comments on a pending case. We reprint the sections of the appellate briefs in *U.S. v. Microsoft* dealing with the propriety of Judge Thomas Penfield Jackson's public comments on that case.

Also in this issue, we reprint the remarks made by Judge Thomas W. Ross from the November 2000 ceremony in which he received the William H. Rehnquist Award. A leader in state criminal sentencing reform, his comments on that subject and its relationship to public trust and confidence in the courts are worth noting. We also include a book review of the book *Managing Notorious Trials*.

Last, we invite your attention to the annual index of the past four issues of *Court Review*. All of the articles listed are available on our website at <http://aja.ncsc.dni.us/courtrv/review.html>—SL



Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 13. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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President's Column

Chris Williams

I recently attended Jury Summit 2001 in New York City. We learned many innovations for juror accommodation. Jurors interacted with judges and supportive court personnel to assist in making each juror's service more pleasant.

The jury system must be preserved and protected. I want to thank New York Chief Judge Judith S. Kaye for hosting this excellent conference on the jury system. The consensus there was that "one-day, one-trial" jury service is a success in all of the jurisdictions that have implemented it. Having no exemptions for anyone also improves the representativeness of jury panels. With more diverse and sophisticated panels, civil and criminal decisions were found to be more just and fair.

Methods of jury selection must change in most jurisdictions, using multiple lists (such as voter registration plus driver's license and/or motor vehicle registration) to ensure appropriate panels for each court. Each state that has not adopted one-day, one-trial must soon look to this jury reform to encourage the populous to get more involved in the jury system. The greater number of individuals called for jury service will improve public trust and confidence in the court and the jury system. Ninety percent of jurors who were interviewed after one-day, one-trial service were impressed with the efficiency of the jury system and court performance.

Jury systems can grow stronger with better orientation of jurors, better understanding of court procedures, judicial outreach programs to explain courts to the community, and appropriate conferences between the bench, bar, and media. Proceedings from Jury Summit 2001 can be found online at <http://www.jurysummit.com>.

I also attended the National Center for State Courts Americans with Disability Task Force meeting in Williamsburg, Virginia. Chief Justice Ronald T.Y. Moon of Hawaii is the chairperson of this task force. As your representative from the American Judges Association, we discussed priorities for how courts can comply with the ADA. Our goal is to develop a website through the National Center to improve dissemination of problem-solving information for courts regarding ADA compliance standards. Funding for this project has been provided by the U.S. Department of Justice. Topics addressed at this meeting included employment of per-

sonnel and compliance steps for reasonable accommodations; programs and public services; public accommodations of court personnel, jurors, witnesses, and spectators; transportation provisions; and accessibility standards. All courts must have an ADA action plan for compliance, give public notice of compliance, and have self-evaluations, transition plans, grievance procedures, architectural barrier checklists, job descriptions, and ADA compliance resolutions.

The National Center is in the process of developing a Web crawler to allow access to ADA updates by entering the National Center's Web page and logging into an ADA information center.

The whole idea is to give prompt answers to common problems judges face when confronted with ADA compliance issues. Issues might include the need for interpreters for the hearing impaired or how to help people with cognitive disorders obtain access to the courts. Data banks will be set up through each state to ensure the availability of interpreters, such as Communication-Access Real-Time (CART) reporters or language-based interpreters for different ethnic groups.

Courts are sometimes in immediate need of support services to comply with ADA requirements. The task force hopes to have all state court administrators on board to help come up with immediate solutions for courts on a moment's notice. The task force will continue work to improve each state's ability to come into compliance with all requirements of the ADA in the next few months.

As members of the AJA, please take the time to thank the Justice Department for its support of state court ADA compliance. Many issues must be resolved. For example, what impact does the method of ADA compliance have on the court process? Can the interpreter or CART reporter be present in the jury room for the deaf juror? What mode of interpretation will best assist the court in continuing a trial without interruption?

It will take lots of hard work to keep judges abreast of all the new developments of the jury system and ADA compliance, but be assured that there are judges who care and who will continue the efforts of improving the judiciary. Thanks to the National Center for State Courts, the State Justice Institute, and the Justice Department for their support.



Free Speech for Judges:

A Commentary on *Lubet et al. v. Posner*

Monroe H. Freedman

Criticism of unethical judicial conduct has been leveled against Richard Posner, the widely respected former chief judge of the United States Court of Appeals for the Seventh Circuit. The critics are two widely respected legal scholars, Professors Steven Lubet and Ronald Dworkin.¹ Judge Posner, in turn, has vigorously defended himself.² Given the intellectual stature of the antagonists, it is not surprising that both sides are right. In my view, however, Judge Posner is more right.

The criticism relates to Judge Posner's book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton*. The *New York Times* called it one of the ten best books of 1999, and it was a finalist for the *Los Angeles Times* Book Award. Professors Lubet and Dworkin's questions about judicial ethics relate to Judge Posner's charges that President Clinton and others committed various unlawful acts. For example, Professor Lubet notes Judge Posner's allegation that "Clinton engaged in a pattern of criminal behavior and obsessive public lying, the tendency of which was to disparage, undermine, and even subvert the judicial system of the United States."³ Elsewhere, Judge Posner suggests that President Clinton is guilty of perjury, wire fraud, criminal contempt, the making of false statements to the government, and aiding and abetting a crime.⁴

The basis for questioning Judge Posner's ethics is the Code of Judicial Conduct for United States Judges.⁵ Canon 3A(6) of the Code says that a judge should abstain from public comment about a "pending or impending proceeding in any court" if the comment might reasonably be expected to affect the outcome of the proceeding or impair its fairness.⁶

At the time *An Affair of State* was published, there was known to be an active criminal investigation by the Independent Counsel into President Clinton's conduct; also, professional disciplinary proceedings against the President in Arkansas were clearly foreseeable. Thus, Professor Lubet says, proceedings against Clinton were impending. Judge Posner protests, however, that there was no "impending proceeding" within the meaning of the Canon. He insists that "impending" does not mean "possible sometime in the future." Rather, he says, the word means "about to happen"

or "imminent." In Professor Lubet's view, however, the import of "impending proceeding" is broader, embracing any proceeding "that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances," regardless of whether litigation has already been filed in court.⁷

Certainly in the context of the Clinton matter, Judge Posner's contention that there was no impending proceeding is a quibble. Indeed, once the Canon is properly construed, even Professor Lubet's somewhat broader definition of "impending" is also too narrow.

Judge Posner is correct in saying that his book is entitled to First Amendment protection. Moreover, in commenting on a matter of public importance—specifically, criticizing the conduct of the highest public official in the nation—Judge Posner was unquestionably exercising a "core First Amendment right." Accordingly, any limitation on his speech would have to withstand "exacting scrutiny." That means that the government (acting here through the Federal Judicial Conference) must carry the burden of demonstrating a "subordinating interest [that] is compelling." Further, the Conference must show that the regulation of that compelling interest is "closely drawn" to avoid any unnecessary abridgment of First Amendment rights.⁸

Professor Lubet says that one reason for restraining Judge Posner's speech is that "the outspoken opinion of a respected federal judge might influence the prosecutor's decision about whether or not to proceed."⁹ But think about that standard. After all, a prosecutor's decision about whether to proceed in a particular case might be influenced by the outspoken opinion of a respected member of Congress, or of another prosecutor, or of an editorial writer for the *New York Times*, or even by the outspoken opinion of a respected law professor. The slope is not only slippery but virtually bottomless. Indeed, Professor Lubet goes so far as to find it "instructive" that Judge Posner criticized Abner Mikva for publicly attacking the integrity of Kenneth Starr, since Mikva, in Judge Posner's words, was "mantled with the prestige of a former chief judge of a federal court of appeals."¹⁰ Rather than relying on Judge Posner's criticism of

Footnotes

1. E.g., Steven Lubet, *On Judge Posner and the Perils of Commenting on Pending or Impending Proceedings*, COURT REVIEW, Summer 2000, at 4; Steven Lubet, *When Is an Investigation Merely an Investigation?*, COURT REVIEW, Summer 2000, at 7.
2. E.g., Richard A. Posner, *The Ethics of Judicial Commentary: A Reply to Lubet*, COURT REVIEW, Summer 2000, at 6.
3. Lubet, *On Judge Posner*, *supra* note 1, at 5.
4. *Id.* at 4.
5. The Federal Judicial Conference relied upon the ABA's 1972 Model Code of Judicial Conduct when, in 1973, it adopted the Code of Judicial Conduct for United States Judges. In 1990, the ABA issued a revised Model Code of Judicial Conduct. The provision

discussed here, Canon 3A(6) of the Code of Conduct for United States Judges, is in the 1990 Model Code as Canon 3A(9).

6. The first sentence of the Canon is the part that is material here. It reads: "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."
7. Lubet, *On Judge Posner*, *supra* note 1, at 4.
8. See *In re Primus*, 436 U.S. 412, 432 (1978) (relating to the regulation of lawyers' speech).
9. Lubet, *On Judge Posner*, *supra* note 1, at 5.
10. *Id.*

Mikva as authority for limiting speech, Professor Lubet should have recognized it as a chilling presage of where his own argument is heading.

Professor Lubet adds, however, that because Judge Posner is a judge, his comments on a matter under investigation might “compromis[e] the neutrality of the federal judiciary.”¹¹ For my own part, I haven’t seen anything like that happen in this case. Nor, more important, does that concern—unsupported by any experience in fact—rise to the status of a “subordinating interest that is compelling.” The independent counsel, after all, was working in Washington, D.C., while Judge Posner sits in Chicago, Illinois. Thus, the judge could have no direct influence over the prosecutor, nor would he have occasion to adjudicate any controverted issue that might result from the Independent Counsel’s investigation.

The previous sentence suggests, however, that there is at least one compelling interest in limiting judges’ speech. If a judge were to comment on a controverted issue in an impending case that later came before that very judge, the judge’s impartiality might be subject to reasonable question. In that event, the judge would be required to recuse himself under the federal judicial disqualification statute.¹² To avoid that situation, Canon 3A(6) should be construed to apply to a controverted issue where there is a reasonable possibility that the issue will be contested in a case that will come before the judge for decision. Otherwise, the judge would be limiting his ability to carry out his judicial responsibilities in the public interest.

In addition, as Judge Posner rightly points out, the Canon protects a judicial candidate in Senate confirmation hearings from being pressured into taking premature positions on controversial cases that might come before her.¹³ Here again, the result would be mandatory disqualification of the judge from hearing those cases. And here again, the judge should be forbidden by the Canon from expressing an opinion on any controverted issue where there is a reasonable possibility that the issue will later come before the judge for decision.

Arguably, Professor Lubet’s expansive reading of the proscription in Canon 3A(6) is correct as a matter of plain meaning.¹⁴ That is, the literal language of the Canon appears to forbid a judge, broadly, from commenting on a proceeding in any court, regardless of how absurd it is to think that the judge might ever preside over that proceeding. What I am suggesting, on the other hand, is that the limitation on judicial speech in Canon 3A(6) be construed narrowly to apply only when there is a reasonable possibility that the proceeding will come before the judge for decision. This narrower reading would avoid uncon-

stitutionally impinging on judges’ speech (or, at least, it would avoid the difficult constitutional issue regarding judges’ core First Amendment speech).

At the same time, I would construe the word “impending” more broadly than either Judge Posner or Professor Lubet has done, so that it covers any controverted issue where there is a reasonable possibility that the issue will later come before the judge for decision.¹⁵ Reading the Canon in that way serves two compelling interests—it discourages mandatory disqualification of judges because of their prior comment on controverted issues in cases that later come before them, and it discourages senatorial pressuring of judges to commit themselves on important issues in advance of deciding those issues in cases that later come before them.

Further, in order to avoid unduly restricting the free speech of judges, as well as to avoid the kind of unfortunate debate that has occurred with respect to Judge Posner’s book, I would urge that the first sentence of Canon 3A(6) of the Code of Judicial Conduct for United States Judges, and of Canon 3A(9) of the ABA’s Model Code of Judicial Conduct, be amended to read as follows:

A judge shall not make any public comment on the merits of a case that is pending before the judge, or make any public comment on the merits of any other issue if there is a reasonable possibility that the issue will be contested in a case that will come before the judge.

Although I believe that the present provision can properly be construed to mean just that, the amendment would resolve an important issue, and resolve it in a way that is consistent with judges’ First Amendment rights and with the public interest.



Monroe H. Freedman is the Howard Lichtenstein Distinguished Professor of Legal Ethics, and the former dean, at Hofstra University Law School. For more than 20 years, he has also lectured twice a year on legal ethics at the Harvard Law School. The ABA has given Professor Freedman its highest award for professionalism, in recognition of “a lifetime of original and influential scholarship in the field of lawyers’ ethics.” The Journal of the Legal Profession said of him, “Monroe Freedman’s thinking, writing, and lectures have been the primary creative force in legal ethics today.” Professor Freedman’s latest book is *Understanding Lawyers’ Ethics* (1990).

11. *Id.* at 7.

12. 28 U.S.C. section 455(a) reads: “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”

13. Lubet, *On Judge Posner*, *supra* note 1, at 6.

14. I would argue with him, however, about the impact of the limitation in Canon 3A(6) that the judge’s comment is forbidden only if it “might reasonably be expected to affect [the proceeding’s] outcome or impair its fairness.” My particular concern about that language is that it is not sufficient to avoid a chilling effect on judicial speech, or to avoid the kind of unfortunate debate that

has occurred with respect to Judge Posner’s book.

15. Judge Posner would limit “impending” to mean “imminent.” Professor Lubet would limit it to mean any proceeding “that can be identified . . . as a dispute between recognizable parties over identifiable facts and circumstances.” The latter definition is too narrow to protect a judicial candidate from being pressured to commit herself on, say, the constitutionality of hypothetical abortion or gun-control legislation, when there is no current dispute between “recognizable parties” over “identifiable facts and circumstances.”

Free Speech and Judicial Neutrality: A Reply to Professor Freedman

Steven Lubet

Professor Monroe Freedman, with characteristic insight and grace, defends Judge Posner's *An Affair of State* on First Amendment grounds, arguing that "any limitation on [Posner's] speech would have to withstand 'exacting scrutiny.'" I do not disagree that the First Amendment applies—how could it be otherwise? But Professor Freedman's analysis greatly undervalues the compelling importance of judicial neutrality.

I am pleased that Professor Freedman evidently agrees with me that *An Affair of State* comments extensively on an "impending proceeding." Of course, there is no longer room to take issue with that conclusion. Even accepting Judge Posner's restrictive equation of "impending" with "imminent," it is now obvious that a proceeding—in the form a specially empaneled grand jury—was very much about to happen when *An Affair of State* went to press.¹

Let me make the following points:

1. *An Affair of State* provided a virtual roadmap for the prosecution of Bill Clinton and others, describing in detail how a prosecutor could frame and win a perjury or obstruction of justice case. In my view, the public has a compelling interest in preventing federal judges from influencing potential prosecutions. Professor Freedman sees this as a "virtually bottomless" slippery slope, since a prosecutor's decision "might be influenced by the outspoken opinion of a respected member of congress, or of another prosecutor, or of an editorial writer for the *New York Times*." Today's limitation on judges, the argument goes, might somehow morph into a blanket prohibition on the speech of elected officials and journalists.

With all respect, this argument proves nothing more than the exhaustion of the metaphor. There is no incline that runs from the judiciary to the press, and no reason to think that limitations on judicial speech would affect others. Professor Freedman's examples are not comparable, because members of Congress, journalists, editorialists, and law professors are all expected to be active participants in public debates. Indeed, the public may be served when opinion leaders influence the con-

duct of prosecutors, since that is part of the democratic process. The job of a judge, however, is not to be a surrogate for public opinion. Rather, judges are expected to be neutral in such matters. It is the need for institutional neutrality—as opposed to active advocacy—that breaks any possible link between limitations on judges and widespread restrictions on First Amendment rights.

I can prove this point with a simple example. Since 1972, the Code of Judicial Conduct has required judges to refrain from engaging in charitable solicitation, an otherwise protected form of speech. If there were indeed a slippery slope connecting judges to other public officials, journalists, and law professors, surely that restriction would have spread at least a bit over the last three decades. Of course, it has not. There is a clear rationale for the limitation on judges—it is necessary to prevent the appearance or reality of favor-currying or coercion. That rationale, however, does not apply to other professions, and so the limitation has remained confined to the judiciary. In other words, no slippery slope.

2. On the other hand, Professor Freedman worries that the no-comment rule may infringe on a judge's exercise of a "core First Amendment right." The preservation of judicial neutrality, however, requires that judges refrain from certain forms of advocacy, whether or not labeled a "core" right.

Again, I can prove my point with an example. There is no greater "core" First Amendment activity than participation in political campaigns. If any speech is protected by the First Amendment, it would be political endorsement and electioneering. The preservation of an apolitical judiciary, however, requires that judges refrain from endorsing candidates, giving stump speeches, recruiting precinct workers, or otherwise rallying the faithful. I assume that Professor Freedman would not want to see federal judges regularly lined up behind political candidates. If his First Amendment absolutism extends that far, however, I trust that most readers will see the flaws and reject it accordingly.

Footnotes

1. Independent counsel Robert Ray empaneled such a grand jury in July 2000. Moreover, the eventual indictment of Bill Clinton was no remote abstraction. Clinton was so worried about facing charges that he entered a plea deal, surrendering his law license and agreeing to forego the possibility of seeking attorney fees under the independent counsel act. For present purposes, the

latter aspect of the deal is perhaps most significant. If Clinton had not been indicted, he would have been entitled to reimbursement of his attorney fees, probably \$1 million or more, under a provision of the independent counsel act. His willingness to abandon that claim indicates that Clinton understood indictment to be a substantial threat.

In any event, the invocation of “core First Amendment rights” does not advance the discussion, because such rights must give way to legitimate judicial concerns.

3. Which brings us to the precise question: Does the public have a compelling interest in instructing sitting judges to refrain from commenting on pending and impending proceedings? To paraphrase a relevant political figure, it depends on what one’s conception of “compelling” is. In my view, there is a compelling institutional interest in maintaining the detached neutrality of the judiciary. The ideal judge—the one with the most legitimacy and in whom the public will repose the most faith—is the one who follows the law irrespective of self-interest or personal opinion. Thus, the public is best served when judges refrain from certain sorts of overt advocacy.

To be sure, the First Amendment prohibits an absolute gag rule. Nor would I dream of suggesting one, since engagement with social issues is also a requisite for informed judging. The no-comment rule, however, strikes an appropriate balance (even Judge Posner agrees that it is a good rule, differing with me only on the question of immediacy), requiring only that judges abstain from addressing matters that are poised for litigation. In constitutional terms, this is a trivial limitation. It is “closely drawn” to avoid unnecessary restrictions, leaving judges absolutely free to address all other issues of social concern.²

Judge Posner’s recognized brilliance needs no elaboration from me, and Bill Clinton is certainly able to defend himself. But Professor Freedman’s principle cannot be limited to intellectual judges and powerful defendants. As a constitutional rule, it would have to apply equally when a spiteful judge excoriates a vulnerable defendant (so long as the case is in a different court). Surely Professor Freedman, himself a former criminal defense lawyer and our foremost proponent of the adversary system, recognizes the threat to due process inherent in that scenario. Who would have confidence in a system that allows judges to proclaim defendants guilty before trial?



Steven Lubet, a professor of law at Northwestern University, is coauthor of the book, Judicial Conduct and Ethics, now in its third edition.

2. In fact, Professor Freedman’s own proposal sweeps much more broadly, as it would apply to all “issues” that reasonably might come before the judge in a “contested case,” and not merely to identifiable, impending proceedings. It is virtually certain that

perjury cases will come before the Seventh Circuit, no doubt involving the definition of materiality. Thus, Freedman’s rule would actually restrict Judge Posner so long as he remains on the bench, and not merely until the end of the Clinton litigation.

Craft Robe ad

Careful Self-Examination Is Vital

Thomas W. Ross

Editor's Note: We reprint here the remarks delivered by Judge Thomas W. Ross on November 13, 2000 in the Great Hall of the United States Supreme Court at a ceremony in which he received the William H. Rehnquist Award. That award is presented annually by the National Center for State Courts to a state court judge who possesses the qualities of judicial excellence.

As we sit here tonight our democracy is under great stress. Six full days after Election Day we still do not know who will be our next president. It is very likely that the outcome may be decided only after action by our courts. This is not something we want. But, should we be surprised or angry if this happens? The answer, in my view, is a resounding no. Instead, we should be thankful that our system of government and the rule of law allow us to resolve disputes even about something as important as who will hold the most powerful office the world in a courtroom and not in the streets. We should also be proud that our citizens still have enough confidence in our courts and judges to trust that we can resolve such important disputes fairly and in a just manner.

My fear, though, is that this confidence the public has historically had in the judiciary is eroding. On MSNBC last weekend, a commentator speaking about the election said, "It would be a disaster for this thing to go to the courts." He went on to say that the public does not trust the courts, that the courts were entirely political, that the outcome from litigation would be entirely political, and that the public would have no confidence in the outcome. I was quite disturbed by his remarks and, though I disagree with the extreme nature of his comments, I fear they may have some validity.

Why is this? In my view, it is in part because of the way growing numbers of Americans view our criminal justice system. The court system most Americans see and think of is our criminal justice system. Increasingly, as we all know, there are large segments of our society that no longer believe the courts are fair to everyone. Increasingly, there is a belief by many of our citizens—both white and black—that justice is available only to whites and the wealthy.

These citizens do not feel the poor get a fair shake and they believe the system discriminates against people based on inappropriate factors. These are concerns we don't like to hear about. These are things that are uncomfortable to talk about, particularly for those of us that are white and well off economically. Many of us believe these are only problems of perception and have no basis in fact. I believe they are real. I also believe, however, that they are mostly not based on overt discrimination so much as they are reflective of a society struggling to adapt to increasing cultural pluralism.

If we learned nothing else from this past election we learned that our nation is deeply divided in a number of different ways. There are divisions based on political party, individual issues, race, gender, economic status, religion, and even geography.

These divisions and splits find their way into our courts whether we want to admit it or not. Concerns by many of our citizens about the high percentage of African-Americans in prison compared to whites and racial profiling are increasingly part of everyday discussion in many communities. The death penalty moratorium movement has a certain momentum and is further evidence that more and more people, including many who believe in the death penalty, are questioning the fairness of our criminal justice system.

Part of the reason I became involved in sentencing reform is my desire to help recapture some of the lost public trust and confidence for our courts. It is my view that the time has come for us all to look at our systems and change them in ways that make them more truthful, more rational, more consistent, and less susceptible to discrimination. I truly believe the changes we have made in North Carolina have moved our state in the right direction on these issues.

As I plan to leave the bench, I intend to continue my work in criminal sentencing reform. I work with a group at the Vera Institute of Justice in New York called the National Associates Program on Sentencing and Corrections. This group is made up of judges, district attorneys, police, and correction officials and legislators from all over the country. What the group has in common is that they have all been through sentencing reform in their states and they want to offer assistance to others to make the process more rational and less political. The group has no common philosophy or agenda. It is bipartisan. We have a cooperative agreement with the Corrections Program Office at the U. S. Department of Justice. They fund a great deal of our work. We are working now in five or six states and I believe can provide to state officials working in these areas a level of peer-to-peer assistance that is unparalleled and unavailable anywhere else.

Thoughtful review and reform of sentencing laws to make them more truthful, consistent, and certain is part of the answer. But to move to the next level in addressing trust and confidence issues, I believe we must invest significant resources in high-quality research to determine whether and where our criminal justice system discriminates. It is time we look more carefully at police arrest practices and prosecutorial charging decisions to see if there is disparity in treatment based on race, gender, religion, or economic status at these stages of the process. We must continue to examine plea-bargaining and sentencing in our courts to see if people are treated differently based on inappropriate factors. And, we must look as well at release practices to better understand what happens at this stage of the process. The data is vital. We have learned the value of quality data in North Carolina with our computer simulation model and I think we must have equally good and reliable data in these areas.

The National Center for State Courts has an impeccable reputation for independence and quality. Or at least they did

before they selected me for this award. One step we can take is to help insure that the National Center is funded in a way that would enable them to do the research and gather the data that is needed to fully understand the issues I have mentioned and to help the states begin to forge solutions.

One way to measure the health of a society is to examine the quality of its justice—to look at how it exercises its power over the least of its citizens. Our nation is becoming increasingly diverse. Our population looks much different than it did ten years ago and it will be even more diverse in ten more years. If we want our system to provide justice for all our citizens as these demographic and cultural changes occur, we must make sure our courts are open and available to all. We must be sure that all people are treated fairly and receive justice without regard to their net worth, what they look like, or where they are from.

As President Franklin D. Roosevelt said, “Among American citizens there shall be no forgotten men and no forgotten races.” Today, I believe President Roosevelt would also want us to remember Americans of every gender, class, and faith. Before we can accomplish these goals, we must know the facts and identify where in our system the problems exist. They are

there and right now we are just not looking to find them. It is time to admit we have problems, look for the reasons they exist, and find solutions to fix them. This work will not be easy or pleasant. Self-examination rarely is. However, if we fail to meet this challenge, I fear the remaining confidence the public has in the courts will evaporate—and without that public trust the fabric of our government will be in jeopardy.



Thomas W. Ross is the executive director of the Z. Smith Reynolds Foundation in Winston-Salem, North Carolina. He was director of Administrative Office of the Courts in North Carolina from June 1999 through December 2000 and had served as a superior court judge from Greensboro, North Carolina, since 1984. Previously, Ross had been the administrative assistant to a North Carolina congressman, and he had taught law and government at the University of North Carolina. He served as the chair of the North Carolina Sentencing and Policy Advisory Commission for nine years, during which time comprehensive sentencing reforms were adopted.

Core Funding Ad



Managing Notorious Trials: Practical Aspects of the High-Profile Case

Peter V. Ruddick

Timothy R. Murphy, Paula L. Hannaford, Genevra Kay Loveland, and G. Thomas Munsterman, *MANAGING NOTORIOUS TRIALS*. National Center for State Courts, 1998. 225 pp. \$30.

You go in early one morning, planning to enjoy a cup of coffee, and get caught up on mail before you start in on the day's mundane docket. As you round the corner to the courthouse, you see a dozen television trucks with their satellite broadcast dishes telescoped to the sky. Think this might have something to do with you? Whether the next—or first—high-profile case in your jurisdiction is a heinous mass murder or an election challenge with the U.S. Presidency in the balance, you may well wish you had read this book before the petition is filed.

Trying a notorious case is an extremely demanding ordeal for the trial judge, the court administrator, and the entire courtroom staff. To be ready for the trial requires thought, reflection, and detailed

preparation. To say that a trial judge is going to treat a notorious case “just like any other case” is to confuse means with ends. (*Managing Notorious Trials*, p. 7.)

Managing Notorious Trials provides a thoughtful review of the special issues that confront the trial judge—often suddenly—in cases with significant media interest: demands from various media, courtroom and courthouse logistics, staff delegation, security, protective orders on statements by attorneys and staff to the press, difficult litigants, change of venue, and trial and jury management. This edition updates the book first published in 1992 (then titled *A Manual for Managing Notorious Cases*), adding ideas and experience from trials that followed and new technologies, as well as changes in substantive law, such as the increased attention to victims' rights and use of their impact statements in court.

The authors draw on the experiences, mostly good, some bad, of trial judges in a variety of such cases. This is not a

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manual on how to handle every high-profile case, but rather an outline of the issues that are likely to confront the judge. It recognizes that courts vary widely in their size, resources, and local practice, and two cases that might be “notorious” may be vastly different in every respect but their media interest. By the same token, judges even in the same jurisdiction may not agree on the philosophical questions presented in such cases. You will not find a definitive answer here as to which witnesses you might want to declare off limits to the cameras, or how far a gag order on attorneys should go, but rather some ideas that have worked in other cases and the kinds of practical considerations that go into such decisions.

A passage in the original Introduction explains the authors’ point of view:

Many of the lessons learned are neither profound nor complex. The primary lessons involve thinking and planning ahead, anticipating contingencies, and being prepared. Handling a notorious case may be unlike anything a trial judge and court have ever experienced before. Pitfalls, dangers, and opportunities for embarrassment abound. But notorious case can be managed, and they can be rewarding. Good management of a notorious case provides a court and a judge with the opportunity to showcase the legal system in general, and an individual court in particular. The public has a rare opportunity to observe a court at its best, in a trial presided over by

a confident and well-prepared judge, assisted by a competent and well-prepared staff, functioning efficiently and effectively in the full glare of daily public and media scrutiny.” (*Managing Notorious Trials*, p. xi.)

Managing Notorious Trials is divided into four chapters: pre-trial matters, dealing with media, jury considerations, and planning for security. Each chapter commences with a helpful page of “lessons learned,” summarizing the principal thoughts of that chapter. If there is a complaint here at all, it is with organization. For example, media and security issues are confronted at every stage of such a proceeding, and appropriately, in each chapter of the book—not just the designated chapter. The book has a thorough index, though, so finding a specific reference after the first read will present no problem at all. In addition, about half the book is made up of appendices, some of which are law summaries, sample rules, and guidelines. Probably the most useful are the sample documents from specific cases, including orders for decorum, media advisories, jury questionnaires, and security orders.

One discussion of particular interest is the selection of the trial judge for the case in the first place. Noting that many jurisdictions provide for random assignment of cases, the authors suggest several alternatives for the high-profile case, including the possibility of a tandem assignment in which one judge handles the trial and the other handles the logistics and public affairs aspects. Also offered are suggestions for protec-

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Voice IQ Full pg Ad

tive orders limiting attorneys' statements to the media as an alternative to pure gag orders.

The media chapter includes some excellent principles for dealing with reporters and other representatives, discussing how to avoid charges of favoritism or the appearance of withholding information, and a good discussion of various judicial approaches to media access. Nuts-and-bolts issues, like how your courtroom seats will be allocated (possibly the most controversial and divisive administrative decision the judge may make, the authors claim) and the use of a separate, wired media room, are presented as well.

Managing Notorious Trials is specifically written for trial judges, and will be a useful tool for any judge dealt such a case, whether it be one of intense local attention or national public interest. The media seem to take more and more interest in court proceedings, and more and more cases become "notorious." As the authors note, there appears to be no limit to the appetite for gossip and titillation that surround such cases. So

long as these trends continue, the likelihood of any trial court judge having a high-profile case is enhanced. A couple of hours with this book before Geraldo calls will be time well spent.



Peter V. Ruddick is a state general jurisdiction trial judge in Johnson County, Kansas, the most populous county on the Kansas side of the Kansas City metropolitan area. He has been a trial judge since 1992, hearing criminal cases, several of which have drawn substantial media attention. Among them was the 1995 case of Debora Green, which he drew by random assignment; Green ultimately pleaded no contest to the murder of two of her children, who died after she set fire to her house while the children, ages 13 and 6, were asleep. Ruddick received a B.A. philosophy and political science in 1971 and a J.D. in 1974 from the University of Kansas.

Court Review Author Submission Guidelines

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

Court Review is received by the 3,500 members of the American Judges Association (AJA), as well as many law libraries. About 40 percent of the members of the AJA are general jurisdiction, state trial judges. Another 40 percent are limited jurisdiction judges, including municipal court and other specialized court judges. The remainder include federal trial judges, state and federal appellate judges, and administrative law judges.

Articles: Articles should be submitted in double-spaced text with footnotes, preferably in WordPerfect format (although Word format can also be accepted). The suggested article length for *Court Review* is between 18 and 36 pages of double-spaced text (including the footnotes). Footnotes should conform to the 17th edition of *The Bluebook: A Uniform System of Citation*. Articles should be of a quality consistent with better state bar association law journals and/or other law reviews.

Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

Book Reviews: Book reviews should be submitted in the same format as articles. Suggested length is between 3 and 9 pages of double-spaced text (including any footnotes).

Pre-commitment: For previously published authors, we will consider making a tentative publication commitment based upon an article outline. In addition to the outline, a comment about the specific ways in which the submission will be useful to judges and/or advance scholarly discourse on the subject matter would be appreciated. Final acceptance for publication cannot be given until a completed article, essay, or book review has been received and reviewed by the *Court Review* editor or board of editors.

Editing: *Court Review* reserves the right to edit all manuscripts.

Submission: Submissions may be made either by mail or e-mail. Please send them to *Court Review's* editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com, (913) 715-3822. Submissions will be acknowledged by mail; letters of acceptance or rejection will be sent following review.

Preliminary Observations from an Evaluation of the Broward County Mental Health Court

John Petrla, Norman G. Poythress, Annette McGaha, and Roger A. Boothroyd

According to a report issued by the United States Department of Justice in 1999, there are approximately two million people with mental illness, substance abuse disorders, or both under the control of federal, state, and local correctional systems at any one time.¹ Of the ten million adults booked into United States jails in a given year, it is estimated that approximately 700,000 have serious mental disorders, while 75% of those people also have a substance abuse disorder.²

Mental illness is not, nor should it be, exculpating in every instance. Many individuals with the most serious mental illnesses, however, are often arrested for minor offenses, such as disorderly conduct or trespassing. There is a growing sense that many of these individuals would benefit much more from treatment than from disposition by the criminal justice system.³ In fact, some have suggested that the criminal justice system has replaced the mental health system, by default, as the primary provider of mental health treatment for impoverished individuals with mental illness, though the treatment provided in jails and prisons is often grossly inadequate.⁴ People with mental illness stay longer in jails than people charged with similar offenses, and their confinement may exacerbate their illness.⁵ Providing care for people with mental illness and significant substance abuse problems also may create management issues for jail officials, while increasing costs to the localities that operate most jails in the United States.

There have been a number of efforts to address these issues. Two types of responses worth noting here are those initiatives designed to divert people from the criminal justice system *prior* to booking and those initiatives, especially specialty or single-jurisdiction courts, designed to divert people from the criminal justice system into treatment *after* arrest.

Efforts to divert people into treatment prior to arrest concentrate, not unexpectedly, on the police, because police officers are the primary gatekeepers between the criminal justice and other human services systems. A recent analysis⁶ of such efforts found that there were three major categories of pre-arrest diversion programs: (1) programs in which officers are specially trained to identify and respond to mental health issues in the community; (2) programs in which the police department uses mental health professionals to provide consultations to police in the field; and (3) programs that utilize partnerships between police and mobile mental health teams to address mental health crises.⁷ The common goal of these programs is to identify and provide access to treatment for individuals experiencing a serious mental illness or substance abuse problem that may have caused the behavior that brought the individual to police attention.

Post-arrest initiatives have often resulted in the development of specialty courts. The most common has been the drug treatment court, developed in response to the overwhelming number of defendants entering the criminal justice system

Footnotes

- The evaluation described in this article was supported by funding from the John D. and Catherine T. MacArthur Foundation, as well as the Florida legislature.
1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MENTAL HEALTH & TREATMENT OF INMATES AND PROBATIONERS(1999).
 2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1997. A recent review of studies on the prevalence of mental illness in jails suggests that between 6% and 15% of jail inmates have a severe mental illness. Richard H. Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCH. SERV. 483 (1998).
 3. Randy Borum, Jeffrey Swanson, Marvin Swartz & Virginia Hiday, *Substance Abuse, Violent Behavior and Police Encounters Among Persons with Severe Mental Disorder*, 13 J. CONTEMP. CRIM. J. 236 (1997).
 4. Fox Butterfield, *Prisons Replace Hospitals for the Nation's Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1, A18; E. Fuller Torrey, *Jails and Prisons—America's New Mental Hospitals*, 85 AMER. J. PUB. HEALTH 1611 (1995). A good discussion of legal issues involved in the care of incarcerated individuals with mental disorder can be found in FRED COHEN, *THE MENTALLY DISORDERED INMATE & THE LAW* (Civic Research Institute 1998).
 5. Risdon N. Slate, *Courts for Mentally Ill Offenders: Necessity or Abdication of Responsibility*, in COURTS & JUSTICE: A READER 435-36 (G. Larry Mays & Peter R. Gregware, eds., 2d ed. 2000).
 6. RANDY BORUM, *JAIL DIVERSION STRATEGIES FOR MISDEMEANOR OFFENDERS WITH MENTAL ILLNESS: PRELIMINARY REPT.* (Dep't. of Mental Health Law & Policy, Louis de la Parte Florida Mental Health Institute, University of South Florida 1999).
 7. A summary of specific local initiatives designed to address the needs of people with co-occurring disorders in the criminal justice system can be found in *THE COURAGE TO CHANGE: A GUIDE FOR COMMUNITIES TO CREATE INTEGRATED SERVICES FOR PEOPLE WITH CO-OCCURRING DISORDERS IN THE JUSTICE SYSTEM* (Nat'l. Gains Ctr., Albany, New York (1999)).

because of drug-related offenses.⁸ The Department of Justice defines a drug treatment court as a “court with the responsibility of handling cases involving . . . less serious drug-using offenders through an intensive supervision and treatment program. Drug court programs bring the full weight of all interveners (e.g., the judge, probation officers, correctional and law enforcement personnel, prosecutors, defense counsel, treatment specialists and other social service personnel) to bear, forcing the offender to deal with his or her substance abuse problem or suffer consequences.”⁹

There was one drug court in 1989; by 1997, there were approximately 325 drug court programs planned or in operation.¹⁰ In general, drug courts are perceived as successful in reducing recidivism, through court monitoring and by causing defendants to obtain treatment.¹¹ By definition, however, drug courts concentrate on individuals charged with drug-related offenses and may be ill-equipped to address mental illness issues.¹²

In an effort to address the needs of at least some individuals who enter the criminal justice system with serious mental ill-

nesses, about a dozen jurisdictions in the last three years have created mental health courts,¹³ and Congress has enacted legislation to create up to 125 mental health courts around the country.¹⁴ This article describes Florida’s Broward County Mental Health Court, the first mental Health Court in the United States, and reports on preliminary findings of an evaluation of that court being conducted by the authors.

Post-arrest initiatives have often resulted in the development of specialty courts.

I. THE BROWARD COUNTY MENTAL HEALTH COURT

Broward County, Florida, has a population of approximately 1.5 million people. It had 112,508 reported crimes in 1997, a rate of 79 crimes per 1,000 residents.¹⁵ In 1996, the Broward County jail had housed 3,882 individuals with a mental illness

8. The Department of Justice estimated that one-third of the offenses committed by adult offenders in 1996 had alcohol use or abuse as a factor, and that in 1997 more than 570,000 of state and federal inmates, or 51% of all prisoners, indicated that they used alcohol or drugs at the time of their offense. Dess A. Grangetto, *Reducing Recidivism by Substance Abusers Who Commit Drug and Alcohol Related Crimes*, 10 J. CONTEMP. LEGAL ISSUES 383, 390 (1999). In the federal courts, increased criminal caseloads, in large measure because of drug-related charges, caused Chief Justice William H. Rehnquist to observe that the federal courts were becoming national narcotics courts. See *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 302 (1996). See also Jeffrey W. Stempel, *Two Cheers For Specialization*, 61 BROOKLYN L. REV. 67, 80 (1995) (“[I]n America’s urban areas, federal trial courts are perilously close to becoming specialized criminal courts. Indeed, they may be on their way to becoming specialized drug courts.”). The impact of drug-related offenses on state courts has also been overwhelming in many jurisdictions. James R. Brown, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23N.E. J. CRIM. & CIV. CON. 63, 80 (1997).
9. NAT’L ASS’N OF DRUG CT. PROF. & OFFICE OF COMMUNITY-ORIENTED POLICING SERVICES, U.S. DEP’T. OF JUSTICE, COMMUNITY POLICING AND DRUG COURTS/COMMUNITY COURTS: WORKING TOGETHER WITHIN A UNIFIED COURT SYSTEM App. vii (1998).
10. DRUG CT. CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJ., U.S. DEP’T. OF JUSTICE, DRUG COURT ACTIVITY: SUMMARY INFORMATION 1 (May 1997).
11. Lynne M. Brennan, *Comment: Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders—An End to Cruel and Unusual Punishment*, 22 HAMLINE L. REV. 355, 380-81 (1998).
12. The difficulties that courts may have in addressing both substance abuse and mental illness issues may reflect not only the mission of a drug court (i.e., to concentrate on substance abuse issues) but also difficulties in the manner in which treatment is organized. There have been historic difficulties in integrating the treatment of mental illness and substance abuse, in part because providers of care have usually focused on one, but not both, issues. Increasingly, treatment providers are attempting to create approaches to treatment that acknowledge that many individuals

with serious mental illnesses often have substance abuse disorders as well. See, e.g., Robert E. Drake, Carolyn Mercer-McFadden, Kim T. Mueser, et al., *Review of Integrated Mental Health and Substance Abuse Treatment for Patients with Dual Disorders*, 24 SCHIZOPHRENIA BULL. 589 (1998); NAT’L. ADV. COUNCIL, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEP’T. OF HEALTH & HUMAN SERV., ACTION FOR MENTAL HEALTH & SUBSTANCE-RELATED DISORDERS: IMPROVING SERVICES FOR INDIVIDUALS AT RISK OF, OR WITH, CO-OCCURRING SUBSTANCE-RELATED & MENTAL HEALTH DISORDERS: A SAMHSA CONFERENCE REPORT & A NATIONAL STRATEGY (1997).

13. Brandy Tomhave, Legislative Assistant to Representative Ted Strickland, at a panel titled, “Mental Health Courts: A Jurisprudent Therapy Perspective,” comments at the American Bar Association Annual Meeting, New York, New York, July 8, 2000. There has been growing press coverage of mental health courts in the last two years. See, e.g., Stefanie Thomson, *Mentally Ill Helped in Special New Court*, COLUMBIAN (Vancouver, Wash.), May 6, 2000, at A1; Sheila Toomey, *Innovative Justice; Anchorage Judges Find New Ways to Slow Revolving Door of Defendants*, ANCHORAGE DAILY NEWS, Feb. 27, 2000, at A1; Kate Nash, *City Council Split Over Big-I Reconstruction Money*, ALBUQUERQUE TRIB., Jan. 18, 2000, at A4 (reporting that the Albuquerque City Council was advocating for the creation of a mental health court); Elaine Jarvik Deseret, *Touchy Topic: Mental Health Violence*, DESERET NEWS (Salt Lake City), Jan. 16, 2000, at A01; Editorial, *Real Help for Inmates*, DENVER POST, Nov. 14, 1999, at G4.
14. Officially called America’s Law Enforcement and Mental Health Project, Pub. L. No. 106-515 (codified at 42 U.S.C. §§ 3796ii et seq.), the bill was sponsored by Senators DeWine and Domenici and was signed into law on November 13, 2000. In the statute, Congress found that a large number of inmates in state prisons and local jails suffered from mental illness; Congress also found that Broward County, Florida, had “created separate Mental Health Courts . . . to place nonviolent mentally ill offenders into judicially monitored inpatient and outpatient mental health treatment programs, where appropriate, with positive results.” Pub. L. No. 106-515, § 2.
15. FLA. DEP’T. OF LAW ENFORCEMENT, CRIME IN FLA., 1997 ANN. RPT.

Editorial support for the court, and for the appointment of a judge knowledgeable about mental health issues, was immediate.

at a cost of \$14.2 million; on average, these individuals were jailed for 23 days.¹⁶ Police estimated that they were arresting six people with mental illness per day, with the average arrest costing about six hours of an officer's time.¹⁷ The jail was under scrutiny because of overcrowding and perceived problems in care.

County officials already had in place a task force examining issues at the interface of the criminal justice and mental health systems. This task force, chaired by Circuit Judge Mark Speiser, comprised various county stakeholders, including the courts, the state's attorney office, the public defender, the county sheriff, and various health and mental health officials. The task force had focused much of its attention on mental health issues within the jail, and the idea for a "mental health court" grew from members of this task force.¹⁸ Broward County had in the early 1990s established one of the nation's earliest drug courts, so county officials were familiar with the development and use of special jurisdiction courts.¹⁹

The Broward County Mental Health Court was established on June 6, 1997 by administrative order of Judge Dale Ross, chief judge of Florida's Seventeenth Judicial Circuit, which consists of Broward County. Judge Ross's order²⁰ said that it was "essential that a new strategy be implemented to isolate and focus upon individuals arrested for misdemeanor offenses who are mentally ill or mentally retarded in view of the unique nature of mental illness and mental retardation, and the need for appropriate treatment in an environment conducive to wellness and not punishment, as well as the continuing neces-

sity to insure the protection of the public."²¹ The order also found that there was "a recognized need to treat defendants qualified to participate in the Court before a specialized trained Judge who possesses a unique understanding and ability to expeditiously and efficiently move people from an overcrowded jail system into the mental health system, without compromising the safety of the public."²² The order observed that Broward County had experienced a "rapidly increasing" number of misdemeanor cases involving mental illness or mental retardation leading to "congesting and overburdening" of the court dockets, as well as jail overcrowding, and that there had been a "continuing shrinkage" of mental health resources, necessitating the centralization of such resources into a system to make them more accessible.²³

The order created a part-time mental health subdivision to be housed within the county court's criminal division. The court's jurisdiction was limited to defendants arrested for misdemeanors suffering from mental illness or mental retardation. Domestic violence cases and driving under the influence charges were excluded, as were charges of battery, a violent misdemeanor, absent the victim's consent.²⁴ In addition, defendants charged with violent misdemeanor offenses occurring at mental health treatment facilities were assigned under the order to the mental health court.

The court was assigned to Judge Ginger Lerner-Wren, who had been elected the previous year. Judge Lerner-Wren was chosen for the court because of her extensive background with mental health and human services issues: She had been the Broward County Public Guardian, and had also served as the plaintiffs' monitor to oversee implementation of a settlement agreement in a federal class action lawsuit seeking to improve conditions within South Florida State Hospital and the surrounding community mental health system. Editorial support for the court, and for the appointment of a judge knowledgeable about mental health issues, was immediate.²⁵

16. John De Groot, *Mental Trap: The State's Mentally Ill Are Caught in a Vicious Cycle That Clogs Jails and Costs Florida Taxpayers*, SUN-SENTINEL (Ft. Lauderdale), Oct. 12, 1997, at A1.

17. *Id.*

18. The importance of this task force in the creation of the mental health court cannot be exaggerated. The task force had met regularly since 1994 and provided a forum for community leaders to engage in frequent conversations regarding a variety of issues that faced the local criminal justice and mental health systems. Participants have indicated that the task force conversations created enough trust among the participants to ease the creation of the mental health court. Other communities have gone through similar experiences prior to the creation of drug courts. See, e.g., Brown, *supra* note 8, at 95 ("[T]he coalition [that created the Boston drug court] actively involved community groups, treatment providers, and business leaders in the planning and implementation process. The importance of collaboration and cooperation cannot be overestimated. Often competing for scarce resources, including space, staff, and money, criminal justice agencies have rarely cooperated at the level demonstrated by the coalition that supported Boston's drug court.").

19. DEPT OF COMM. AFFAIRS, STATE OF FLA., AN EVALUATION OF THE BROWARD AND HILLSBOROUGH COUNTIES DRUG COURTS (Fla. St. Univ.

Inst. for Health & Human Serv. Res. Dec. 1993).

20. Administrative Order No. VI-97-I-1A, *In re Creation of a Mental Health Court Subdivision within the County Criminal Division*, 17th Cir. Ct., Broward Co., Fla.

21. *Id.*

22. *Id.*

23. *Id.*

24. On occasion, with the consent of the victim, the mental health court does accept jurisdiction in cases involving domestic violence.

25. In an editorial, the Ft. Lauderdale *Sun-Sentinel* called Judge Lerner-Wren a "perfect fit for the judge's job," Editorial, *Nonviolent Offenders, Community Will Benefit from New Kind of Court*, SUN-SENTINEL, June 19, 1997, while the *Miami Herald* applauded creation of the court as "a significant tightening of the threads that bind together the patchwork system for treating mental illness" and noted Judge Lerner-Wren's "broad experience in mental health law." *A Stitch in the Patchwork*, MIAMI HERALD, May 31, 1997, at A26.

II. EVALUATION OF THE MENTAL HEALTH COURT

There have been more than 20 evaluations of drug courts since their inception.²⁶ These evaluations have been important in providing policy makers with information about the operation and effect of drug courts. Given the growing interest in issues involving mental illness in the criminal justice system, we thought it important, and participants in the mental health court agreed, that the court be evaluated. Funding for an evaluation has been provided by the John D. and Catherine T. MacArthur Foundation, a private foundation with a long track record in funding research in mental health, health care, and mental health law²⁷ and by the Florida legislature.

The evaluation, being conducted by faculty within the Department of Mental Health Law and Policy at the University of South Florida, has four parts. The first is a series of “key informant interviews” with individuals closely involved with the creation and implementation of the mental health court. The interviews provide qualitative data on the reasons for the creation of the court, whether participants believe the initial goals of the court have been met, and issues that have arisen in implementing the court.

The second part of the evaluation is examining the court process itself, comparing the mental health court to a conventional misdemeanor court in Hillsborough County.²⁸ As noted below, the mental health court is established on the premise that it is a “treatment court” and it is by design much more informal and less adversarial than an ordinary criminal court. By observing and coding several dozen hearings, as well as analyzing hearing transcripts, we will be able to describe in some detail the roles of the participants, comparing and contrasting those roles with a more traditional court.

The third part of the evaluation is a follow-up study of 100 people whose cases have been heard by the mental health court and 100 people with similar backgrounds whose cases were heard in traditional misdemeanor court. A series of interviews

are being conducted with these individuals over a 16-month period from their enrollment in the study. Enrollment in the study, which is voluntary, occurs after the initial hearing in mental health court or the first appearance in misdemeanor court at the comparison site. An interview is also conducted with a family member or other person identified by the individual. Individuals are asked to describe their experiences

with the court and after. The mental health court is organized explicitly on the premise that individuals who come before the court are to be given “voice” and treated respectfully; it has been suggested that individuals who believe that they have been treated fairly report greater satisfaction with judicial outcomes and may be more willing to accept treatment as well.²⁹ The interviews seek to determine whether individuals perceive the court as fair and whether individuals perceive their participation in the court as voluntary or coerced.³⁰ The interviews also examine whether individuals have engaged in behaviors constituting a risk to others, utilizing questions developed by the MacArthur Foundation Research Network on Mental Health and the Law.³¹ Finally, individuals are asked questions regarding their use of mental health services, compliance with prescribed medications and other treatments, current mental status, and community adjustment.

The final part of the evaluation will gather data from a variety of sources, including days incarcerated, use of emergency mental health services, and associated costs for individuals

The mental health court is organized . . . on the premise that individuals who come before [it] are to be given “voice” and treated respectfully

26. OFFICE OF JUST. PROG., U.S. DEP’T OF JUSTICE, DRUG COURT MONITORING, EVALUATION, AND MANAGEMENT INFORMATION SYSTEMS (1998).

27. In 1988 the foundation approved funding for a research network on mental health and the law. This network, headed by Professor John Monahan of the University of Virginia, conducted over the next 10 years research into the core mental disability law issues of risk, coercion, and civil and criminal competency. The network’s work constitutes the most far-reaching and productive research yet conducted in the mental disability law field. See, e.g., TOM GRISSO AND PAUL APPELBAUM, ASSESSING COMPETENCE TO CONSENT TO TREATMENT: A GUIDE FOR PHYSICIANS AND OTHER HEALTH PROFESSIONALS (1998); Randy Otto, Norman G. Poythress, Robert Nicholson, et al., *Psychometric Properties of the MacArthur Competence Assessment Tool—Criminal Adjudication*, 10 PSYCH. ASSESSMENT 435 (1998); Charles Lidz, Steven K. Hoge, William Gardner, et al., *Perceived Coercion in Mental Hospital Admission: Pressures and Process*, 52 ARCH. GEN. PSYCH. 1034 (1995); John Monahan, Henry Steadman, Paul Appelbaum, et al., *Developing A Clinically Useful Actuarial Tool For Assessing Violence Risk*, 176 BRIT. J. PSYCH. 312 (2000).

28. Hillsborough County, Florida, was chosen as a comparison site because it is similar demographically to Broward County and

because it is geographically proximate to the University of South Florida in Tampa, which is conducting the evaluation.

29. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment*, 46 SMU L. REV. 433 (1992); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

30. Legal status does not necessarily predict whether an individual will perceive himself or herself as being coerced in a given situation. For example, some individuals who were on “voluntary” status for mental health treatment reported that they had been coerced into care, while some on involuntary commitment status reported that they did not perceive themselves as having been coerced (though the majority did). S. Ken Hoge, Charles W. Lidz, M. Eisenberg, et al., *Perceptions of Coercion in the Voluntary and Involuntary Patients*, 20 INT’L. J. L. & PSYCH. 167 (1997). It is possible that individuals who remain under the jurisdiction of the mental health court for an extended period of time, going through the status hearings noted below, may perceive themselves as being more coerced over time. On the other hand, they may not, and if they perceive themselves as being treated fairly, it may ameliorate perceptions of coercion.

31. See note 27 *supra*.

[M]ost individuals seen by the court in its first two years had a psychiatric diagnosis.

who enter treatment through the mental health court.

The evaluation will not attempt to determine categorically whether the Broward County Mental Health Court “works.” Whether such a court “works” depends in large measure on the goals

established for such a court. It is also worth noting that there is not a single model or “type” of mental health court, and that information derived from one court may or may not be applicable to others.³² The evaluation will provide useful information regarding this particular court, however, and at least some of that information may prove useful to policy makers and other localities considering the creation of a mental health court.

III. PRELIMINARY OBSERVATIONS FROM THE EVALUATION

It is premature to draw conclusions from those portions of the evaluation that rely on interviews with individuals enrolled in the study after entering the mental health court or the comparison misdemeanor court. This is because individuals are still being enrolled in the study, and interviews are ongoing. However, it is possible to make some preliminary observations based on the key informant interviews and observations of the mental health court process. The observations that follow are necessarily tentative, and more conclusive observations await the final collection and analyses of data.

The mental health court became operational in July 1997. The court, like the mental health courts established since, has a separate docket for its cases. In addition to the consolidation of cases before a particular judge, the state attorney and the public defender’s office assign attorneys specifically chosen for the court. Both the public defender, which provides representation in the vast majority of cases, and the state’s attorney choose representatives for the court based on potential “fit” between the lawyers and the goals and processes of the mental health court.

The state mental health agency also has a representative at each session of the court, as does the county’s largest mental health provider. Representatives from other treatment agencies, as well as sheriff’s deputies assigned to the jail’s mental

health unit, are also routinely present at the court.

In the first two years of the court’s operation (1997-1999), the court assumed jurisdiction over 882 cases, at a rate of approximately 40 per month.³³ More recently, however, that number has grown to an average of 53 cases per month.³⁴ The court also retains jurisdiction over a large number of cases for the purpose of monitoring their progress, generally through periodic status hearings. Over time, this has the effect of enlarging the court’s docket, because the overall number of cases for which the court has responsibility continues to grow. As a result, and because of the goal of the mental health court to get people with mental illness out of jail quickly, the mental health court meets more frequently than originally anticipated, sometimes meeting every day of the week. Cases today are sometimes heard within a few hours of referral, and the speed with which the court gets to cases is a core feature of the court.³⁵

Individuals, who must accept the court’s jurisdiction voluntarily, qualify for the court relatively easily. The order establishing the court directed that anyone charged with a nonviolent misdemeanor would be preliminarily qualified for the court if “they previously or currently have been diagnosed by a mental health expert as suffering from mental illness or mental retardation or have manifested obvious signs of mental illness or mental retardation during arrest or confinement or before any court.” Motions to assign an individual to the court may be made by any court or the defense or state attorney. In addition, any participant in the criminal justice system (arresting officer, jail officials, attorneys, magistrates) or family member or advocate may refer a person to the mental health court. Doctoral level clinical students from Nova Southeastern University, under the supervision of mental health staff from the public defender’s office, screen clients at the daily magistrate court and make recommendations to the magistrate for referral to the mental health court.³⁶ In practice, magistrates make the most referrals.

Because the gate into the mental health court was designed to be open wide, no formal diagnostic criteria or screens are used prior to the court’s exercise of jurisdiction.³⁷ Despite this, treatment histories made available to the court at an initial hearing showed that most individuals seen by the court in its first two years had a psychiatric diagnosis. These diagnoses included 18% diagnosed with schizophrenia; 10% with depression; 29% with

32. For example, as noted in the text that follows, the Broward County mental health court does not impose diagnostic screens before an individual can be admitted to the court. In contrast, it is reported that the Marion County, Indiana, mental health court requires that a person have a diagnosis of schizophrenia, bipolar disorder, or major depression and sign an agreement to participate in the program. Amy Watson, Daniel Luchins, Patrick Hanrahan, et al., *Mental Health Court: Promises and Limitations*, 28 J. AMER. ACAD. PSYCH. & L. 476 (2000).

33. These figures, and those that immediately follow, are taken from the mental health court’s *Second Year Progress Report: July 1998-June 1999, The Nation’s First Mental Health Court*. The report is available online at www.broward.org/ojss/ and is also available from Judge Ginger Lerner-Wren’s office at 201 SE 6th Street, Rm. 429, Ft. Lauderdale, Florida 33301.

34. OFFICE OF JUSTICE SYSTEM SERV., BROWARD CO., FLA., MENTAL

HEALTH CONSUMERS IN THE BROWARD COUNTY JUSTICE SYSTEM (presented to the Mental Health Task Force, April 24, 2000).

35. The administrative assistant to the mental health court judge is responsible for preparing the court’s docket. The administrative assistant also calls treatment providers to notify them of the need to be in court for a hearing, and coordinates the transfer of clients from Broward County jails to the court. Although paperwork to formally transfer a case to mental health court is supposed to be completed prior to transfer, as a practical matter cases may be heard before this occurs because of the mental health court’s goal of minimizing jail stays for people with mental illness.

36. Lisa Rabasca, *A Court That Sentences Psychological Care Rather Than Jail Time*, 31 MONITOR ON PSYCH. 58 (2000).

37. In contrast, at least one other mental health court requires that individuals meet certain diagnostic criteria before being accepted by the court. See note 32 *supra*.

dual diagnoses of mental illness and substance or alcohol abuse; 13% with bipolar disorders; 10% with schizoaffective disorders; 20% unknown; and only 2% with mental retardation or developmental disability as a primary diagnosis. Of the individuals seen by the mental health court in its first two years, 69% were male, and most were between the ages of 28 and 40. Approximately one-quarter were homeless.³⁸

Observations from Key Informants

Key informant interviews have been conducted to date with approximately two dozen individuals involved in some way with the creation or implementation of the mental health court. Informants include judges, representatives of the public defender's office and the state's attorney office, family members, and treatment professionals within the community. In general, there is consensus among those interviewed regarding why the court was created. Nearly all cite the presence of large numbers of people with mental illness in the local jails and a desire to divert such individuals into treatment. Most also expressed the hope that treatment would reduce recidivism among people who came through the mental health court, though the major articulated goal was to reduce the number of people with mental illness in the jail and the time spent there.

Informants also expressed general satisfaction with the work of the mental health court to date, believing that it had met its articulated goals. Individuals noted the respect with which people are treated in the mental health court, as well as anecdotal successes in obtaining treatment for people. Most informants cited the judge presiding over the court as the key factor in the perceived success of the court. Informants agreed that support for the court, particularly among lawyers and judges involved with it, was very high, and that communication in general between the various agencies and individuals involved with the court and with the cases coming before the court was generally very good, although it could be improved.

A number of informants did express concern that certain types of services, for example, housing, continued to be difficult to obtain. Some informants also indicated that the needs of certain types of individuals, including those with substance abuse problems, individuals with head injuries, and women who had been traumatized, were not always met by the service system. As noted below, this has led in some circumstances to the creation of additional services within Broward County.

In addition, a number of informants noted that the court's increasing caseload could over time create problems for the court over time. This is primarily because the mental health court was created out of existing resources; no new resources

were added for judges or attorneys. As the caseload grows, questions have been raised about the capacity of the current system to handle those cases.

IV. THE MENTAL HEALTH COURT PROCESS

Not all clients who come before the mental health court for an initial hearing have their cases remain before the mental health court. At the first hearing, the court determines whether the case is appropriate for the mental health court. The client's participation in the court is also voluntary, an issue discussed in more detail below in the discussion of the role of counsel.

The court may decide not to qualify the individual for the mental health court for a variety of reasons. These include a perceived lack of a mental health issue, a perception that the client is poorly motivated for treatment, or pending felony charges. Some clients are referred for a preliminary examination under Florida's civil commitment law, while others may be referred for an evaluation of competency to stand trial. The court operates on a pre-adjudicatory basis, and will only resolve criminal charges upon agreement of the parties. The court generally does not consider, and cautions individuals from discussing, the particulars of pending charges. If the person decides to go before the mental health court, charges usually are dismissed when the court decides to end its jurisdiction (which can extend for one year). This is in contrast to other mental health courts that may require pleas of guilty or no contest as a condition for entering the program.³⁹

Role of the Court

In making these decisions, the mental health court bases its actions on the principle of "therapeutic jurisprudence."⁴⁰ David Wexler, who coined the phrase and has written most extensively about it, has posited therapeutic jurisprudence as a way for lawyers and courts to examine "the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences."⁴¹ Christopher Slobogin, in a commentary on therapeutic jurisprudence, characterized it as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."⁴² In recent years, the notion that courts should consider the ther-

In making these decisions, the mental health court bases its actions on the principle of "therapeutic jurisprudence."

38. *Second Year Progress Report: July 1998-June 1999, The Nation's First Mental Health Court*. 17th Judicial Circuit, Broward County, Florida (1999).

39. JOHN S. GOLDKAMP AND CHERLY IRONS-GUINN, *EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE* (2000).

40. Judge Lerner-Wren has written that "through the application of Therapeutic Jurisprudence, the Court has been able to establish an effective and innovative method of utilizing the Court system

in a positive, and in many cases, empowering mechanism for individuals with severe mental disability." *Progress Report: July 1997-June 1998, The Nation's First Mental Health Court*, 17th Judicial Circuit, Broward County, Florida (1998).

41. David B. Wexler & Bruce J. Winick, *Introduction*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick, eds. 1992).

42. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *Psych., Pub. Pol'y & L.* 193, 196 (1995).

The difference from drug courts is a fundamental one.

apeutic or nontherapeutic effects of their processes and decisions appears to be gaining advocates among at least some judges.⁴³

This philosophic orientation has had a significant impact on the operation of the mental health court and the roles played by the various participants. First, the presiding judge often states explicitly to individuals coming before the mental health court that the court is a “treatment court.” She also may emphasize to the individual that the goal of the court, if the person accepts the court’s jurisdiction, is to obtain necessary services.

Second, the court attempts to treat individuals respectfully and to elicit the individual’s views regarding his or her situation. The court greets the individual by name, and clearly attempts to engage each individual in a conversation regarding his or her thoughts on the types of resources that might prove beneficial. The court is designed to attempt to give “voice” to the individual. A commentator has described this issue in the following terms: “The judge should listen attentively to the patient and convey the impression that what he or she has to say is important and will be given full consideration. According voice and validation in this way can considerably enhance the patient’s feeling of participation and can inspire trust in the judge.”⁴⁴ In practice, this means that hearings before the mental health court often run from several minutes to a half-hour, longer particularly than initial proceedings in misdemeanor court ordinarily last.

Third, the court may attempt to gain access to treatment, or encourage a non party to obtain treatment, during the proceeding. For example, in one case we observed, the mental health court was conducting a status hearing for an individual whose condition apparently had improved after treatment in the community. During the hearing, a probation officer from a prior case came to court, indicating to the judge that he had just now located the individual who had been missing and now faced a potential charge for violation of probation. The mental health court judge, in the middle of the hearing, called the judge involved with the other case, and asked that judge to

forego a probation violation hearing at that time because the individual was doing well in treatment. The other court agreed, though it asked that the individual appear before that court so the arrangement could be spelled out. In a different case, a mother accompanied her son to a status hearing. During the hearing the mother indicated that she had previously been abused by her husband, with whom she was now living again, and expressed concern that the home environment would not be conducive the mental health of her son, the mental health court defendant. The court urged her to seek treatment in a program for traumatized women that had begun in large part to respond to women coming into the mental health court. While the mother was not a defendant before the court, the mental health court judge urged her to contact the program, saying, “I think you will really like it. I think that you will be able to benefit from it.”⁴⁵

Finally, the mental health court rarely if ever uses punitive sanctions for noncompliance with treatment. This is in marked contrast to many drug treatment courts (and some mental health courts), which rely on what former Attorney General Janet Reno described as a “carrot and stick” approach to treatment. In many drug courts, a defendant who does not comply with treatment may be jailed or face other sanctions—in the Broward County Mental Health Court, the court attempts, typically through a status hearing, to persuade the person to continue with treatment on a voluntary basis. The difference from drug courts is a fundamental one. Drug courts often rely on urine screens to determine whether a person is using drugs; if the results are positive, punitive measures are available, in part because the drug use itself was illegal and likely in violation of bond or probation conditions. Mental illness, in contrast to many forms of substance abuse, is not itself a crime, nor is there an equivalent to the urine screen as a monitoring device.

Role of Counsel

Counsel in the mental health court also play very different roles than in a traditional criminal proceeding. The proceedings are very informal, and there are few occasions where motions are filed or more formal “lawyering” occurs. This is by design. The assumption is that the adversarial process is often antithetical to obtaining appropriate services for the individ-

43. See, e.g., Deborah J. Chase & Peggy Fulton Hora, *The Implication of Therapeutic Jurisprudence for Judicial Satisfaction*, COURT REVIEW, Spring 2000, at 12; William Schma, *Judging for the New Millennium*, COURT REVIEW, Spring 2000, at 8; Randal B. Fritzler & Leonore M.J. Simon, *Creating a Domestic Violence Court: Combat in the Trenches*, COURT REVIEW, Spring 2000, at 28; Peggy Fulton Hora, William G. Schma, & John T. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (“[W]e propose to establish therapeutic jurisprudence as the [Drug Treatment Court] movement’s jurisprudential foundation. . . . We suggest that the concepts and ideas contained in this Article offer new tools and methods for dealing with the problems of crime and drug use—problems that have been ineffectively addressed by current laws and jurisprudential methodologies.”). Judge Judith Kaye, Chief Judge of the New York Court of Appeals,

has argued that the role of lawyers and courts must change dramatically in the future. Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 4 (in drug treatment courts, “the lawyers also have new roles. The prosecution and defense are not sparring champions, they are members of a team with a common goal: getting the defendant off drugs. When this goal is attained, everyone wins. Defendants win dismissal of their charges—not to mention improvement of their lives—while the public wins safer streets and reduced recidivism.”). Judge Kaye has also recently directed the courts in New York State to focus their efforts in drug cases on obtaining treatment and other services for defendants, rather than focusing on punishment. Katherine E. Finkelstein, *New York to Offer Most Addicts Treatment Instead of Jail Terms*, N.Y. TIMES, June 23, 2000, at A1.

44. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L. ISSUES 37, 58 (1999).

45. Transcript, Case No. 00-577MM10A, Broward Co. Cir. Ct., at 11.

ual. As a result, the most substantive conversations in a given case usually occur between the court, the defendant, the defendant's family if present, and the treatment staff representing local treatment providers that are usually at a hearing.

When lawyers adopt a less adversarial role, some may question whether the rights of individuals are being sacrificed. For example, an individual who chooses to proceed before the mental health court effectively waives speedy trial rights. This is because the mental health court puts off resolution of the charges until the person obtains the treatment agreed to in the proceeding before the court. In addition, an individual may be under the jurisdiction of the mental health court for a longer period of time than would have been the case in a traditional misdemeanor court. In the latter setting, many charges are disposed of through a plea and time served.⁴⁶ However, the mental health court assumes that the routine handling of misdemeanor cases when mental illness is involved is in part responsible for the fact that defendants may experience a cycle of release and rearrest. In the mental health court, status hearings to determine how the person is faring may be held over a period extending up to a year. Some might argue that the continuing jurisdiction of the court is an imposition on the person's liberty that would not occur in a more traditional setting, while others might argue that this feature of the mental health court is integral to enabling the individual to improve his or her life.

The question of the appropriate role of counsel in proceedings designed to obtain nonpunitive dispositions is not without controversy.⁴⁷ It is an issue that has arisen in other contexts such as civil commitment hearings and juvenile justice hearings.⁴⁸ In key informant interviews, representatives from the legal system suggested that these potential problems are ameliorated because the individual makes an informed, voluntary choice to have his or her case heard by the mental health court. These informants estimated that about 5% of individuals who might otherwise qualify for the mental health court decide to not proceed before it. The mental health court also has a variety of devices to obtain information about a person's competency to proceed, including ordering an evaluation of criminal competency. The importance of the issue of voluntariness has been raised in other discussions of mental health courts.⁴⁹

V. THE MENTAL HEALTH COURT AND THE ALLOCATION OF HEALTH CARE RESOURCES

Courts play an important role in the allocation of health, mental health, and human service resources through their decisions in individual cases.⁵⁰ Because the creation of the Broward County Mental Health Court was not accompanied by the creation of additional mental health services, the court effectively has had to compete with other needs within the community in gaining access to services for clients coming through the mental health court. The court does have intrinsic advantages in gaining access: while courts are often frustrated by a lack of available services for defendants, few mental health providers will simply ignore a client referred for services by a court. But this, in turn, raises a potential collateral issue: If a specialty court becomes perceived as a more certain way to gain access to services, it may create incentives to use the criminal justice system as a vehicle for obtaining care. In part, this explains the preference in some quarters for interventions that divert individuals *prior* to arrest.

At a more general level, the mental health court has had an impact on the overall development of mental health services within Broward County. There have been two programs created specifically since the inception of the mental health court based on needs identified by the court. The state legislature appropriated funds for temporary residential placements for clients referred by the mental health court, addressing what the key informant interviews have identified as a critical gap in services. In addition, one of the local mental health providers has created a program for women admitted to the court who have been victims of trauma.

The creation of these programs illustrates the power that a special jurisdiction court such as the mental health court can have in identifying service needs. In addition, the task force that had created the court provided a vehicle for lobbying the state legislature for the monies needed to establish the residential program. This was not the only such effort in Florida—another group in central Florida, composed of judges, the local sheriff, other law enforcement officials, mental health providers, and families of people with mental illness, gained \$5

[A]bout 5% of individuals who might otherwise qualify for the mental health court decide not to proceed before it.

46. A previous study of misdemeanor cases at Hillsborough County, our comparison site in this study, revealed that 94% were resolved with a plea of *nolo contendere*, usually as part of a plea agreement for "time served." Norman G. Poythress, Richard J. Bonnie, Steven K. Hoge, et al., *Abilities to Assist Counsel and Make Decisions in Criminal Cases: Findings from Three Studies*, 18 LAW & HUMAN BEHAV. 437 (1994).

47. See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1206 (1998). Boldt argues that "a reduced advocacy role defense counsel is not warranted" in drug court proceedings, because defendants face the

potential of coercive and punitive interventions. *Id.* at 1216. He also argues that the shift in role for the court, from neutral party to active involvement in treatment, may further compromise the role of counsel in advocating for his or her client because of the "therapeutic relationship" established between court and defendant. *Id.* at 1261-63.

48. Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L. ISSUES 37 (1999).

49. GOLDKAMP & IRONS-GUYN, *supra* note 39.

50. John Petrila, *Courts as Gatekeepers in Managed Care Settings*, 17 HEALTH AFFAIRS 109 (1998).

The emergence of therapeutically oriented courts raises important questions about the role of judges and lawyers

million dollars in additional funding for mental health services, and a statewide coalition, called Partners in Crisis, is emerging from these efforts.⁵¹

The emergence at the local level of coalitions involving judges, law enforcement officials, families, consumers of mental health services, and

providers to lobby for increased funding for mental health services represents an important development in the mental health field. It has often been difficult to attract political support for increased funding for mental health services in many jurisdictions, and these emerging coalitions can wield significant political power. As noted earlier, such groups can also play an important role in planning for services locally, and for addressing the issues that often arise when multiple human service and criminal justice systems are attempting to deal with complex, individual cases.

SUMMARY

The Broward County Mental Health Court, and the emergence of similar courts around the United States, is an important development in efforts to address issues raised by the numbers of people with mental illness entering the criminal justice system. The mental health court has some similarities to the drug treatment courts that have emerged in the last decade, but there are important differences as well. For example, the Broward County court is based explicitly on the premise that punishment and treatment should be separated; as a result, the court almost never applies the type of punitive sanction that has been part of the development of most drug courts.

The emergence of therapeutically oriented courts raises important questions about the role of judges and lawyers in disposing of individual cases.⁵² Mental health and drug treatment courts also highlight the role that the courts increasingly play in the allocation of mental health and other human services resources. It seems unlikely that the courts in the near future will adopt formal responsibility for administering treatment programs. Mental health courts and drug treatment courts, however, may draw judges squarely into local and state planning and, in some instances, advocacy for increased funding for services. These are important developments that are certain to stimulate much discussion and debate in the future.



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51. *Focus on Mental Illness; Policy-Makers Must Become Partners in Solving the Crisis and Muster the Resolve to Move Beyond Discussion into Action on Behalf of the Mentally Ill*, ORLANDO SENTINEL, June 18, 2000, at G2.

52. In addition to the substantive questions about the role of judging

and the role of counsel noted in this article, some judges have concluded that adoption of an explicitly therapeutic orientation may increase judicial job satisfaction. Deborah J. Chase & Peggy Fulton Hora, *supra* note 43.

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A Judge's Introduction to Neuropsychological Assessments

R. K. McKinzey

When you want to know how something works, you put it through its paces, making it do what it was designed to do. You can look at the structure of the thing, open it, take pictures and x-rays, but you won't know how well it works until you test its *function*. This principle is true for cars, radios, and body organs. Just because there is no detectable damage of the structure does *not* mean there is no detectable dysfunction.

The brain's function is behavior: that's what it does for a living. It consists of three parts—going upward, they are the subcortex, the white matter, and the cortex, the part of the brain closest to the skull. The subcortex handles basic functions like breathing and heart rate; diseases of the subcortex are assessed and treated by physicians such as neurologists and psychiatrists. Physicians use neuroimaging methods like the electroencephalogram (EEG), computed tomography (CT), or magnetic resonance imaging (MRI) to evaluate changes in the structure; they use more controversial methods, like the quantitative EEG (qEEG), single-photon emission computed tomography (SPECT), functional MRI (fMRI), and positron emission tomography (PET) to measure functioning.¹

The cortex's function, however, is those behaviors we think of as voluntary—thinking, moving, and perceiving. Psychologists have been measuring such behavior for decades with tests. Along the way, we've collected bits of behavior that tell us where the cortex is having problems; the measurement of cortical functions as expressed by such bits of behavior is called neuropsychological assessment. Neuropsychological tests measure cortical dysfunctions that are the result of damage rather than normal aging, personality traits, or a host of psychiatric conditions. Such damage or intellectual deficits can be the result of such neurological insults as head trauma, infection, toxins, substance abuse, bleeding, or tumor.

Neuropsychological issues can arise whenever psychologists are brought into civil or criminal proceedings,² and can be raised by either psychologists or neuropsychologists. In personal injury and disability cases, the presence and extent of cortical damage may be central. In competency hearings, the question of ability to dispose of property, make contracts, revise a will, testify, parent, waive Miranda rights, stand trial, or be executed could involve the results of neuropsychological testing. In criminal trials, evidence of brain damage could be used to support a plea of insanity, a defense of lesser intent, or in miti-

gation.³ If not summarized in a brief, the results of the testing would be presented as a declaration, report, or testimony.

READING A NEUROPSYCHOLOGICAL DECLARATION OR REPORT

Neuropsychologists are trained to write for other doctors, not for judges. As a result, their written productions may not be as clear as expected. The process of deciphering reports can be simplified, however.

Step One: What's the referral question? What question has the psychologist been asked to answer: Need for treatment or further testing? Competency on a given issue? Diagnosis? Does the doctor's notion of the referral question agree with yours?

Step Two: Bases of opinion. The second step is to establish what the psychologist considered and relied upon in coming to an opinion. There should be at least an interview and testing, and perhaps some records. If the records are listed, check to see whether they include the relevant ones, especially if the report was done early in the case, before some of the relevant records were produced.

Establishing the tests given can sometimes be difficult, even when the neuropsychologist lists them. There are four approaches to neuropsychological batteries: giving screening tests; giving the Halstead-Reitan Battery (HRB) or a variant, the Halstead-Russell Neuropsychological Evaluation System (HRNES); giving the Luria-Nebraska Neuropsychological Battery (LNNB); and giving an idiosyncratic battery (the flexible battery approach).

The neuropsychologist may have given one or more screening tests. For example, look for the Trail Making Test, Category Test, Bender-Gestalt, or, rarely, the Screening Test for the LNNB. Screening tests are quickly given and scored; their primary use is to decide whether a more comprehensive battery should be given. Screening tests are favored by clinical psychologists who do not have specialized neuropsychological expertise. The primary disadvantages to screening tests are their lesser accuracy than the more comprehensive batteries and their limited ability to describe the nature of the dysfunctions.

If the neuropsychologist has given the LNNB, it will be stated clearly. There may also have been other tests given as supplements.

If the neuropsychologist has given the HRB or HRNES, it may or may not be stated clearly. The core of these batteries is

Footnotes

1. Because these testing methods are rarely referred to by their full names, further reference in this article will be by their acronyms.
2. See DANIEL W. SHUMAN, *PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE* (1999).

3. See R. K. McKinzey, *Neuropsychological Assessment in Capital Cases*, 22 CACJ FORUM 50 (1995).

the Category Test, Tactual Performance Test, Seashore Rhythm Test, Speech-sounds Perception Test, and Finger Tapping Test. *It is only this core that gives the HRB any added accuracy over one or more screening tests.* Again, supplemental tests may have been given.

When the flexible battery approach is used, there will be a long list of tests that have been given. This may or may not include the HRB core (the LNNB will usually not be mentioned). Look for the Rey-Osterreith Complex Figure, Auditory-Verbal Learning Test, Boston Naming Test, and Wisconsin Card Sorting Test.

Regardless of the approach used, there may be other kinds of tests given, including Intelligence Quotient (IQ) testing, such as the Wechsler Adult Intelligence Scale (WAIS-III), Raven, Shipley, or Kaufman; academic achievement testing, such as the Woodcock-Johnson; or personality testing, such as the Minnesota Multiphasic Personality Inventory (MMPI-2), the Millon Clinical Multiaxial Inventory (MCMI-III), the Personality Assessment Inventory (PAI), or the Rorschach. *None of these should be used to determine damage,* although they may help in describing the deficits. Some psychologists are giving tests for malingering, and several tests are listed in the Appendix to this article. Unfortunately, most are highly inaccurate, as is discussed in more detail later.

Step Three: Is damage present? If the neuropsychologist has given screening tests, an opinion should be given on whether or not a complete battery of tests is necessary. If the history and testing is normal, further testing would be unnecessary. If the history reveals clear damage and the screening is abnormal, a screening might answer the referral question. If the history or testing is equivocal or the stakes high, a complete battery will be recommended.

If the neuropsychologist has given the LNNB, one or more rules will be used to decide whether or not the profile is abnormal. These decision rules are age and education corrected, and among the most sensitive of all tests for neuropsychological dysfunction. Before describing the results as normal or abnormal, however, the LNNB manual requires both a quantitative analysis of the decision rules and a qualitative item analysis.⁴ A description of deficits indicated by the profile usually follows.

If the neuropsychologist has given the HRB, one or more of several decision rules has been used, and only then followed by a description of deficits. The most common decision rule used is the Impairment Index, derived from the core tests (described in the Appendix). The Average Impairment Rating (AIR) adds five other tests. The General Neuropsychological Deficit Scale (GNDS) adds 35 to the core. The Average Impairment Scale (AIS) drops two and adds five. Other norms that are available will correct the scores for age and education and the norms used should be mentioned in the report.⁵ Properly used, these decision rules are considered quite sensitive, and should not be ignored or supplanted.

Some neuropsychologists decline to use any test or decision

rule, even when included in the battery, to opine on the presence or absence of damage. These neuropsychologists simply describe the pattern of test results, noting intellectual strengths and weaknesses. This approach is entirely appropriate in some settings, where the cause, or etiology, of the underlying neurological disorder is undisputed. When the etiology or presence of any disorder is part of the dispute, however, such an approach could prove problematic.

Step Four: What is the etiology, location, and nature of the damage? The finding of abnormality is bolstered by a documented etiology for the damage. Examples include head trauma (sometimes multiple, from fights, abuse, or car or motorcycle accidents), neurotoxins (e.g., childhood lead poisoning), parasite infestation, missile wounds (gunshots, pellets), tumors, genetic abnormalities (Huntington's, Alzheimer's), anoxia (carbon monoxide poisoning, strangulation, glue sniffing), stroke, progressive infections (AIDS, syphilis, encephalitis), or nutritional deficits (severe childhood neglect, Korsakov's).

Fetal Alcohol Syndrome, epilepsy, drug or alcohol intoxication or withdrawal, and retardation are special cases, and a complete discussion of the extensive literature on each is beyond the scope of this article. Some points should be kept in mind, however.

Fetal Alcohol Syndrome is defined as a cause of *retardation*, which will normally be diagnosed by first grade, and accompanied by an IQ score of less than 70. Fetal Alcohol Effect is used to describe those people whose mothers were drinking heavily, yet the infant was not clearly damaged or retarded.

Epilepsy is sometimes used in an "unconsciousness" defense. Seizures are said to arise from the temporal lobe, giving rise to complex behavior without conscious thought, and variously called psychomotor or complex partial seizures. Neuropsychological and neurological test results can be normal, but the diagnosis gains credibility when accompanied by an abnormal EEG.

The effects of drug and alcohol intoxication are well known. Acute withdrawal may cause intellectual clouding for hours to months, depending on a host of factors. The attribution of long-term damage to intoxicant abuse can be disputed, however, depending on the substance and the test used.

Retardation (developmental disability) is not an etiology—it is a description of intellectual and social functioning. By definition, it does not exist without an IQ test score of below 70 *and* accompanying limits in functioning. Efforts to use test inaccuracies to make a score fit the definition usually fail. "Borderline Intellectual Functioning" is still not retardation. In any case, a cause for the retardation should be available.

The credibility of the etiology and damage will be enhanced if the neurologic insult is documented and consistent with the available neurological imaging, neuropsychological testing, and history. The fit of the available information has been called "ecological validity," which essentially means "it just makes sense." The intellectual impairments from the damage should

4. See CHARLES J. GOLDEN, ET AL., LURIA-NEBRASKA NEUROPSYCHOLOGICAL BATTERY: FORMS I & II MANUAL (1995); CHARLES J. GOLDEN, ET AL., LNNB HANDBOOK: 20TH ANNIVERSARY (1999).

5. See ROBERT K. HEATON, ET AL., COMPREHENSIVE NORMS FOR AN EXPANDED HALSTEAD-REITAN BATTERY (1991).

be apparent from the time of the insult, without a long period of asymptomatic functioning in between the insult and the testing. Damage described as “marked” or “severe” ought to be apparent on neurological imaging, although subtle deficits often are not.

Having found an etiology, the neuropsychologist might suggest a specific spot for the damage (“localization”), which should have ecological validity as well. The damage will be said to be some combination of: subcortical; white matter; right, left, or bilateral; anterior (front half), posterior (back half), frontal (underneath the forehead), parietal (back and top), temporal (over the ears), occipital (far back of the head), some combination (e.g., parieto-occipital), or diffuse (the entire cortex).

There are some points to remember:

- (1) Localization should not usually be attempted using screening tests alone.
- (2) Not all brain damage leads to the same symptoms. For example, impulse control is a function of the frontal lobes, not those parts of the cortex in the back of the head. There must be a connection between the intellectual impairments caused by a given localization and the issue at hand.
- (3) Mild and moderate head blows cause damage limited to focused areas (“focal”), not diffuse. A punch might cause “coup-contrecoup” damage, in which the locus of damage is matched by the brain bruising on the opposite side of the skull in the line of the blow’s vector. The severity of the blow should have some connection to the severity of deficits: a low-speed, rear-end auto accident should not cause marked damage.
- (4) Neurotoxins (drugs, lead, poisons, etc.) generally cause diffuse damage, not focal.

At some point, the neuropsychologist will describe the intellectual impairments (“neuropsychological deficits”) shown by the testing. Again, these should have some ecological validity. The neuropsychologist may organize these according to “domains,” or different kinds of functioning. These domains include attention and concentration, moving, touch, verbal and nonverbal listening, seeing, speech, academics, memory (verbal and nonverbal, immediate and delayed), and general intellectual tasks such as abstraction, reasoning, problem solving, and concept formation.

One especially complex domain is called “executive functions,” defined as “those capacities that enable a person to engage successfully in independent, purposive, self-serving behavior.”⁶ Since volition is often affected, disorders of executive functions have long been central to legal issues.⁷

Within this domain are such notions as judgment, initiative, inhibition, impulse control, planning, self-monitoring, and maturity. Executive dysfunctions are often inferred from tasks that demand the ability to change ongoing behavior. For example, Trail Making Test B asks the testee to connect circles changing back and forth between circles with numbers and circles with letters (“1 to A to 2 to B”) and an LNNB item described as a “change-of-set coordination task” asks the testee to tap once with

one hand and twice with the other. These tests might indicate executive dysfunction; these are often ascribed to frontal lobe damage, although other areas have been implicated as well.⁸

Step Five: What is the relationship to the legal question?

Having reported the results of the testing, the neuropsychologist will then opine on the legal question at hand. Faust, among others, has pointed out the gap that often exists between neuropsychological test results and legal issues, and the neuropsychologist may strain to make the connection.⁹ The Appendix lists four common opinions:

- (1) Due to anterior, frontal, or diffuse damage, the testee is impulsive, which in turn affects level of intent or mitigation.
- (2) Due to posterior, parietal, occipital, temporal, or diffuse damage, comprehension is impaired, resulting in poor competency.
- (3) Temporal or diffuse damage has caused rages or an unconscious act, allowing a lower level of intent or a complete defense.
- (4) Whatever damage is present is grounds for monetary compensation, disability benefits (usually by affecting employability), or mitigation.

MAKING SENSE OF DIRECT EXAMINATION

In some settings, no report or declaration is ever written. The court is presented with testimony, perhaps preceded only by a brief offer of proof. The flow of testimony will go according to the procedures for any expert witness: the neuropsychologist will be qualified like any other expert, and the qualifications and possible bias explored as usual. The recitation of records read should be compared to what is available and necessary to understand the case. Listen carefully for neurological imaging (CT, MRI, EEG, qEEG, SPECT, PET) reports. One doctor will obviously opine that there is some sort of damage (as from a head blow) or dysfunction (as in epilepsy), and that the neuropsychological deficits found have something to do with the question before the court. Another doctor may present a rebuttal, and the trier-of-fact will be asked to reconcile or choose between the two opinions.

The steps to understanding the direct are the same as reading a report. Use the Appendix to keep track of the tests the doctor gave and whether or not each was abnormal. Was there a test for malingering? Do the etiology, location of damage, nature of deficits, and symptoms agree with the neuropsychological testing and neuroimaging? Does the ecological validity of the damage support the legal question at hand? If the doctors disagree, did one do a better job than the other? Ignoring them both just because they disagree is a victory for the rebuttal doctor, who may have done the worse job!

MAKING SENSE OF THE CROSS-EXAMINATION

Cross-examinations can be done crisply, yielding a maximum of information in a minimum of time. They can also be done

6. See MURIEL LEZAK, *NEUROPSYCHOLOGICAL ASSESSMENT* 42 (1995).

7. See, e.g., ISAAC RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (Harvard University Press 1838, 1963).

8. See LEZAK, *supra* note 6, at 650.

9. See DAVID FAUST, ET AL., *BRAIN DAMAGE CLAIMS: COPING WITH NEUROPSYCHOLOGICAL EVIDENCE* (1991).

tediously and sloppily, yielding a minimum of information in a maximum of time. How crisply the cross is done depends in part on whether the discovery was timely enough for proper preparation. In civil cases, discovery is usually done with sufficient time for depositions and preparation with a knowledgeable consultant. Criminal cases do not always have that luxury, and the morass of esoteric data suddenly produced may overwhelm an attorney with little experience with neuropsychological testimony. If discovery has not been timely, expect a request for a continuance. Pity the poor attorney who has not planned ahead and arranged for a consultant to be on call.

Once the cross starts, the usual approach to examining experts will be followed. If not done earlier, the doctor's qualifications and possible biases are explored. The records relied upon will be compared to those available. If any questions remain about the neuropsychological tests given (such as whether or not the test result is abnormal), these can be clarified. The cross-examiner then has to make a tactical decision on whether to go straight to the legal questions, try to do a "learned treatise" attack, or to just call a rebuttal neuropsychologist.

CHALLENGES TO THE OPINION

There are many ways of challenging a neuropsychologist's opinion, as exhaustively described by Faust,¹⁰ and the doctor will be prepared to deftly defend against the mundane ones. If properly prepared, however, the attorney may nevertheless decide to challenge the presence or absence of damage during cross. The challenge stands the best chance of being worthwhile if (a) the damage is described as mild or subtle or (b) the known level of functioning is not clearly impaired and (c) the etiology is either not well-documented or is inconsistent with the severity of the purported results (for example, a low-speed car accident causing severe damage). The potential for a misinterpretation of the test results is high in such cases. The process of such a challenge involves the concepts of decision rules, accuracy rates, norms, alternate etiologies, and malingering.

By definition, all tests use decision rules. The test has been given to many people with and without the disorder the test was designed to measure. Some decision rule has been devised to separate the two groups, with varying levels of accuracy. False positive refers to the frequency the given measure identifies the patient as having a condition the patient does not in fact have, according to a given criterion measure. For example, if an IQ test calls 60% of college graduates retarded, the test would be useless.

False negative refers to the frequency the measure misses a condition the patient has, according to another criterion measure. For example, if a blood test designed to detect an infection misses the infection 50% of the time, its utility would be greatly limited.

Hit rate refers to the combined percentages of correct diagnoses (hits), or true positives and true negatives. The perfect test has a 100% hit rate, with 0% false positives and 0% false negatives. Some psychologists prefer to use the term sensitivity for true positives and specificity for true negatives. The false

negative rate is 1 minus sensitivity and the false positive rate is 1 minus specificity. (If these terms are used in a jury trial, make sure the definitions are clearly given.)

Over the years, researchers have developed multiple sets of decision rules for some tests. Psychologists have trouble remembering a well-known fact: increasing the number of tests also increases the chances of finding something wrong. This goes for multiple decision rules created by multiple normative sets as well. This problem has been corrected for the LNNB, but not for the other approaches. At the moment, the HRB has 7 different sets of norms, and 8 different decision rules. The effect on the false positive rate of combining these rules, *even when applied in the recommended manner*, is unknown.

Interestingly, neuropsychologists sometimes do not calculate any of the rules! For example, although the core tests of the HRB have been given, there will be no mention of the HRB or of which rule has been used. As a result, goes the challenge, the doctor has no idea of the accuracy of the battery, and it might be quite high or low. The doctor who has used a battery whose accuracy is known might be able to achieve credibility over a doctor whose test battery has an unknown accuracy.

Another challenge uses the concept of multiple norms, rather than decision rules. After a psychologist gives a test to a person, the test is scored, and a number, the raw score, is obtained. The raw score is then compared to the compiled scores of people whose condition is known, including normal people. The compilation is known as norms. The raw score is converted via norms to a statistically derived number (e.g., t-scores, standard scores, scaled scores, percentiles), which is then interpreted. *It is only the normed score that has any meaning.*

But to whom is the person compared? As it turns out, tests usually need to consider more than one characteristic (or variable), such as age, to be useful. The same raw score means one thing when done by a child, another when produced by an adult. In neuropsychological assessment, age, education, and gender are common variables. The daunting task of giving the same test to a sample large enough to be representative (referred to as the standardization) is usually undertaken by the authors of a given test, who are also responsible for updating the norms when necessary. Thus, such updated tests as the Wechsler IQ tests (W-B, WAIS, WAIS-R, and WAIS-III) and MMPI (now the MMPI-2) have had normative updates consisting of hundreds of people. However, many neuropsychological tests do not have authors capable of such large-scale efforts, and have much more limited norms available.

What is a psychologist to do when the available norms are insufficient? The answer, in practice, became: gather your own. In 1970 and 1984, Bert W. Russell, wanting to improve on the 1947 norms for the Halstead-Reitan Battery, published two sets of his own. By 1991, it was clear that none of the three sets adequately accounted for age, education, and gender, so another two sets (one in book form, another computerized) was produced.¹¹ In response, Reitan and Russell produced two more sets of their own, making a total of seven different sets of norms, *all of which are still in use*. None of these norms, includ-

10. See FAUST, *supra* note 9.

11. See HEATON, ET AL., *supra* note 5.

ing the oldest set, have been unequivocally declared as superior to the others.

A new book by Maura Mitrushina and others has documented the explosion of available norms for a wide variety of neuropsychological tests.¹² For example, Mitrushina and her coauthors list 19 different normative sets for the Category Test, 24 for the Trail Making Test, and 37 for the Finger Tapping Test. Some of these norms are crude, with too few people to make them representative. This has not stopped neuropsychologists from using them, however.

The problem with having multiple neuropsychological norms available is that, in some cases, the use of a different normative set dramatically changes the interpretation: a normal score becomes abnormal, or vice versa. An abnormal score becomes better or worse. A testee goes from being tragically demented to perfectly normal, depending *entirely* upon which set of norms the psychologist chooses to use.

For example, one criminal defendant, age 67, was sent to a neuropsychologist in hopes of finding a defense. Three weeks prior to the crime, the defendant suffered a blow from a falling heavy box at an acquaintance's home. He had no loss of consciousness and drove himself to the emergency room, where the wound was cleaned and he was released. The neuropsychological exam, done five months later, found sufficient intellectual deficits to challenge the defendant's ability to form intent. However, to support such a finding, the neuropsychologist had to use non-age-corrected norms, despite explicit test manual instructions to the contrary. When age norms were applied by a rebuttal expert, the test results became quite normal, and the defense was gutted.¹³

A less esoteric challenge asks whether the neuropsychologist considered other reasons for the abnormal results. Such alternative reasons include psychiatric conditions, medication, post-arrest trauma, or malingering.

Psychiatric conditions like the psychoses (e.g., schizophrenia, manic-depression) and serious depression also *sometimes* produce abnormal neuropsychological test results. So far, no undisputed actuarial method exists to rule out all psychiatric conditions as the cause of abnormal neuropsychological test results, leaving clinical judgment and ecological validity.

Medication (or the lack of it) may need to be considered as alternative etiologies. A patient in chronic pain may be using codeine to ease the pain, and may get abnormal results due to the sedation. Too little thyroid medication may disrupt thinking. Too much caffeine can cause anxiety that seems like impulsiveness. Confusion may be shown by the secret imbiber of alcohol.

Another challenge asks a simple question: "Doctor, how do you know the patient wasn't faking?" We've long known our tests are easily faked, but detecting malingering on neuropsychological testing has proven to be fairly difficult. It has taken 20 years to produce such procedures, and they are only now finding their way into routine use. The race was won by the stand-alone Test for Malingered Memory (TOMM), but other successful tests followed, and more are on the way. Of course,

giving a special test to detect malingering has a weakness, as the procedure might be spotted, especially if the testee's attorney warns the testee ahead of time. This aspect of the problem has been addressed by the development of procedures embedded within a test that measures other functions. Such internal validity scales have now been validated and cross-validated for the LNNB and Raven Progressive Matrices.

It is thus now possible to give a comprehensive neuropsychological battery with multiple checks for malingering, and some neuropsychologists are arguing that such methods should be routinely given in both clinical and forensic settings. Considerable resistance remains, however, as does the use of inadequate tests. There are common variants of three errors:

- (1) Using various arguments, some psychologists resist giving any malingering test or procedure at all, even when the forensic nature of the referral is clear. One doctor simply rejected the vast literature as being "unsettled," arguing that, since some tests in the battery were normal, the patient couldn't possibly be faking. This argument is contradicted by the research. Some psychologists may simply argue that the patient's tests are internally consistent. Although inconsistency has been cited as a hallmark of fakers, the rule has never been validated, and the psychologist will be unable to provide a specific false negative rate.
- (2) Some psychologists will use malingering tests that are known to be inaccurate. One well-known measure, the Fifteen Item Test (also known as Rey's Memory Test,) remains in use despite research showing it to be completely insensitive to malingering. Some try to use personality tests like the MMPI, despite decades-old research showing it to be unsuitable as a measure of *neuropsychological* malingering.
- (3) Some psychologists will use tests that are insufficiently validated. There are many tests and procedures that have been tried with one sample (the initial validation), but not with a second, independent sample (the cross-validation). The research has repeatedly shown that cross-validation is essential, as most measures fail to maintain the accuracy levels obtained in the initial validation.

Now that specific, accurate, easily given malingering tests are available, such errors and resistance are no longer defensible, unless the ecological validity is of such clarity that malingering simply is not credible in the case at hand.

If there is damage, so what? On direct, the neuropsychologist may have argued that there was a connection between the intellectual deficits and the legal issue at hand. The argument must be made at a level understandable to the trier-of-fact, and it takes no specialized knowledge to challenge the relationship: What does intellectual impairment of any sort have to do with the legal question at hand? It is at this point that the real issue before the court can be addressed. The sometimes bewildering mass of neuropsychological details should never be allowed to obscure a yawning gap between the test results and the decision to be made, nor to obscure a perfectly reasonable connection.

12. MAURA N. MITRUSHINA, ET AL., HANDBOOK OF NORMATIVE DATA FOR NEUROPSYCHOLOGICAL ASSESSMENT (1999).

13. See R. K. McKinzey & Thomas Ziegler, *Challenging a Flexible Neuropsychological Battery under Kelly/Frye: A Case Study*, 17 BEHAV. SCI. & L. 543 (1999).

SOME UNSOLICITED ADVICE: JUDICIAL DECISIONS AND LOGISTICS

Funding. If the court controls indigent funding, the first decision will be whether to allow a neuropsychologist to be hired. The request will come after the attorney has gotten some history of neurological insult or a recommendation from a psychiatrist or psychologist, who may have given a screening test. In capital cases, however, the request ought to be made even *without* a currently known history, as the frequency of neuropsychological impairments rises with the level of violence.¹⁴

Extent of testimony. Neuropsychologists have training and experience in the evaluation of some medical conditions. They routinely make diagnoses, devise treatment plans, and establish etiologies. In some jurisdictions, however, the extent of their testimony is an appellate matter, and some research prior to the testimony will be necessary. The American Psychological Association often files amicus briefs on such issues, and their positions can be found at <http://www.psyclaw.org/issues.html>. The primary issue seems to be the reluctance of some jurisdictions to allow a nonphysician the ability to make judgments about the etiology of a given disorder. This issue can perhaps be avoided by simply rephrasing the question as, "Doctor, are the test results most consistent with" a given etiology.

Attorney presence. Sometimes, an attorney demands to be present during an evaluation. Neuropsychologists worry that the presence of a third party or videotape affects the security and validity of the tests, which were never designed to be used with a third party in the room. They therefore balk at the demand, citing the policy statement of the National Academy of Neuropsychologists.¹⁵ If no compromise can be agreed upon, a decision by the court may be necessary. But in most cases a judge can treat this as a nonissue. The attorney is extremely unlikely to uncover anything untoward in the interview and testing, and is equally unlikely to pay another neuropsychologist to watch the entire exam on the off chance that something useful will be spotted. On the other hand, having the attorney on-call in the waiting room can do much to reduce the natural anxiety a testee feels during an adversarial exam.

Raw protocols. Sometimes, a psychologist will balk at releasing the testing materials ("raw protocols") to anyone other than an appropriately trained psychologist, citing the ethical code of the American Psychological Association¹⁶ and of the National Academy of Neuropsychologists¹⁷ on maintaining test security and copyrights. This is usually handled by the raw protocols being sent to the consulting psychologist. Sometimes, the requesting attorney refuses to name the psychologist for some obscure tactical reason. In the end, the psychologist will release records to whomever the court orders, asking only that the test forms being copied do not become part of the public record.

This policy has been called "silly," however,¹⁸ and is in the process of revision.

Testimony logistics. When testimony is planned, some points should be made to the presenting attorney. To avoid tedious delays, make sure the doctor has a recent vita and can easily recite what records have been read. Ask if the doctor plans to use a poster as an exhibit to present the test results. If the doctor plans to use an exhibit, has it been presented for discovery in a timely manner? Most importantly, make sure the doctor understands that court schedules unavoidably change with *no* warning, and the doctor might have to change scheduled obligations to accommodate the court's schedule. If the court's budget is responsible for the doctor's hourly fees, try to minimize the time the doctor waits in the hall.

SUMMARY

Neuropsychological assessment is the testing of cortical functioning designed to diagnose neurological disorders that cause psychological symptoms. The results may not agree with neuroimaging, which are tests of structure. Neuropsychologists will appear in the same settings as psychologists and are subject to the same rules. Understanding a neuropsychologist's opinion includes the steps of deciphering which tests have been given, whether other sources for abnormal results have been considered, and the logic of the application of the results to the legal question at hand. The latter will always be attacked by the adversary, but more-sophisticated "learned treatise" attacks are possible as well. The testimony will be smoothest, of course, if proper planning and preparation have been undertaken by the presenting and cross-examining attorneys. Judges and attorneys listening to a neuropsychological expert or reviewing such an expert's report may find the Appendix that follows a useful tool in understanding and considering the testimony.



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14. See MCKINZEY, *supra* note 13.

15. See National Academy of Neuropsychology, *Presence of Third Party Observers during Neuropsychological Testing*, in 15 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY 370 (2000) (found on line at <http://nanonline.org/nan/subpages/professional/policies.html>).

16. The APA code can be found online at <http://www.apa.org/ethics/code.html>.

17. See National Academy of Neuropsychology, *Test Security*, in 15 ARCHIVES OF CLINICAL NEUROPSYCHOLOGY 383 (2000) (found online at <http://nanonline.org/nan/subpages/professional/policies.html>).

18. See Paul R. Lees-Haley & John C. Courtney, *Disclosure of Tests and Raw Test Data to the Courts: A Need for Reform*, 10 NEUROPSYCHOLOGY REV. 169 (2000).

Appendix Exam Checklist

Use x for abnormal, o for normal, underline for given but result not clear

Luria-Nebraska Neuropsychological Battery

Halstead-Reitan Battery Decision Rule Used:

Norms used: • Heaton '91 • HRNES '93 • Reitan '93 • Russell ('70? '84?)

Severity • AIR • AIS • GNDS • AIR

Impairment Index • II • II • II

Core (Impairment Index)

Category Test

Tactual Perception Test

Total Time

Location

Memory

Seashore Rhythm

Speech-sounds Perception

Tapping (Dominant Hand, usually right)

Additional (AIR)

Trails A

Trails B

Aphasia Screening

Spatial Relations

Sensory Perceptual

AV-1

Screening Tests (these are the most common, but there are many others)

• Bender Gestalt • Screening Test for the LNNB • Cognistat • MicroCog • Quick Neuropsychological Screening Test

Flexible Battery: Common Tests (but there are many others)

• Wisconsin Card Sorting Test • Symbol Digit Modalities • Hooper
• Auditory-Verbal Learning Test • Rey-Osterreith Complex Figures • Conner's CPT
• Wechsler Memory Scale (R? III?) • Boston Naming Test • Memory Assessment Scale
• Peabody Picture Vocabulary Test • Boston Diagnostic Aphasia Exam • Stroop (whose norms?)

IQ Tests (can be used to describe deficits, but not determine damage)

• Wechsler Adult Intelligence Scale (WAIS) (R? III? NI?) • Raven Progressive Matrices (faking formula scored?)
• Shipley ILS (heavily influenced by culture) • Kaufman Brief Intelligence Test

Malingering Tests

• Rey's 15 Item Test • TOMM • PDRT
• 21 Word Test • Victoria • HRB formula (whose?)
• LNNB formula • SIRS (not used for brain damage!) • CARB
• Symptom Validity Testing • "Just makes sense" • VIP

Personality Tests (none should be used to determine brain damage)

• MMPI (I? II?) • MCMI (I? II? III?) • PAI • SCL-90-R • TAT
• Beck Depression Inventory • Rorschach • Draw-A-Person, Human Figure Drawing • Sentence Completion

Achievement Tests (none should be used to determine brain damage)

• Wide Range Achievement Test (WRAT, R? III?) • North America Reading Test
• Peabody Individual Achievement Test • Woodcock-Johnson

Severity of Deficits

• Normal • Borderline • Mild/Subtle • Moderate • Marked/Severe/Profound (neuroimaging should be positive)

Diagnosis (DSM-IV)

• Dementia Due to (etiology) • Personality Change Due to (Etiology) • Retardation • Cognitive Disorder NOS
• Postconcussion Syndrome • Attention Deficit/Hyperactivity Disorder (ADHD) • Antisocial Personality Disorder
• Substance-induced Mood or Withdrawal Disorder • Substance Dependence/Abuse

Etiology: • Head Trauma • Infection • Poisoning • Substance Abuse • Tumor • Genetic

Documented?

When?

How?

Confirmed by neuroimaging tests of:

• structure • CT • MRI • EEG
• function • qEEG (BEAM, Brain Mapping) • SPECT • PET • fMRI

Dr's Opinion on legal issue

• Unclear (Clarify)
• Anterior/Frontal/Diffuse causes impulsivity/substance abuse/lower level of intent
• Posterior/Parietal, Occipital, Temporal/Diffuse causes poor comprehension
• Temporal/Diffuse causes rages/unconsciousness/lack of intent
• Damage is grounds for mitigation (Why?)
• Other

Lexis-Nexis Ad

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The Resource Page: Focus on *U.S. v. Microsoft*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 00-5213

Microsoft Corporation

Defendant-Appellant,

v.

United States of America,

Plaintiff-Appellee.

Microsoft Corporation

Defendant-Appellant,

v.

State of New York, ex rel.

Attorney General Eliot Spitzer, et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLANT

Editor's Note: In this and the preceding issue of Court Review, we have published a series of essays concerning the propriety of public comment by judges about pending, or impending, matters. While this discussion, prompted by Judge Posner's book on the Clinton impeachment, was in progress, another real-life discussion of this issue took center stage: Microsoft's appellate argument that the antitrust judgment against it should be set aside because of the public comments made by the district judge handling that case.

The Microsoft case may, in many ways, simply be a unique case. The district judge's decision to speak widely and publicly regarding it may also be unique. But even though that case may contain some unique aspects, we believe that the arguments made in it may provide useful and general lessons as well. For example, many judges who have handled high-pro-

file cases have made themselves available for off-the-record or background sessions with reporters. Microsoft has challenged such practices as "secret" sessions in which the judge not only explained the proceedings, but also made personal remarks about the parties and witnesses and received extrajudicial information from the reporters.

In our Resource Page section, we occasionally reprint materials that we believe will be of broad interest to judges, particularly when they may not be readily available elsewhere. We believe that the briefs filed on appeal by both sides in the Microsoft case merit publication here. Whether one agrees or disagrees with the specific conduct of the trial judge in the Microsoft case, the way in which that conduct has been described and argued on appeal should be of interest to other judges.

Pagination of the original briefs is shown in brackets.

STATEMENT OF THE ISSUES

[2] 6. Whether the district judge's public statements about the merits of the case require that the judgment be vacated and the district judge disqualified from any further proceedings.

STATEMENT OF THE CASE

This case arises out of Microsoft's competition with Netscape from 1995 to 1998—the so-called “browser war.” In competing with Netscape to satisfy increasing demand for Internet functionality, Microsoft (i) developed new versions of its Windows operating system that included Internet technologies, (ii) distributed those technologies widely, and (iii) encouraged third parties to design their software products to take advantage of those technologies. Consumers clearly benefited from this competition. As the district court found, Microsoft's conduct contributed significantly to (i) improving the quality of Web browsing software, (ii) lowering its cost, and (iii) increasing its availability. Microsoft's inclusion of Internet technologies in Windows also benefited the thousands of software developers that create applications that run on the operating system. At the same time, nothing Microsoft did limited Netscape's ability to compete: Netscape's Web browsing software remained “fully interoperable” with Windows, and Netscape had unimpeded access to “every PC user worldwide.” In fact, Netscape's customer base grew dramatically during the period in question. To sanction Microsoft for improving its products and promoting and distributing them vigorously—as the district court did—would stifle innovation and chill competition, contrary to the purposes of the antitrust laws.

The proceeding below went badly awry from the outset. When this case was filed in May 1998, then Assistant Attorney General Joel Klein said that the DOJ had embarked on a “surgical strike,” challenging Microsoft's inclusion of Web browsing software in Windows. Steve Lohr, [3] *U.S. v. Microsoft: The Case*, N.Y. TIMES, May 19, 1998, at A1. Over the next two years, however, the district court permitted plaintiffs to transform their case beyond recognition. As a result, what began as an attack on Microsoft's addition of Internet technologies to Windows ended with an unprecedented order breaking up the company—a completely unjustified outcome that no one could have imagined at the outset.

The district judge's extensive public comments about the merits of the case epitomize his disregard for proper procedure. The day after judgment was entered, news organizations began publishing stories based on interviews with the district judge. Two *New York Times* reporters, who liberally quoted the district judge in a recently-published book, disclosed that he granted them interviews “during the trial on the condition that his comments not be used until the case left his courtroom.” JOEL BRINKLEY & STEVE LOHR, *U.S. v. MICROSOFT* 6 (2000). These “friendly, informal and unstructured” discussions were described as “a rare audience with a sitting judge during the course of a trial.” Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at C8. Following entry of judgment, the district judge embarked

on a speaking tour, appearing at antitrust conferences here and abroad to discuss his views of Microsoft and his reasons for breaking up the company. The district judge's public comments would lead a reasonable observer to question his impartiality and—together with other procedural irregularities—the fairness of the entire proceeding.

[6] Despite Microsoft's motion for a continuance, trial began on October 19, 1998, five months after the complaints were filed. The parties concluded their cases-in-chief on February 26, 1999 and presented rebuttal evidence between June 1 and June 24, 1999.

The district court issued findings of fact on November 5, 1999. 84 F. Supp. 2d 9 (D.D.C. 1999). Although 412 paragraphs long, the district court's findings contain no citations to the record, making it impossible to ascertain the purported basis for many findings. The most inculpatory “findings” consist of sweeping, conclusory assertions, unfounded inferences and speculative predictions masquerading as “facts.” *E.g., id.* at 111-12 (FF 411-12). In commenting to the *New York Times* on the harsh tone of his findings, the district judge explained his judicial philosophy towards Microsoft as follows:

I like to tell the story of the North Carolina mule trainer He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him:

[7] “How do you do it? How do you train the mule to do all these amazing things?” “Well,” he answered, “I'll show you.” He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: “You just have to get his attention.” I hope I've got Microsoft's attention.

BRINKLEY & LOHR, *supra* at 278. In making its findings, which adopted nearly all of plaintiffs' factual assertions, the district court ignored vast amounts of uncontradicted evidence submitted by Microsoft on the central issues in the case.

SUMMARY OF ARGUMENT

[64] The entire proceeding below was infected with error. Revealing a profound misunderstanding of the antitrust laws, the district court condemned Microsoft's competitive response to the phenomenal growth of the Internet and the emergence of Netscape as a platform competitor. Far from violating the antitrust laws, Microsoft's conduct was procompetitive, producing enormous consumer benefits. Thomas W. Hazlett, *Microsoft's Internet Exploration*, 9 CORNELL J. L. & PUB. POL'Y 29, 52 (1999) (“The facts of the ‘browser war’ lead inexorably to one conclusion: [65] consumers have benefited enormously from the ferocious rivalry between Netscape and Microsoft.”). The district court branded Microsoft's actions anticompetitive even though it recognized that Microsoft did not foreclose Netscape from the marketplace. In addition, the district court's handling of the case was fundamentally flawed, invariably to Microsoft's detriment, culminating in the imposition of the draconian relief requested by plaintiffs, including a breakup of

the company, without holding a hearing. Then, in an attempt to defend his rulings, the district judge embarked on a speaking tour, which followed his extrajudicial discussions with reporters during trial. The district judge's public comments about the merits of the case, together with his improper handling of the litigation, undermine all confidence in the integrity of the proceedings. This Court should reverse the judgment below and direct entry of judgment for Microsoft for the following reasons.

. . .

[67] 6. The district judge's repeated public statements about the merits of this case, including comments made during the trial itself, violated the Code of Conduct for United States Judges and would cause an objective observer seriously to doubt his impartiality. These public comments alone require that the judgment be vacated. Thus, if any part of the judgment is not reversed as a matter of law, the judgment should be vacated in its entirety and the remainder of the case remanded to a different judge for a new trial.

ARGUMENT

. . .

VI.

The District Judge's Public Comments Concerning the Merits of the Case Require That the Judgment Be Vacated and the Case Reassigned to Another Judge.

[146] On June 8, 2000, the day after judgment was entered—but with important post-trial motions still to be heard—numerous news organizations, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Washington Post*, *Newsweek*, *USA Today* and National Public Radio, began publishing stories based on interviews with the district judge. The district judge apparently started granting press interviews “during trial on the condition that his comments not be used until the case left his courtroom.” BRINKLEY & LOHR, *supra* at 6. The *New York Times* described those interviews as “friendly, informal and unstructured” discussions. Brinkley & Lohr, N.Y. TIMES, *supra* at C8.

After entry of judgment, the district judge continued to speak publicly about the case—particularly his decision to break up Microsoft—and about his views of Microsoft's character. On September 18, 2000, the district judge spoke about the case at a conference in Amsterdam sponsored by the International Bar Association. On September 28, 2000, he discussed the case at an antitrust seminar in Washington, D.C. sponsored by a private law firm. James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, WASH. POST, Sept. 29, 2000, at E1. On October 2, 2000, he discussed the case during a speech at Dartmouth College. Alison Schmauch, *Microsoft Judge Shares His Experiences*, THE DARTMOUTH, Oct. 3, 2000, at 1. On October 5, 2000, he gave a speech about the case at St. Mary's College of Maryland. Peter Spiegel, *Microsoft Judge Defends Post-Trial Comments*, FIN. TIMES, Oct. 6, 2000, at 4. And on October 27, 2000, the district judge spoke at a law school conference on Capitol Hill. *Microsoft Judge Says He May Step Down from Case on Appeal*, WALL ST. J., Oct. 30, 2000, at B4. This Court can take

judicial notice of the generally known fact that the district judge has been speaking publicly about the [147] case (to the press and others) as reported in these publications. See *Washington Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991).

The district judge's public comments about the case both during and after trial violated the Code of Conduct for United States Judges. 175 FR.D. 363 (1998). Canon 3A(6) provides: “A judge should avoid public comment on the merits of a pending or impending action . . .” *Id.* at 367. The official commentary states: “The admonition against public comment about the merits of a pending or impending action continues until completion of the appellate process.” *Id.* at 370. The Code of Conduct is thus clear that “a judge never may discuss the merits of a pending case in a non-judicial forum, especially when he has reason to know that the parties to the litigation may appear before him again for further judgment in the case.” *In re Barry*, 946 F.2d 913, 917 (D.C. Cir. 1991) (Edwards, J., dissenting). Because “the proscription against commenting on the merits of a pending case in a non-judicial forum is absolutely unequivocal,” *id.* at 917 n.3, the district court's repeated public comments about this case are indefensible. See also *In re IBM*, 45 F.3d 641, 642-43 (2d Cir. 1995) (referring to “newspaper interviews given by the Judge concerning IBM's activities” as one basis for recusal); *United States v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976) (“It cannot be gainsaid that public comment bearing specifically upon pending or impending litigation is an activity that judges should scrupulously avoid.”), *cert. denied*, 431 U.S. 933 (1977).

Such comments are grounds for disqualification under 28 U.S.C. § 455(a), which requires a judge to “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Indeed, the district court recently stated that he would consider recusing himself if this Court does not affirm his ruling. *Microsoft Judge Says He May Step Down from Case on Appeal*, WALL ST. J., *supra* at B4. The test under Section 455(a) is an objective one, requiring [148] disqualification if there is an appearance of partiality. See *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 865 (1988); *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995). The proscription against public comments on the merits of a pending case “is so straight-forward and unequivocal under the Code of Conduct that its breach will almost always give rise to a legitimate claim of disqualification under section 455(a).” *In re Barry*, 946 F.2d at 917 (Edwards, J., dissenting). As Chief Judge Edwards stated:

The integrity of the judicial process would be seriously doubted if judges were free to air their views on pending cases outside of the appropriate judicial forum. Whenever such an occurrence arises, a judge should recuse himself to protect the sanctity of the judicial process. It does not matter whether the judge intends to act with bias or otherwise to prejudice the defendant. What matters is that there has been a breach of a code of conduct by an officer of the court such that the integrity of the process has been called into question. That is enough to warrant recusal.

Id. at 917-18 (footnotes omitted). Simply stated, “[a] judge should be above the fray; he or she should not be influenced by, or appear to be caught up in or contribute to, public clamor.” *In re Charge of Judicial Misconduct*, 47 F.3d 399, 400 (10th Cir. Jud. Council 1995). By repeatedly commenting on the merits of the case in the press, the district judge has cast himself in the public eye as a participant in the controversy, thereby compromising the appearance of impartiality, if not demonstrating actual bias against Microsoft.

In fact, the district judge’s remarks reveal sufficient antagonism toward Microsoft to “cause an objective observer to question [the judge’s] impartiality.” *Liljeberg*, 486 U.S. at 865. For example, in discussions with the *New York Times*, the district judge reportedly analogized Microsoft’s executives to “drug traffickers” caught on telephone wiretaps. BRINKLEY & LOHR, *supra* at 6. He also repeatedly attributed his decision to impose structural relief to what he described as Microsoft’s “intransigence.” E.g., Grimaldi, WASH. POST, *supra* at E1. And he impugned Microsoft’s chairman, stating: “Bill Gates is an ingenious engineer, but I don’t think he is that adept at business ethics.” Spiegel, FIN. TIMES, *supra* at 4. Lastly, the district judge [149] discussed his personal views on the merits of the case, including such matters as product integration (e.g., taking issue with Justice O’Connor’s statement in *Jefferson Parish* that cameras are a single product, BRINKLEY & LOHR, *supra* at 263) and his reasons for breaking up Microsoft.

In *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993), the court held that a district judge should have disqualified himself under Section 455(a) because of a single appearance on the television program *Nightline*. The judge’s statements in *Cooley* were, if anything, less objectionable than the remarks at issue in this case. After entering an injunction barring protesters from blocking access to an abortion clinic, the judge in *Cooley* appeared once on *Nightline* to emphasize that his injunction would be enforced. *Id.* at 995. Stressing that the judge deliberately chose “to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him,” the court concluded: “[A]t least after the judge’s volunteer appearance on national television to state his views regarding the ongoing protests, the protesters, and his determination that his injunction was going to be obeyed, a reasonable person would harbor a justified doubt as to his impartiality in the case involving these defendants.” *Id.* To remedy the violation of Section 455(a), the court vacated each defendant’s conviction and sentence and remanded the case for a new trial before a different judge. *Id.* at 998.

The district judge here deliberately chose to discuss the merits of the case in public, expressing strong personal views about Microsoft and its executives in person, in print and on the radio, both during and after trial. Indeed, some of his remarks suggest that he may have prejudged the central issue in the case—tying—in advance of his liability ruling. Cf. *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Texaco, Inc. v. FTC*, 336 F.2d 754, 759-60 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965). The district judge’s decision to discuss repeatedly the merits of the case in public, and thereby flout [150] the Code of Conduct’s clear proscription, is all the more egregious

because this Court has already admonished him for expressing views on a pending case outside a judicial forum. See *In re Barry*, 946 F.2d at 40. Likewise, the district judge’s apparent decision to read letters he received from the public during trial, some of which he described as “thoughtful pieces by people who were vitally interested in the case,” Sarah Jackson-Han, *Father in Law*, DARTMOUTH ALUMNI MAG., Nov./Dec. 2000, at 44, was a flagrant violation of Canon 3(A)(4) of the Code of Conduct. *Microsoft*, 56 F.3d at 1464.

The district judge’s violations of the Code of Conduct are emblematic of the manner in which he conducted the entire case—employing improper procedures and changing the rules of the game, always to Microsoft’s detriment. To preserve the appearance of justice, should any of plaintiffs’ claims survive review, the Court should vacate the judgment as to those claims and remand for a new trial before a different district judge.

CONCLUSION

The Court should reverse the judgment below and direct the entry of judgment for Microsoft. As to any aspect of the judgment not reversed, the Court should vacate and remand the case to a different district judge for a new trial.

Respectfully submitted,

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November 27, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al.*,

Plaintiffs-Appellees

v.

MICROSOFT CORPORATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES UNITED STATES AND THE STATE PLAINTIFFS

. . .
SUMMARY OF ARGUMENT
. . .

[45] VI. Finally, Microsoft cannot establish any prejudice from the out-of-court statements of Judge Jackson. Those statements provide no grounds for inferring bias or partiality, nor establish a basis for setting aside the judgment or removing him from subsequent proceedings. That result follows no matter how this Court evaluates Judge Jackson's statements under the Canons of Judicial Conduct.

ARGUMENT
STANDARD OF REVIEW

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a) [46] Microsoft makes one perfunctory reference to Rule 52 in its discussion of the standard of review (MS Br. 67-68), but nowhere in its brief does Microsoft forthrightly argue that any of the district court's 412 Findings of Fact must be set aside as clearly erroneous within the meaning of Rule 52. Rather, at various points in its brief, Microsoft has chosen to criticize selectively certain of the court's findings. Although Microsoft's brief occasionally skirts the edges of a clear error argument, it is not our obligation or this Court's to

identify which of Microsoft's various criticisms may have been intended to constitute such an argument. Nor should the Court accept Microsoft's implied invitation to ignore the dictates of Rule 52 and usurp the role of the district court by engaging in "impermissible appellate factfinding." *Amadeo v. Zant*, 486 U.S. 214, 228 (1988); *see also Milmark Servs., Inc. v. United States*, 731 F.2d 855, 859 (Fed. Cir. 1984)

. . .
VI.

JUDGE JACKSON'S OUT-OF-COURT COMMENTS DO NOT MERIT VACATING THE JUDGMENT OR REMOVING HIM FROM FURTHER PROCEEDINGS

[145] 1. Microsoft claims (MS Br. 147-49) that comments Judge Jackson made about the case in public lectures and newspaper interviews published after entry of the judgment demonstrate bias, or an appearance of bias, and are therefore grounds for disqualification under 28 U.S.C. 455. Those objections are unfounded. The Court should not take the extraordinary step of vacating the judgment or ordering the judge to recuse himself from further proceedings in the case. MS Br. 149.

Section 455 requires recusal of judges who are biased or whose "impartiality might reasonably be questioned." 28

U.S.C. 455(a), 455(b)(1). The Supreme Court has made clear, however, that the bases for recusal on those grounds are limited. First, “judicial rulings alone almost never constitute [146] a valid basis for a bias or partiality motion.” *Liteky v. United States*, 510 U.S. 540, 555 (1994). Second, “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Id.* at 555. The four comments that Microsoft cites as a basis for recusal (MS Br. 145-46) founder on both *Liteky* rules.

The first comment (MS Br. 148) is a public statement attributed to Judge Jackson in the *Financial Times* of October 6, 2000, as follows:

“Bill Gates is an ingenious engineer, but I don’t think he is that adept at business ethics,” [Judge Jackson] said. “He has not yet come to realise things he did (when Microsoft was smaller) he should not have done when he became a monopoly.”

Peter Spiegel, *Microsoft Judge Defends Post-Trial Comment*, *FIN. TIMES*, Oct. 6, 2000, at 4. That reported post-trial statement plainly does not show “deep-seated favoritism or antagonism.” *Liteky*, 510 U.S. at 555. It reflects little more than the court’s ultimate ruling that, in a series of actions taken with Gates’ participation and approval, Microsoft violated Sections 1 and 2 of the Sherman Act. *See id.* at 551 (“not subject to deprecatory characterization as ‘bias’ or ‘prejudice’ are opinions held by judges as a result of what they learned in earlier proceedings”).

The second comment (MS Br. 148) is a passage in Brinkley and Lohr’s book that begins with the authors’ view that “the most damaging documents—the ones that galvanized the resolve of state and federal prosecutors—were written months after that first government [document] request arrived, months after Microsoft’s leaders knew that everything they wrote was likely to wind up in prosecutors’ hands.” JOEL BRINKLEY & STEVE LOHR, *U.S. v. MICROSOFT* 6 (2000). The authors then write that Judge Jackson, who admitted those documents into evidence, likened the phenomenon to the federal prosecution of drug traffickers, who are repeatedly caught as a result of telephone [147] wiretaps. “And yet, he said, ‘they never figure out that they shouldn’t be saying certain things on the phone.’” *Id.* That comparison simply notes an analogy from the judge’s trial experience. It does not reflect “bias or prejudice.” 28 U.S.C. 455.

The judge’s apparent reference in a lecture (reported in the September 29, 2000, *Washington Post*) to Microsoft’s “intransigence” as a basis for ordering structural relief also shows no bias. The remark essentially restates the court’s determination, in its June 7, 2000, opinion on remedy, that a structural remedy is needed in part because Microsoft was unwilling to accept the notion that it broke the law and because it continued to engage in the sort of predatory conduct that the court found unlawful. Remedy Order at 62 (JA 2844); *see Liteky*, 510 U.S. at 550-51, 555. Contrary to Microsoft’s suggestion (MS Br. 148), the fourth cited comment (stating that cameras ought to be available with, and without, light meters, BRINKLEY &

LOHR, *supra*, at 263) does not refer to, much less take issue with, Justice O’Connor’s concurring opinion in *Jefferson Parish*, nor does it reflect bias in any way. And the judge’s “due process” remark, which Microsoft cites elsewhere in its brief (MS Br. 11), essentially restates his ruling that due process did not require additional proceedings on remedy beyond those conducted by the court. *See pp.* 144-45, *supra*.

Indeed, taken in their entirety, Judge Jackson’s comments demonstrate neither bias nor the appearance of bias. For example, the Brinkley and Lohr book quotes the judge describing Microsoft as “a large and important company, innovative and admirable in a lot of ways.” BRINKLEY & LOHR, *supra*, at 277-78. The *Washington Post* article cited by Microsoft says: “But Jackson said he held no ill will against the company or its co-founder and chairman, Bill Gates. ‘I have never conceived of this case as a contest of wills between me and Mr. Gates,’ he said.” James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, *WASH. POST*, Sept. 29, 2000, at E1. And the *Financial Times* article relied on by Microsoft reports that the judge made clear he was still “full of admiration’ for [148] Microsoft’s accomplishments in the software industry.” To be sure, the judge did not allow that admiration to prevent him from fairly weighing the evidence and concluding that Microsoft had violated the antitrust laws, but that is the mark of impartiality. As Judge Learned Hand observed, if an examination of the evidence results in “bias,” it “is precisely the bias which all evidence is intended to create and which it should create, if a court does its duty.” *Alcoa*, 148 F.2d at 433. That is, of course, not “bias” within the meaning of Section 455.

2. Microsoft contends that Judge Jackson’s statements are contrary to Canon 3A(6) of the Code of Conduct for United States Judges, 175 F.R.D. 363 (1998), which provides:

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 the purposes of legal education.

175 F.R.D. at 367. Microsoft also asserts that Judge Jackson considered *ex parte* communications in violation of Canon 3A(4) because of his “apparent decision to read letters he received from the public during the trial” (MS Br. 149, citing *DARTMOUTH ALUMNI MAG.* Nov./Dec. 2000, at 44), but the cited article does not say that Judge Jackson considered the letters in connection with any aspect of the case. Without proof of judicial “bias or prejudice” within the meaning of 28 U.S.C. 455, a violation of either part of the Canon does not justify reversal of the judgment or recusal of the judge from subsequent proceedings. *See United States v. Haldeman*, 559 F.2d 31, 132-34 & n.297 (D.C. Cir. 1976) (en banc); *see also United States v. Barry*, 961 F.2d 260, 263 (D.C. Cir. 1992); *In re Barry*, 946 F.2d 913, 914 (D.C. Cir. 1991). As the introductory Commentary to the Code notes, “the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.” 175 F.R.D. at 365.

[149] 3. There is no need for the Court to interpret Canon 3A(6). Should it choose to do so as part of its supervisory function to guide the course of future proceedings, however, the Court may wish to take into account the following points. First, Canon 3A(6) contains an express proviso that its “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 the purposes of legal education.” 175 F.R.D. at 367. After *Barry*, the Canon was revised to add the “legal education” exception. *Report of the Judicial Conference Committee on Codes of Conduct* at 7 (Sept. 1992). At least three of the judge’s public lectures are, by Microsoft’s own description, “presentation[s] made for the purposes of legal education”: “an antitrust seminar in Washington, DC,” “a law school conference on Capitol Hill,” and “a conference in Amsterdam sponsored by the International Bar Association.” MS Br. 145-46. Two other public lectures that Microsoft mentions — speeches at Dartmouth College and St. Mary’s College of Maryland (MS Br. 146) — appear from the press reports (Microsoft has not provided actual texts) to have been efforts to teach students about the law. As to the balance of the cited remarks, the introductory Commentary to the Code emphasizes that “[t]he Canons are rules of reason” and that the overarching purpose of all the canons is preservation of “[t]he integrity and independence of judges.” 175 F.R.D. at 364, 370-71. Judge Jackson demonstrated that integrity and independence in his conduct of the trial.

Second, although wisdom counsels judges to avoid public comment on a pending case, *see Barry*, 961 F.2d at 263, Canon 3A(6) and its Commentary expressly contemplate that a judge may perceive a public benefit in commenting on judicial matters of general concern. Questions of interpreting the Canons ordinarily do not arise in the context of an appellate court’s sitting in review of a prior judicial decision. Nevertheless, if this Court were to conclude that such guidance is appropriate, it could readily provide the necessary direction to the judge for conducting further [150] proceedings. Such prospective judicial administration should not affect the outcome of this appeal because the remarks cited by Microsoft provide no reason to doubt Judge Jackson’s impartiality.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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ADDENDUM A
STATUTES AND REGULATIONS

28 U.S.C. §455

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom

a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

175 F.R.D. 363

CODE OF CONDUCT FOR UNITED STATES JUDGES¹

Introduction

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. Certain provisions of this Code apply to special masters and commissioners as indicated in the "Compliance" section. In addition, the Tax Court, Court of Veterans Appeals, and Court of Appeals for the Armed Forces have adopted this Code. Persons to whom the Code applies must arrange their affairs as soon as reasonably possible to comply with the Code and should do so in any event within one year of appointment.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions concerning the application and interpretation of this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions concerning this Code and its applicability should be addressed to the Chairman of the Committee on Codes of Conduct as follows:

Chairman, Committee on Codes of Conduct

c/o General Counsel

Administrative Office of the United States Courts

One Columbus Circle, N.E.

Washington, D.C. 20544

(202) 273-1100

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by

1. The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." At its March 1987 session, the Judicial Conference deleted the word "Judicial" from the name of the Code.

Substantial revisions to the Code were adopted by the Judicial Conference at its September 1992 session. Section C. of the Compliance section, following the code, was revised at the March 1996 Judicial Conference. Canons 3C(3)(a) and 5C(4) were revised at the September 1996 Judicial Conference.

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.

B. Administrative Responsibilities.

(1) A judge should diligently discharge the judge's administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require court officials, staff, and others subject to the judge's direction and control, to observe the same standards of fidelity and diligence applicable to the judge.

(3) A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer.

(4) A judge should not make unnecessary appointments and should exercise that power only on the basis of merit, avoiding nepotism and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge with supervisory authority over other judges should take reasonable measures to assure the timely and effective performance of their duties.

C. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to

either within the third degree of relationship, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge has served in governmental employment and in such capacity participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests, and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be dis-

qualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1), except in the circumstances specifically set out in subsections (a) through (e), may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. For example, the duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of personal characteristics like race, sex, religion, or national origin.

Canon 3A(4). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that this provision is not violated through law clerks or other staff personnel.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus-curiae*.

Canon 3A(5). In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

Canon 3A(6). 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. This provision does not restrict comments about proceedings in which the judge is a litigant in a personal capacity, but in mandamus proceedings when the judge is a litigant in an official capacity, the judge should not comment beyond the record.

"Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by the rules of professional conduct applicable in the various jurisdictions.

A Brief Article on Electronic Briefs

Steve Leben

I was sitting in my office, minding my own business, on July 5, 2000. As it was the day following a holiday, things were quite peaceful and I was able to catch up on a lot of paperwork. Then, right at the end of the day, a messenger dropped off at my chambers a copy of one of those motions everybody hates to get—a summary-judgment motion that, with supporting materials, can only be measured in inches. By the time the motions, cross-motions, and responses all were filed over the next few weeks, we had a stack 17 inches high.

A few days later, as I recall, I received a much smaller envelope from the attorney for the defendants, who had filed the first summary judgment motion. It contained a cover letter and a single CD-ROM. The cover letter told me that these attorneys were proud to present me with what they said was the first electronic brief to be filed in a Kansas state court. Since no one I know keeps track of such things, I can't tell you whether they were right in that claim. What I can tell you, however, is that it made handling the case much, much easier.

These electronic briefs contained the entirety of the 17-inch pile of paper that had been filed with the court clerk. They also contained much more. Every case and statute cited in the briefs was included as well; these could be viewed merely by clicking on the case or statute name in the text of the brief. The same was true for factual information: all deposition transcripts, interrogatory answers, and pleading excerpts were included and easily accessible. In addition, some of the depositions had been videotaped. For those, the cited testimony excerpts actually could be viewed from videotape excerpts included on the CD-ROM.

Videotape excerpts, I can tell you, *do* make a more vivid impression than the cold transcripts do. In the electronic briefs, your clue that a videotape excerpt is available would be a small box containing the photo of the witness. When you click on that box, the video excerpt would play. Whenever I would review the factual section of the brief, having those photos next to the statements was itself helpful in just keeping track of which witnesses said what.

Beyond that, the sheer convenience of having three CD-ROMs (covering briefs filed over a period of weeks), each 1/16-inch thick, rather than a 17-inch stack of paper is great. My law clerk and I were both able to take the full set of materials home—and we could both do so at the same time without the need to kill even more trees or spend a day at the copy machine.

The appellate briefs in the *U.S. v. Microsoft* case, excerpts of which are reprinted here, were produced in an electronic format by RealLegal, a Denver-based firm (found on the Web at www.RealLegal.com). RealLegal has produced a redacted, publicly available CD-ROM of the opening brief by Microsoft. You can get a copy of it from RealLegal (303-584-9988) if you want to see for yourself how this works. That CD-ROM contains 6,764 hyperlinks to cases, testimony, and other source material, 12,250 pages of transcripts, 317 exhibits, and 27 minutes of video. The version submitted to the court, which included confidential materials received under seal by the trial court, had an even more comprehensive set of materials.

Only a few years ago, some courts actually rejected electronic briefing altogether. The tide has turned, however, and I would think that any judge who is able to use a computer even a little bit would be happy to receive one in any document-intensive case. The Supreme Court of Washington said as much last year in its opinion in *Aluminum Co. of America (ALCOA) v. Aetna Casualty & Surety Co.*, in which the record took up “about 50 banker’s boxes.” In its opinion, the court “express[ed] sincere appreciation” for the submission of electronic briefs, noting that “[t]he savings to the Court in time-motion efforts alone enabled us to retrieve and examine relevant parts of the record with ease.”

The next time you're sitting in your chambers, minding your own business, when a large stack of motion papers arrives, just hope it's accompanied by an electronic version.

Steve Leben, a general jurisdiction state trial judge in Kansas, is the editor of Court Review.

AMERICAN JUDGES ASSOCIATION Future Conferences

2001 ANNUAL MEETING

September 30-October 5

Reno, Nevada

Silver Legacy Resort

(\$89.00 single or double)

2002 MIDYEAR MEETING

April 18-20

Biloxi, Mississippi

Beau Rivage Resort & Casino

(\$119.00 single or double)

2002 ANNUAL MEETING

September 8-13

Maui, Hawaii

The Westin Maui

(\$155 single or double – golf/mountain view;

\$169.00 single or double – ocean view)

2003 MIDYEAR MEETING

Billings, Montana

(Dates and hotel to be determined)

2003 ANNUAL CONFERENCE

Montreal, Quebec

(Dates and hotel to be determined)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Nos. 00-5212, 00-5213

Microsoft Corporation
Defendant-Appellant,

v.

United States of America,
Plaintiff-Appellee.

Microsoft Corporation
Defendant-Appellant,

v.

State of New York, *ex rel.* Attorney General Eliot Spitzer, *et al.*,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR DEFENDANT-APPELLANT

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INTRODUCTION

. . .

[2] Instead of addressing the fatal defects in their case, plaintiffs drape themselves in the district court's findings of fact, intimating that this Court is constrained to accept those findings without subjecting them to scrutiny. In considering this invitation to rubberstamp what the district court did, the Court should bear in mind the district court's goal in drafting its findings. As the district judge told Ken Auletta, a reporter for the *New Yorker* writing a book about the case, he separated his findings of fact from his conclusions of law (thus enabling him to import numerous conclusions into his findings) in order to insulate his ruling from reversal:

There may have been another motive to split the facts from the law, whispered lawyers on opposite sides of the case: Judge Jackson was trying to box in the Court of Appeals. Guilty, Jackson later admitted to me, "The general rule of law is that the Court of Appeals is generally expected to defer to the trial judge as to matters of fact—unless the findings are clearly erroneous What I want to do is confront the Court of Appeals with an established factual record which is a fait [3] accompli. And part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own."

KEN AULETTA, *WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES* 230 (2001).

The district judge's repeated public comments (see MS Br. at 146-50) also demonstrate an animus towards Microsoft so strong that it inevitably infected his rulings. For example, Auletta reports that the district judge compared Microsoft executives to unremorseful gang members convicted of brutal, execution-style murders, Auletta, *supra* at 369-70, and criticized Microsoft's CEO for having "a Napoleonic concept of himself and his company," *id.* at 397. Indeed, in the public eye, the district judge has joined the fray as an adversary of Microsoft.

By contrast, the district judge told Auletta that he holds government lawyers in particularly high regard, giving credence to the charges they level against a defendant:

"I trust the lawyers from the Department of Justice. I trust civil servants and the U.S. attorneys. I'm not hostile to the government In criminal cases, by and large, my experience is that when the government charges someone, they are probably guilty. I give the benefit of presumptive innocence, but I know of no case of a wrongful conviction."

Id. at 44.

Such comments put the proper gloss on the district court's findings. In another case in which there was reason—but far less reason—to question whether a district judge improperly decided a matter based on his personal views, this Court stated: "[I]n light of the special circumstances of this case, we have reviewed the District Court's findings against the record with particular, even painstaking, care." *S. Pac. Communications Co. v. AT&T*, 740 F.2d 980, 984 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). Painstaking review is warranted here as well.

SUMMARY OF ARGUMENT

[6] 6. The district judge's public comments about the merits of the case and his ad hominem attacks on Microsoft are indefensible. Plaintiffs cannot seriously contend, for example, that it was permissible for the district judge to compare Microsoft to "gangland killers" in comments made to a reporter while the case was still pending. Such comments (i) violate the Code of Conduct for United States Judges, (ii) are clear grounds for disqualification under 28 U.S.C. § 455(a), and (iii) provide an independent basis to vacate the judgment.

ARGUMENT

. . .

IV.

The Relief Awarded by the District Court Cannot Stand.

[46] It is now apparent from the district judge's public comments that the relief awarded in this case was not a carefully tailored response to the antitrust violations found, but rather an attempt to punish Microsoft for what the district judge termed "arrogance which derives from power and unalloyed success." AULETTA, *supra* at 397. In February 2000, the district judge reportedly told Ken Auletta that "he saw a structural remedy as too draconian and too risky" and "feared that the courts would not be able to divide Microsoft without damaging the company, and perhaps the economy." Ken Auletta, *Final Offer*, *NEW YORKER*, Jan. 15, 2001, at 43. But those well-founded concerns were discarded when, based on extrajudicial sources of information, [47] the district judge became angry that Microsoft's senior officers "to this day . . . continue to deny that they did anything wrong." AULETTA, *supra* at 371. It is not an appropriate exercise of judicial power to break up Microsoft because it maintains that its conduct was lawful. Nor is the breakup justified because the district judge believes Microsoft's chairman has "a Napoleonic concept of himself and his company," *id.* at 397, or becomes convinced, based on viewing a 25-year-old photograph of Microsoft's founders (not in the record), that Bill Gates is "a smart-mouthed young kid" who "needs a little discipline," *id.* at 168-69.

. . .
VI.

**The District Judge's Repeated Extrajudicial Statements
and Discussions Provide an Independent Basis for
Vacating the Judgment.**

[72] Plaintiffs do not deny that the district judge discussed the merits of the case with various reporters during trial, before issuing his findings of fact, before issuing his conclusions of law, before entering the decree and before ruling on post-trial motions. Such a denial would be pointless, as the following passage from Ken Auletta's book makes clear:

"I didn't talk to anyone about the merits of the case," Jackson told me in defense of his press conversations. In fact, however, as he acknowledged after I raised an eyebrow, he had talked to me about the merits of the case, but only for publication after he issued his decisions.

AULETTA, *supra* at 382 (emphasis in original).

In ten hours of taped interviews, *id.* at 14 n.*, the district judge showed Auletta "a big green book where he kept notes on each witness" and "interpreted them for [Auletta] with [his] tape recorder going," CNN Morning News, Jan. 16, 2001. The district judge also discussed with Auletta the significance he attributed to the testimony of various witnesses, such as McGeedy's testimony that "Gates complained that [Intel's] software competed with Microsoft." AULETTA, *supra* at 112. Microsoft had no idea such discussions were taking place because the district judge conducted them on the express "condition that his comments not be used until the case left his courtroom." JOEL BRINKLEY & STEVE LOHR, *U.S. v. Microsoft* 6 (2000).

Plaintiffs make no attempt to defend such conduct, nor do they deny the obvious import of the district judge's extensive interactions with reporters during the trial: the district judge not only was "talking for history" about his role in the case; he also was receiving extrajudicial information from reporters. In mid-April 2000, before plaintiffs submitted their proposal for relief, Auletta told the district judge that Microsoft employees had "professed shock that [the district judge] thought they had violated the law and behaved unethically," which caused the [73] district judge to become agitated at Microsoft's "obstinacy." AULETTA, *supra* at 369. Microsoft has no way of knowing what other information reporters provided to the district judge in his secret discussions with them or what effect those two-way communications had on his handling of the case or the decisions he rendered. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (per curiam) (relying on receipt of ex parte communications as one basis for remanding case to different district judge).

Plaintiffs have no answer to the point that the district court's derogatory comments about Microsoft have cast him in the public eye as an adversary of the company. See MS Br. at 146-50. They completely ignore the Tenth Circuit's decision in

United States v. Cooley, 1 F.3d 985 (10th Cir.1993), which demonstrates that the district judge's conduct here violated 28 U.S.C. § 455(a) and is grounds for reversal. The district judge's public comments on the merits of the case not only threaten to call the integrity of the judicial process into question; they have already done so. *E.g.*, Editorial, *Judge Jackson's Remarks*, WASH. POST, Jan. 16, 2001, at A20; Editorial, *So Much for the Rule of Law*, N.Y. POST, Jan. 10, 2001, at 32.

Plaintiffs' contention that the district judge's comments come within the "legal education" exception to Canon 3A(6) is frivolous. Pls. Br. at 148-49. Chatting with reporters in chambers or giving luncheon speeches to groups of lawyers does not constitute "a scholarly presentation made for purposes of legal education." Report of the Judicial Conference Committee on Codes of Conduct at 7 (Sept. 1992).

Although plaintiffs are correct that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion," Pls. Br. at 145 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)), Microsoft is complaining about more than that. In addition to commenting publicly about the case and engaging in undisclosed ex parte communications about its merits, [74] the district judge awarded sweeping relief without conducting an evidentiary hearing based on his publicly-stated view that Microsoft was not entitled to due process. Brinkley & Lohr, *NEW YORK TIMES*, *supra* at C8. The district court also ordered that Microsoft be broken up, without any consideration of the serious harm that would ensue, as punishment for Microsoft's purported "intransigence." James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, WASH. POST, Sept. 29, 2000, at E1. As this Court previously held with regard to far less egregious conduct, "the district judge's failure to accord any weight to Microsoft's interests in making its determination adds to the appearance of bias in this case." *Microsoft*, 56 F.3d at 1464.

Plaintiffs' assertions that the district judge's comments do not reflect "deep-seated . . . antagonism" toward Microsoft (Pls. Br. at 146) and that there is "no reason to doubt Judge Jackson's impartiality" (*id.* at 149) are astonishing. In *Liteky*, the Supreme Court cited the district court's comment in *Berger v. United States*, 255 U.S. 22 (1921), as a prototypical example of judicial bias. 510 U.S. at 555. That comment—"[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty," 255 U.S. at 28—is akin to the district judge's ad hominem remarks about Microsoft. The district judge "went as far as to compare the company's declaration of innocence to the protestations of gangland killers." Auletta, *NEW YORKER*, *supra* at 40-41. The comment is worse in the details.

[The district judge] was so agitated by what he called Microsoft's "obstinacy" that he carelessly compared their proclamations of innocence to those of four members of the Newton Street Crew convicted in a

racketeering, drug dealing, and murder trial he had presided over five years before. There were brutal murders in that case, he recalled: three of the victims had their mouths sealed with duct tape before they were shot in the head with machine guns “On the day of the sentencing,” Jackson remembered, “they maintained that they had done nothing wrong, that the whole case was a conspiracy by the white power structure to destroy them. I am now under no illusions that miscreants will realize that other parts of society view them that way.”

[75] AULETTA, *supra* at 369-70.

This Court previously held that a district judge’s in-court comments that evidenced “his generally poor view of Microsoft’s practices” were a factor to be considered in deciding whether an objective observer would question the district judge’s impartiality. *Microsoft*, 56 F.3d at 1464-65. The district judge’s extrajudicial comments here created a similar appearance of partiality, if not demonstrating actual prejudice or bias.

“A District Judge, particularly one adjudicating a case of considerable public moment, must scrupulously avoid giving the parties or the public any basis for perceiving that he is deciding the case otherwise than pursuant to an application of controlling law to the facts and in the exercise of his impartial,

independent, considered judgment.” *S. Pac. Communications*, 740 F.2d at 984. By airing freely with journalists his personal views about Microsoft and its executives as well as the merits of the case while the case was still pending, the district judge not only violated the Code of Conduct for United States Judges, but also raised profound doubts about his impartiality and the fairness of the trial he conducted.

CONCLUSION

The Court should reverse the judgment below and direct the entry of judgment for Microsoft. As to any aspect of the judgment not reversed, the Court should vacate and remand the case to a different district judge for a new trial.

Respectfully submitted,

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The Resource Page



NEW BOOKS

WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION. Foundation Press, 2000. (\$24.95). 383 pp.

Most judges interpret statutes of one kind or another most every day. Such tasks can become so commonplace that we might lose track of the overall picture. That's easy to do in statutory construction, as normal forms of legal research provide ready rules that can easily lead to a desired result. But most of the canons of construction have a counterpart leading in a different direction, and the policies at issue in statutory construction are not always self-evident. Eskridge, Frickey, and Garrett, who are now on the third edition of their law school casebook, have prepared an excellent one-volume book for the use of law students, lawyers, and judges. In addition to a thorough review of the legislative process, they provide a comprehensive overview of the theories of statutory interpretation, the role of both text and precedent in interpreting statutes, and the use of extrinsic sources in statutory interpretation. Whether to consider legislative history, as well as what should be consulted if one decides such materials may be used, is thoroughly reviewed. The authors suggest what they describe as a moderate position: that legislative history be consulted only if it is readily available to the average lawyer, relevant to the precise interpretive question, and reliable evidence of consensus within the legislature that can be routinely discerned at reasonable cost. They note the value and usefulness of the canons of construction, but also describe how they are rooted in assumptions about the normal usage of language, the proper relationship between legislatures and courts, and

other basic, systemic values. So rooted, the canons can lead to more predictable results. The authors also suggest, however, that the canons of construction not be used as a crutch to avoid discussion of the value choices actually at issue. The book includes an appendix stating in clear language the canons of construction used by the Rehnquist Court, including the "dog didn't bark" canon—the presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in it.

SCOTT DOUGLAS GERBER (ED.), *SERIAM: THE SUPREME COURT BEFORE JOHN MARSHALL*. New York Univ. Press, 2000. (\$22.50). 349 pp.

This book contains a series of essays on ten justices who served on the United States Supreme Court before John Marshall. The book's editor, Scott Douglas Gerber, is a law professor and the author of a book on a more recent Supreme Court Justice, *First Principles: The Jurisprudence of Clarence Thomas*. For this collection, Gerber recruited law, history, and political science professors familiar with the early court to write separately about each of the ten justices, providing both basic biographical information and commentary on each justice's judicial philosophy. Gerber's point in putting together the book appears to have been two-fold: first, in his own words, "to dispel the myth that the early Court became significant only when Marshall arrived," and second, to provide a good, three-dimensional portrait of each of the justices included. The book succeeds on both fronts, including a spirited presentation of the ways in which these justices—well before *Marbury v. Madison*—practiced and championed judicial review. Originally issued in a more-expensive hardbound version, this paperback edition is well worth its purchase price.



USEFUL WEBSITES

Brennan Center for Justice
<http://www.brennancenter.org>

Every judge who is interested in how the judiciary is depicted in the media should go to this website and sign up for its e-mail updates on judicial independence. You will receive regular, usually twice-weekly, summaries of news stories and editorials related to the independence of judges and the courts, including material attacking, defending, or just concerning the judiciary. And, whenever the material cited is available online, a convenient link is provided so that you can easily read the actual story or editorial.

The Brennan Center is a part of the New York University School of Law and, according to its recent press releases, it "develops and implements a nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms." Named in honor of the late Justice William J. Brennan, Jr., the Brennan Center litigates cases, files amicus briefs, drafts legislation and action plans, and publishes books and articles, focusing on areas such as judicial independence, campaign finance reform, and access to justice. Its website has an excellent resource page on judicial independence.

FOCUS ON THE MICROSOFT CASE

The Resource Page presents excerpts of the *Microsoft* antitrust case appeal briefs regarding the conduct of the trial judge in making public comments about the case-vis-à-vis a judge's ethical duties at page 34.