

# Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls

William G. Ross

The disqualification of Judge Thomas Penfield Jackson from the Microsoft case for his free-wheeling comments to the news media<sup>1</sup> has provided a sharp reminder of the dangers of extrajudicial speech.

In its biting opinion, the U.S. Court of Appeals for the District of Columbia castigated Judge Jackson for giving media interviews and public speeches in which he made remarkably astringent remarks about Microsoft. Among his more colorful comments, the judge mused that Bill Gates had Napoleonic hubris and he likened the break-up of Microsoft to swatting a recalcitrant mule with a two-by-four.<sup>2</sup> Among his more potentially prejudicial remarks were his speculation to reporters—before his order splitting Microsoft—that ‘a break-up is inevitable’ and his post-trial comments disparaging the credibility of trial witnesses.<sup>3</sup>

The court concluded that the judge’s remarks violated Canon 3A(6) of the 1972 Code of Judicial Conduct, which requires a judge to “avoid public comment on the merits of pending and impending cases,” and its corollary, Canon 3A(4), which prohibits *ex parte* communications about a case.<sup>4</sup> The court also determined that the judge violated Canon 2, which requires a judge to ‘avoid impropriety and the appearance of impropriety in all . . . activities.’<sup>5</sup> Declaring that these “violations were deliberate, repeated, egregious, and flagrant,”<sup>6</sup> the court ordered the judge’s disqualification pursuant to a federal statute that requires disqualification of a judge when a reasonable observer would question his or her impartiality.<sup>7</sup>

As the court pointed out, the “Microsoft case was ‘pending’ during every one of the District Judge’s meetings with reporters; the case is ‘pending’ now; and even after our decision issues, it will remain pending for some time.” The court explained that the judge “breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case.”<sup>8</sup>

The court’s ruling was appropriate because any public comment by a judge about the facts, applicable law, or merits of a case that is *sub judice* in his court or any comment concerning the parties or their attorneys may raise grave doubts about the

judge’s objectivity and his willingness to reserve judgment until the close of the proceeding. Moreover, any such comments in a jury trial might unduly sway the jury.

The need to avoid bias and the appearance of bias also seems to explain why the canon embraces public comments concerning proceedings in *any* court, rather than merely proceedings in the judge’s own court. This appears to guard against the danger that a judge would feel pressured or appear to feel pressured by the comments of his peers on other benches or that a jury would accord deference to an opinion expressed by another judge. The rule against comments by judges who are not involved in a proceeding likewise helps to ensure the integrity of the judicial process itself since a judicial proceeding should be a self-contained entity that remains immune from outside influences, even if such influences are not specifically prejudicial.

Paradoxically, the apparent increase in inappropriate extrajudicial remarks by judges reflects positive developments—the increased and improved media attention to legal issues in response to growing public sophistication about legal issues. For example, first-year students that I have taught during recent years are better informed about legal concepts and terminology than were the students that I first taught thirteen years ago.

Although the growing public fascination with legal issues may reflect society’s growing litigiousness, it also demonstrates a widespread desire to become better informed about issues that have a pervasive impact on everyday life. Unfortunately, this healthy public appetite for information about the law has stimulated in some judges an undue hunger for publicity. Such craving for media attention debases the dignity of the judiciary and erodes the public confidence in judicial objectivity which is a predicate for the rule of law. As the court of appeals observed in the Microsoft case, judges “who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media.”<sup>9</sup>

## Footnotes

1. United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001).
2. *Id.* at 110-11.
3. *Id.* at 109-11.
4. *Id.* at 108-13. The parallel of Canon 3A(6) in the ABA Model Code of Judicial Conduct approved in 1990 is Canon 3B(9), which states, “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 inter-

fere with a fair trial or hearing.” The parallel of Canon 3A(4) in the 1990 Code is Canon 3B(7), which provides, “A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.”

5. *Id.* at 113.
6. *Id.* at 107.
7. *Id.* at 115 (invoking 28 U.S.C. § 455 (a)).
8. *Id.* at 112.
9. *Id.* at 115.

## FREE SPEECH CONSIDERATIONS

Judges and journalists who complain that ethical canons unduly restrict judicial speech are fond of correctly pointing out that judges are citizens, too, and that judges—like other citizens—enjoy the protection of the First Amendment.<sup>10</sup> Like other citizens, however, a judge does not enjoy unlimited rights to free speech.<sup>11</sup> While restrictions on judicial speech are subject to scrutiny under the First Amendment, courts long have recognized that judges may be disciplined for speech that would not warrant sanctions against other citizens inasmuch as there is a compelling interest in protecting public confidence in the impartiality of the judiciary. Public comments by judges about the facts, applicable law, or merits of a case or any comment about the parties could easily raise doubts about the judge's objectivity and his or her willingness to reserve judgment until the close of the proceedings. The judge's right to free speech in these circumstances must therefore be tempered by the compelling public interest in protecting the integrity of the judicial process and public confidence in the judiciary.<sup>12</sup>

## COMMENTS ABOUT A JUDGE'S OWN DECISIONS

In addition to following the Canon's prohibition on comments about pending and impending cases, a judge also should generally refrain from public comment about his own decisions. As an official pronouncement, a judicial decision is a self-contained entity that must speak for itself. Any public comment by the judge about the decision detracts from its integrity. A judge therefore should not gild his judicial lily. Such comments may distort the legal process by encouraging lawyers and even courts to interpret the decision in the context of the judge's remarks. In contrast to statutes, which may be interpreted with reference to legislative history, a judicial decision must be its own exponent.<sup>13</sup>

It may be appropriate and even wise, however, for a judge to discuss his opinion with the news media in off-the-record sessions in order to help facilitate more intelligent and informed news coverage. As the Supreme Court of Alabama has observed, "Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media."<sup>14</sup>

Judges are most likely to feel tempted to comment upon or explain their decisions when those decisions encounter widespread criticism. In accordance with the need to protect the

integrity of the decision, a judge should ordinarily offer no apology for what she has done. If the criticism is scurrilous, the criticism does not deserve the dignity of a judicial reply. If the criticism is temperate and expresses a reasonable point of view, the judge could not contribute anything of value beyond what his opinion already says; the opinion itself therefore provides the most effective retort to public criticism. Moreover, a host of lawyers, journalists, public officials, and academics are available to come to the judge's defense. In rare instances, however, a public comment by a judge may help to mute criticism of the judiciary more effectively than a comment by anyone else. For example, it may have been appropriate for several members of the Warren Court to publicly defend the Court during the 1960s after the Court's decisions on such controversial issues as school desegregation, subversion, school prayer, and criminal procedure had disaffected substantial portions of the public.<sup>15</sup>

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## CRITICISM OF FELLOW JUDGES

Judges should attempt to stem the growing trend toward direct criticism of other judges.<sup>16</sup> Such criticism is ill-advised because it tends to impugn public confidence in the quality and objectivity of justice by calling undue attention to the political aspects of the judicial process.<sup>17</sup> In particular, judges should refrain from making bilious comments about other judges in their opinions, concurrences, and dissents since such comments are generally superfluous, adding little or nothing to the usefulness of the opinion. Biting dissents may erode the legitimacy of the decision,<sup>18</sup> while majority decisions that sting dissenters may create contentiousness and verbosity that impede the court's ability to provide clear guidance to lower courts, law enforcement agencies, legislators, and citizens.

Incivility among judges also may exacerbate incivility among lawyers. As U.S. District Court Judge Stanley Sporkin has observed, "Civility starts at home. How can courts expect

10. For discussions of the constitutional aspects of regulation of judicial speech, see Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 26 SYRACUSE L. REV. 1181 (1986); Erwin Chemerinsky, *Is It the Siren's Call? Judges and Free Speech While Cases Are Pending*, 28 LOYOLA L.A. L. REV. 831 (1995).

11. See, e.g., *Halleck v. Berliner*, 427 F. Supp. 1225 (D.D.C. 1977); *In re Kaiser*, 111 Wash. 2d 275, 759 P.2d 392 (1988); *In re Rome*, 218 Kan. 198, 542 P.2d 676 (1975).

12. For a recent dialogue about this issue, see Monroe H. Freedman, *Free Speech for Judges: A Commentary on Lubet et al. v. Posner*, COURT REVIEW, Winter 2001, at 4-5; Steven Lubet, *Free Speech and Neutrality: A Reply to Professor Freedman*, COURT REVIEW, Winter 2001, at 6-7.

13. See William G. Ross, *Extrajudicial Speech: Charting the Boundaries*

*of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 609-11 (1989).

14. *Matter of Sheffield*, 465 So.2d 350, 355 (Ala. 1984).

15. *Id.* at 607-08, 610.

16. Some 50% of the 82 judges in the Seventh Circuit who responded to a 1989 survey believed that there were "civility problems" between judges; 47% perceived no problem, and 3% provided no response. See Interim Report of the Committee on Civility of the Seventh Circuit, 143 F.R.D. 371, 431 (1992).

17. See William G. Ross, *Civility Among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 FLA. L. REV. 957-73 (1999).

18. See Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U.L. REV. 113, 115 (1990)(arguing that any dissent might harm a court's legitimacy).

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lawyers appearing before them to be more civil when Article III judges are not civil to one another?

. . . We who try to discharge our judicial responsibilities in a conscientious and just manner . . . should not be the victim of vicious personal attacks from other judges.”<sup>19</sup>

Judges should confine their criticism of the abilities or character of fellow judges to private judicial disciplinary channels, for

public aspersions bring both the target of the criticism and the critic into disrepute and tend to undermine faith in the judicial system. Any private or public remarks by a judge about a fellow judge should be made with the objectivity, balance, and civility that is worthy of the temperament that is expected of a judge.<sup>20</sup> Although judicial civility codes recently adopted by various states may encourage more civility among judges,<sup>21</sup> judges generally should not need written codes to reinforce elementary decorum.

#### **COMMENTS ABOUT POLITICAL ISSUES**

Judges should be particularly wary about making any comment concerning political issues. Judges who take public stands on partisan questions erode the independence and integrity of the judiciary by blurring the line between the courts and politics. Such statements also create the danger of prejudice since a judge may later face in court an issue about which he has spoken. Although she can recuse, “[a] judge is paid to be a judge, not paid to do things which disqualify him from acting as a judge.”<sup>22</sup>

#### **COMMENTS ABOUT THE JUDICIAL ADMINISTRATION AND THE JUDICIAL PROCESS**

Despite the various formal and prudential restrictions on extrajudicial speech, there are many circumstances under which extrajudicial speech is highly desirable. Canon 3B(9) explicitly provides that the rule against comment on a pending or impending case “does not prohibit judges from making public statements in the course of their official duties or from

explaining for public information the procedures of the court.” Extrajudicial discussion by judges about issues concerning the legal system are particularly appropriate, provided that such comments are well reasoned and are not expressed in a manner that detracts from the dignity of the court. Indeed, one organization of state trial judges has urged judges to “explain legal terms, and concepts, procedures, and the issues involved in [a] case so as to permit the news representatives to cover the case more intelligently.”<sup>23</sup> By helping to facilitate more intelligent news coverage, judges can serve an important role in educating the public about the judicial process and can thereby enhance public respect for the judiciary and the judicial system.

Judges likewise have a duty to comment on issues of judicial administration about which they have unique knowledge. It is particularly appropriate for judges to speak out about proposed legislation or other actions by coordinate branches of government that would affect their own court. For example, it was proper for Chief Justice William H. Rehnquist in 1997 to express anxiety about the growing number of judicial vacancies caused by the friction between the Clinton Administration and the Senate Judiciary Committee.<sup>24</sup> Indeed, judges have a virtual duty to make such communications to the extent that they are in a special or unique position to inform legislators or the general public about the benefits or dangers of various forms of legislation. During the controversy over President Roosevelt’s Court-packing plan in 1937, for example, Chief Justice Charles Evans Hughes properly rebutted Roosevelt’s contention that the Court needed more justices because the Court was overworked, for no one was better qualified to speak to this question than was Hughes.<sup>25</sup> When a judge cannot bring anything other than his own prestige to a controversy over judicial administration, however, the propriety of comments is more troublesome.

Judges have made many significant improvements to the law by teaching, publishing, and serving as members of professional organizations. Recognizing the importance of such contributions, Canon 4(B) provides that “[a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.” As the commentary to this Canon aptly notes, “As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice.”

19. *United States v. Webb*, No. 94-0245SS, 1998 WL 93052 at \*7, 1998 U.S. Dist. LEXIS 2328 at \*21-\*22 (D.D.C. Feb. 20, 1998).

20. See Edward M. Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U.L. REV. 583, 644 (1994).

21. See e.g., *Standards of Professional Conduct*, W. VA. LAWYER, Jan. 1997, at 12; Final Report of the Committee on Civility of the Seventh Judicial Circuit, 143 F.R.D. 441, 452 (7th Cir. 1992); Iowa Standards for Professional Conduct, available at 1996 WL 260622; Standards for Professional Conduct within the Rhode Island Judicial System, published at *President’s Message*, R.I. BAR J., May 1996, at 10.

22. *Hearings on Nonjudicial Activities of Supreme Court Judges and Other Federal Judges before the Subcomm. on Separation of Powers, Comm. on the Judiciary, U.S. Senate*, 91st Cong., 1st Sess. 87 (1969)(testimony of Adrian S. Fisher).

23. National Conference of State Trial Judges Committee on News Reporting and Fair Trial, *Judicial Guidelines for Dealing with News Media Inquiries and Criticism* (5<sup>th</sup> Draft, June 5, 1984), cited in *Matter of Sheffield*, 465 So. 2d 350, 355 (Ala. 1984).

24. See *Delay in Approving Judicial Nominees Angers Rehnquist*, WALL ST. J., Jan. 2, 1998, at 40.

25. See M.J. PUSEY, 2 CHARLES EVANS HUGHES 754-57 (1951).

## PRACTICAL POINTERS FOR EXTRAJUDICIAL SPEECH

In many instances, judges may walk a very fine line between useful comments about the judicial system and remarks about issues that may come before the judge or create the appearance that the judge is unduly “political.” The danger is not so great when a judge publishes her thoughts, since the publication process enables the judge to take the time and effort to ensure that he presents his views in a careful and nonprejudicial manner. Similarly, comments made by judges in the relatively cloistered contexts of teaching, public addresses, and service in professional organizations are not likely to cause problems if the judge observes elementary caution to avoid remarks that detract from judicial dignity or create the appearance of bias.

The greatest risk occurs in contacts with the news media. Even a discrete and self-disciplined judge may slip across this line when he enters into a conversation with the press about a case. Another danger is the threat of misquotation. The Supreme Court of Alabama noted that “the risk of being misquoted, albeit honestly, may enter into the consideration and tilt the balance in favor of ‘no comment.’”<sup>26</sup> Since a judge’s interviews with the news media can serve the useful purpose of helping to educate the public about the law, however, judges need to consider ways to talk with the media in a manner that is consistent with judicial decorum.

This conflict between the goal of intelligent media coverage and judicial discretion and decorum may be resolved in part by off-the-record comments. Speaking off-the-record helps to facilitate media understanding of the judge’s work and can help to prevent misunderstandings that could confuse the public or even diminish public respect for the court. At the same time, such comments help to avoid the danger of an appearance of bias or self-promotion that may occur when a judge speaks for attribution. Although off-the-record comments during the pendency of the proceeding probably would constitute “public comment” within the definition of Canon 3B(9), explanations of procedures, history, or terminology would not run afoul of the Canon because they would not be directed to the merits of a case. Neither would such comments be likely to interfere with the fairness of the trial or hearing, in violation of Canon 3B(9). After the conclusion of a case, a judge’s off-the-record comments explaining a judicial decision would not add or detract from the decision insofar as there would be no public record of her comments.

A judge would be prudent to begin every interview off-the-record in order to ensure that nothing that he says can be quoted without permission and that all of his remarks are immunized from quotation if he finds himself talking too freely. It is essential that the judge inform the reporter in advance that his remarks will be off-the-record since journalistic custom generally does not respect retrospective requests for anonymity, even if they are made immediately after the interviewee has spoken.

This off-the-record format also may enable the judge to speak more coherently, without having to break up her

remarks by going on and off the record or engaging in self-censorship that might produce omissions or elliptical remarks that would detract from the reporter’s comprehension of what the judge says. Toward the close of the interview, the judge could select remarks that she wanted to place on the record.

Of course, a judge needs to be circumspect even when speaking off the record, and even here should avoid comments about the merits of pending or impending cases or the personalities of attorneys and their clients. Not only is such silence commanded by the Canons, but it will avoid embarrassment if the reporter does not honor his promise to refrain from quoting the judge because there is always the danger that a reporter will unprofessionally attribute any off-the-record remarks to the judge. Such derelictions, however, are relatively rare, and they will be particularly unlikely if the judge places all of his remarks off-the-record except for those that he specifically authorizes the reporter to quote. Since a judge can avoid careless or unscrupulous reporters only by avoiding the news media altogether, most judges are likely to find that the benefits of talking with the news media about subjects permitted by the Canons will outweigh the danger that the reporter will transgress the line between what is on and off the record.

A judge also would be wise to begin every media interview by declaring that he refuses to comment on the merits of any pending case, any case that might come before him, or any case in which he has participated in the past. The judge might soften this declaration by explaining that the Canons prevent such comment. The judge likewise should make clear that he is willing to comment only about such matters as legal terms, concepts, and procedures.

In talking with the news media, judges also need to take care to consider the background of the reporter and the character of the media. A judge who speaks with a reporter for a legal newspaper or a reporter who specializes in legal affairs for a major newspaper obviously can address legal issues in a more sophisticated manner than if she speaks with a reporter who is unfamiliar with the law. When speaking with a reporter who is not trained in the law, the judge needs to take great patience in explaining legal terminology or issues and should not make the mistake of assuming the reporter knows anything about the law.

## SUMMARY

Extrajudicial speech can produce great public benefit and also can cause tremendous harm. Temperate extrajudicial speech that avoids discussion of pending cases or controversial

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26. Matter of Sheffield, 465 So. 2d 350, 355 (Ala. 1984) (affirming the Court of the Judiciary’s finding that the judge had violated Canon

3A(6) by discussing with a local newspaper editor a proceeding for constructive contempt that was pending in the judge’s court)

political issues can help to enhance public respect for courts and understanding of judicial issues. As the disqualification of Judge Jackson demonstrates, however, indiscrete comments may create the appearance of bias or encourage the perception that judges are excessively emotional or political in their adjudication of cases. Accordingly, judges need to exercise a high level of circumspection in making comments off the bench about judicial issues. A judge generally should refrain from making comments unless he has carefully weighed both the potential benefits and risks and has concluded that the former significantly outweigh the latter. Although sanctions may be imposed for grossly inappropriate comments, it is impossible for judicial ethics commissions to monitor the myriad extrajudicial comments of tens of thousands of judges or to establish standards that would apply to all situations. Most questions

about the propriety of extrajudicial comments therefore must be resolved through the sound discretion and common sense of judges themselves.



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