

*Key Issues in  
Judicial Ethics*

**COMMENTING ON PENDING CASES**

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BY CYNTHIA GRAY



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## INTRODUCTION

Canon 3A(6) of the 1972 American Bar Association Model Code of Judicial Conduct stated: “A judge should abstain from public comment about a pending or impending proceeding in any court.” Concerned that that language was “overbroad and unenforceable,” the ABA narrowed that provision in the 1990 model code. Milord, *The Development of the ABA Judicial Code* at 21 (1992). Thus, Canon 3B(9) of the 1990 model code provides:

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.*

(emphasis added). (Both versions also provide that a judge must require “similar abstention on the part of court personnel subject to the judge’s direction and control.”) There has been no authority interpreting the change in the code, however, and what change the qualification “might reasonably be expected to affect its outcome or impair its fairness” will have on judges’ ability to comment on a pending proceeding is not clear.

Moreover, not all jurisdictions have adopted the change in the restriction on public comments even if they have adopted other provisions of the 1990 model code. The codes in many jurisdictions still prohibit all public comment, not simply public comment “that might reasonably be expected to affect its outcome or impair its fairness.” Explaining the decision to retain the broader language from the 1972 model code, commentary to the Maine code states that “the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar.”

This paper explores the requirement that a judge refrain from commenting on cases, including cases pending before the judge, cases pending before another judge in the same jurisdiction, cases in another jurisdiction, cases pending on appeal, and impending cases. Whether a judge may respond to criticism of a decision in a pending case and when a judge’s comments may require disqualification are also considered. The paper discusses exceptions to the rule such as explaining court procedures and comments in scholarly presentations. The paper also

examines First Amendment challenges to the restriction. Finally, the paper discusses commenting when a case is no longer pending, particularly if a judge is criticized about a completed case.

## COMMENTING ON A CASE PENDING BEFORE THE JUDGE

Under both the 1972 and 1990 model codes, a judge is clearly prohibited from commenting on the merits of cases pending before the judge because any such comments could “reasonably be expected to affect its outcome or impair its fairness.” Comments about a case pending before the commenting judge might:

- give the appearance that the judge has already decided the case, casting doubt on the judge’s “objectivity and his willingness to reserve judgment until the close of the proceeding,” or
- unduly influence or appear to unduly influence the jury.

Ross, “Extrajudicial Speech: Charting the Boundaries of Propriety,” 2 *Georgetown Journal of Legal Ethics* 589 (1989). Moreover, 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.” *United States v. Microsoft Corp.*, Nos. 00-5212 and 00-5213 (U.S. Court of Appeals District of Columbia Circuit June 28, 2001). In *Microsoft*, the court explained:

Judge Learned Hand spoke of “this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire. . . .” Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the “cold neutrality of an impartial judge.” Cold or not, federal judges must maintain the appearance of impartiality. . . . Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

The canon specifically provides that judges may make “public statements in the course of their official duties.” “A judge’s comments during a pretrial conference or from the bench about a proceeding before him may be public in the sense that the com-

ments are made in open court, but such statements are a part of a judge’s duties and are not proscribed.” Thode, *Reporter’s Notes to the Code of Judicial Conduct* at 55 (ABA 1973). Moreover, judges may comment “on proceedings in which the judge is a litigant in a personal capacity,” although that does not include “cases such as writ of mandamus where the judge is a litigant in an official capacity.” Commentary to Canon 3B(9).

The prohibition on commenting on pending cases obviously restricts any comment that reflects prejudgment of the case. For example, the New York State Commission on Judicial Conduct found that a judge should not have made comments to a reporter that indicated a predisposition to believe the defendant and to disfavor the woman that he was charged with assaulting. In the *Matter of Bender*, Determination (December 21, 1999) ([www.scjc.ny.us/bender.htm](http://www.scjc.ny.us/bender.htm)) (censure for this and other misconduct). Speaking with a reporter about the case of a man charged with assault based on an incident involving his girlfriend, the judge stated, “At the time of the arraignment, there were facts deduced that perhaps he should have had her arrested because she assaulted him.” The judge also stated that the judge did not expect the woman to return to the home that she shared with the defendant, and “There was not any reason for the alleged victim to be at the apartment to make a problem.” Stating that it was improper for the judge to make any comment to a newspaper reporter concerning a pending case, the Commission concluded it was especially wrong for him to publicly accuse the alleged victim of committing a crime, particularly since the remark was based only on unsworn conversations at an arraignment.

In a second case, the Commission concluded that a judge’s comments to a reporter about a criminal case pending in his court conveyed the appearance of pre-judgment. The judge indicated to the reporter that he believed that the defendant was a danger to the community and that the \$20,000 bail that he had set was probably not high enough to keep the defendant in jail. In the *Matter of Maislin*, Determination (August 7, 1998) ([www.scjc.ny.us/maislin.htm](http://www.scjc.ny.us/maislin.htm)) (admonished for this and other misconduct)). Noting that it was wrong for a judge to make any public comment, no matter how minor, to

a newspaper reporter or to any one else about a case pending before him, the Commission stated that the judge's remarks were not minor.

The restriction on commenting on pending cases applies even if the comment is not on the merits of the case. The Louisiana Supreme Court held that a judge should not have commented to a reporter about a motion to recuse in a criminal matter. *In re Best*, 719 So. 2d 432 (Louisiana 1998) (censure for this and other misconduct). The judge had said, "I don't think much of [the motion to recuse]. It's frivolous. There's not a reason in the world to recuse myself. It's just an effort by [the attorney] to zealously represent his client." When asked about the attorney's claim that he had improperly denied a motion to quash, the judge responded, "I gave him a cutoff date and he failed to submit the evidence in time. He failed in representing his client." In a second case, after an inquiry from a newspaper, the judge made public a sealed order in which a second judge agreed that she would be recused from all cases involving a particular law firm, and the second judge then rescinded her agreement after the disclosure. The judge told a reporter, "I don't believe she has the authority [to rescind her agreement]. I don't think she's a party to it." The judge also stated in additional comments published in the newspaper that he "had reservations about sealing those documents (the settlement order), but all parties to the order wanted them secret."

Following are additional examples of cases in which judges have been disciplined for commenting on cases pending before them.

- A judge should not have talked to a newspaper reporter before a final disposition after the judge ordered two boys detained in family court for psychological exams. Among other statements, the judge had commented: "I felt the need to put them in there so they can have the psychological (testing) and so they'll be here. It was either that or go ahead and send them to the Department of Youth Services" (*In the Matter of Nice*, COJ 21, Judgement (Alabama Court of the Judiciary June 21, 1988) (6-months suspension for this and other misconduct)).
- A judge should not have (1) shown a deci-

sion to a newspaper reporter and discussed his rationale before the parties received copies; (2) informed a reporter that he planned to vacate an order of contempt (the person held in contempt learned of the judge's intention to vacate the order by reading the newspaper while the validity of the order was pending in the superior court on a petition for writ of habeas corpus); and (3) defended his imposition of a 30-day jail sentence because a defendant requested a jury trial by discussing the pending matter with the press and writing a letter to the editor (*Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (California 1988) (removal for this and other misconduct)).

- A judge should not have discussed with a journalist the progress of a murder trial over which he was presiding and his opinions and reactions to the conduct of participating attorneys, witnesses, and the jury. The judge had known that his comments, though given "off the record," would be used by the journalist in material that he was preparing for publication (*In re Hayes*, 541 So. 2d 105 (Florida 1989) (reprimand)).
- A judge should not have written a letter published in a newspaper that, in an effort to lessen division in the region, addressed community reaction to the arrest of five Native Americans charged with a murder and spoke out against the dynamics that feed racism; the case was pending before the judge (*Press Release (Wolf)* (Minnesota Board on Judicial Standards 1996) (reprimand)).
- A judge should not have made comments to a reporter about a probation revocation pending before the district court (*Press Release (Porter)* (Minnesota Board on Judicial Standards November 5, 1999) (reprimand)).

### *Disqualification*

In addition to other considerations, under Canon 3E(1), a judge's off-the-bench comments about a pending case may disqualify the judge from the case if the comments cast doubt on the judge's

ability to act impartially.

For example, in *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), the court held that the appearance on a national television show by a judge who had entered an injunction against abortion protests created in reasonable persons a justified doubt as to his impartiality and required his disqualification from cases involving the protests. The judge had stated his views regarding continuing protests at abortion clinics, the protesters, and his determination that his injunction against the protests was going to be obeyed. The court stated:

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

Similarly, the Court of Appeals for the First Circuit held that a trial court judge should have disqualified herself after making comments to a reporter that a reasonable person could have interpreted as doing more than correcting misrepresentations and as creating an appearance of partiality. *In re: Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). A suit was filed challenging Boston's elementary school student assignment process, claiming that plaintiffs had been deprived of preferred school assignments based on their race. The district court judge postponed a decision on a motion for class certification until further discovery. In a statement to a reporter quoted in a *Boston Herald* story, counsel for the petitioners "made the provocative claim that '[i]f you get strip-searched in jail, you get more rights than a child who is of the wrong color,'" referring to a case in which the judge had certified a class of women who had been strip-searched in jail. The

judge responded to what she viewed as inaccuracies in the article. In a follow-up article, the *Herald* quoted the judge as saying: "In the [strip search] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. This is a more complex case." In a motion to disqualify, the petitioners argued that the judge's statement could be construed as a comment on the merits of the pending motions for preliminary injunction and class certification, signaled that relief was unlikely to be forthcoming, and provided defendants with a ready-made argument with which to distinguish the cases.

Noting "judges are generally loath to discuss pending proceedings with the media, even when litigants may have engaged in misrepresentation," the court stated:

In newsworthy cases where tensions may be high, judges should be particularly cautious about commenting on pending litigation. Interested members of the public might well consider Judge Gertner's actions as expressing an undue degree of interest in the case, and thus pay special attention to the language of her comments. With such public attention to a matter, even ambiguous comments may create the appearance of impropriety . . . . In fact, the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias.

Stating "the judge's public comments could easily be characterized as legitimate efforts to explain operative law," the court concluded the "comments were sufficiently open to misinterpretation so as to create the appearance of partiality, even when no actual prejudice or bias existed." The court stated, "The fact that Judge Gertner's comments were made in response to what could be characterized as an attack by counsel on the procedures of her court did not justify any comment by Judge Gertner beyond an explanation of those procedures. Whether counsel for petitioners misrepresented the facts or not is irrelevant . . . ."

In *Judith R. v. Hey*, 405 S.E.2d 447 (West Virginia 1990), a judge was disqualified from a custody proceeding when he made several comments to the press and on a national television program highly critical of the reputation, character, and motiva-



tion of one of the parties; the judge was subsequently censured for his remarks. The judge had said, among other things, “My primary concern, and I want to make this clear, is for the welfare of that child, and I don’t think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one. The judge was subsequently censured for those remarks (*In the Matter of Hey*, 425 S.E.2d 221 (West Virginia 1992)), and the West Virginia Supreme Court of Appeals held that the judge’s remarks were not “judicial acts” for which he should have absolute immunity from the mother’s suit for defamation. *Roush v. Hey*, 475 S.E.2d 299 (1996). See also *In re IBM Corp.*, 45 F.3d 641 (2d Cir. 1995) (a judge was disqualified from an IBM anti-trust case brought by the federal government based on judicial and extra-judicial actions, including newspaper interviews he gave concerning IBM’s activities in general and an assistant attorney general’s role in the suit); *Papa v. New Haven Federation of Teachers*, 444 A.2d 196 (Connecticut 1982) (where a judge made critical comments quoted in a newspaper about a particular teachers’ strike and stated that he was “ready to jail more” teachers if the strike was not settled soon, he was disqualified from a case involving that strike).

Finally, the comments the trial judge made to reporters during the Microsoft anti-trust case formed part of the basis for the decision vacating his remedy order and led the Court of Appeals for the District of Columbia Circuit to direct that the case be assigned to a different trial judge on remand. *United States v. Microsoft Corporation*, Nos. 00-5212 and 00-5213 (June 28, 2001). The D.C. Circuit emphasized it found no evidence of actual bias. However, it concluded that the judge’s “secret interviews with members of the media” and “numerous offensive comments about Microsoft officials in public statements outside of the courtroom” gave rise to an appearance of partiality, “seriously tainted the proceedings,” and “called into question the integrity of the judicial process.”

The court found that accounts of the judge’s interviews began appearing immediately after he entered final judgment and that the judge “also had been giving secret interviews to select reporters

before entering final judgment — in some instances long before.” The judge had “embargoed” the early interviews, insisting that the fact and content of the interviews remain secret until the final judgment.

In the interviews, the judge discussed numerous topics relating to the case, including his distaste for the defense of technological integration (one of the central issues in the lawsuit), “what he regarded as the company’s prevarication, hubris, and impenitence;” “his contemporaneous impressions of testimony;” “after-the-fact credibility assessments;” and his views on the appropriate remedy. The court stated that reports of the interviews conveyed “the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write.”

The court noted that the judge’s comments might not require disqualification had he spoken them from the bench, which would have given Microsoft “an opportunity to object, perhaps even to persuade” and created a record for appeal. However, the court stated: “It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge’s remarks would be reported.” The court also stated that the judge’s insistence on secrecy “made matters worse” because it suggested knowledge of the impropriety and “prevented the parties from nipping his improprieties in the bud.”

The court explained that, although it condemned public judicial comments on pending cases, it would not hold that every violation of the restriction or every impropriety “inevitably destroys the appearance of impartiality” and requires disqualification. In this case, however, the court held, “the line has been crossed,” emphasizing that the judge’s violations “were deliberate, repeated, egregious, and flagrant.”

The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge’s impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press.

(The court also explained that the judge’s interviews raised serious questions about whether he had

violated the prohibition on ex parte communications. The court stated: “When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case.” Moreover, noting that the judge’s secret interviews “provided a select few with inside information,” the court stated that for all the judge knew, the reporters “may have been trading on the basis of the information he secretly conveyed.”)

### *Explaining procedures and decisions*

An express exception to the prohibition on making public comments on pending cases, under both the 1972 and the 1990 model codes, allows a judge to make public statements “explaining for public information the procedures of the court.” Explaining court *decisions*, however, does not fall within this exception.

To distinguish between impermissible public comments and permissible public explanations, the terminology section of the Georgia code of judicial conduct prohibits “valuative statements” but allows “generally informative explanations to describe litigation factors.” According to the Georgia code, “valuative statements” judge “the professional wisdom of specific lawyering tactics or the legal correctness of particular court decisions.” Examples of permitted “informative explanations” include descriptions of:

- the prima facie legal elements of types of cases,
- legal concepts or principles such as burden of proof, duty of persuasion, innocent until proven guilty, and knowing waiver of constitutional rights,
- “variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct,”
- procedural phases of lawsuits,
- the social policy goals behind the law being applied, and
- “competing theories about what the law should be.”

Citing the exception for explaining court procedures, the Tennessee judicial ethics committee stated

that a trial judge may speak to groups on subjects related to but separate from the merits of a case while the case was on appeal. *Tennessee Advisory Opinion 89-13*. The case had attracted widespread media attention, and the judge who had presided was invited to speak at civic clubs, school classes, and bar-related functions. The committee explained that a judge could discuss:

- the rules and procedures regulating in-court media coverage of trial proceedings,
- the procedures a trial judge is required to follow when sitting without a jury, and
- the general proposition that the personal opinions of the judge or the moral, ethical, theological, and political views of society should have no part in the court’s decision in a particular case.

Following are other examples of speech falling within the exception for explaining court procedures.

- A judge may explain the procedures for detaining a witness who refuses to obey a subpoena, but may not speak to the ACLU concerning a case in which the judge had a recalcitrant witness arrested while a motion for post-conviction relief was impending (*Florida Advisory Opinion 96-18*).
- A judge may discuss procedures of the court in general terms for the information of the public, but may not relate trial strategies to a decision in a specific case (*Georgia Advisory Opinion 60* (1984)).
- The judges of a district in which a high profile case is pending may appoint a judge who is not hearing the case as a media liaison to answer questions concerning legal procedures and/or processes (*Nevada Advisory Opinion JE-00-6*).
- A judge may express an opinion of the actions of a local conditional release commission generally, but should not mention the names of any specific defendants nor discuss pending cases (*New York Advisory Opinion 92-67*).
- If a court is establishing a new program, a

judge may properly discuss the program with the media so long as the judge is careful to refrain from comment on any pending matter (*Pennsylvania Formal Advisory Opinion 99-3*).

- A justice of the peace may answer questions concerning inquest proceedings prior to a final ruling on a death certificate, but may not discuss the facts or other aspects of the case during the investigation or while the matter is pending (*Texas Advisory Opinion 95 (1987)*).

The exception for explaining the procedures of the court, the Alabama Supreme Court suggested, allows a judge to:

- explain a case in abstract legal terms,
- provide background information relating to the operation of the court system, and
- explain legal terms, concepts, procedures, and the issues involved in the case.

*In the Matter of Sheffield*, 465 So. 2d 350 (1985).

An extra-judicial explanation by a judge of his or her ruling, however, is not an appropriate explanation of court procedures. In *Sheffield*, the court rejected the judge's argument that his comments to a reporter were merely abstract legal explanations of a pending contempt hearing and a part of his judicial duty. A witness in a case before the judge had written a letter critical of the judge that was published in the local newspaper. The judge issued an order directing the witness to show cause why she should not be held in contempt of court. The evening before the hearing, in a telephone call with the editor of the local newspaper, the judge explained the meaning of constructive or indirect contempt and the possible sanctions for contempt. The judge also said, "The contempt speaks for itself. I think it is pretty obvious who she is talking about." Furthermore, the judge suggested to the editor that "the article [had] false information in it," and that the editor "might want to look at the libel laws; call an attorney." The court found that the judge had violated the restriction on making comments on a pending case.

Rejecting the argument that the judge was merely explaining court procedures, the Texas State Commission on Judicial Conduct found that a

judge's lengthy interview with reporters explaining his sentence in a case violated the prohibition on making public comments. *Order of Public Censure (Hampton)* (November 27, 1989). The judge had talked with two reporters while a motion for a new trial was pending in a case in which a defendant had been convicted of killing two men. To one of the reporters, the judge stated:

The victims were homosexuals. They were out in the homosexual area picking up teenage boys. Had they not been out there trying to spread AIDS around, they'd still be alive today. I hope that's clear. [The defendant] is an eighteen year old boy. He had thirty years in prison. You know that's a pretty heavy punishment for a kid that's never done anything wrong before. I balance the character of the defendant against the crime he committed. I tried to consider every fact that was presented to me. I've been prosecuting since 1955. Defending, I defended cases twenty years. I've been judging them for seven years and any sentence that I do is a sum total of thirty-three years experience in criminal law and it does not upset me if anybody in the Gay Alliance disagrees with me.

The Commission condemned the comments because they were lengthy, reviewed the specific details of the case, and formulated or pronounced the rationale for the judge's rulings. The Commission explained that to excuse such a discussion "would be to introduce and condone the use of off-record, extra-judicial considerations into the adjudicative process. Perceptions of fairness would decrease and mistrust increase." The Commission found that the judge's comments, per se, were destructive of public confidence in the integrity and impartiality of the judiciary, noting that the public had reacted to the judge's comments with disbelief, abhorrence, and indignation. The Texas advisory committee has also stated that a judge's explanation of his or her stated position in a case is not an explanation of court procedures. *Texas Advisory Opinion 191 (1996)*.

The Illinois judicial ethics committee advised that a judge should not attempt "to explain an action that he had taken in court with extrajudicial statements that were not a matter of public record." *Illinois Advisory Opinion 96-5*. See also *Illinois Advisory Opinion 98-10*. The committee received an

inquiry from a judge asking if he could have answered a reporter's questions about a pending child support case in which the judge had increased the reporting requirements for an unemployed father on the grounds that the father was not making an earnest job search. The committee noted that a judge who discusses reasons for a ruling risks inadvertently providing information that is not a part of the public record. Moreover, even if the judge does not improperly comment on a pending case, the "reporter's accounts of the judge's remarks could give rise to an erroneous appearance that the judge violated the rule." The committee replied that the judge could not have discussed his reasons for the ruling except to comment on "matters of public record, including reciting without elaboration, any explanation of the judge's ruling that appeared in the transcript of the proceedings or in the court's order."

Instead of responding "no comment," the committee recommended that a judge faced with an inquiry from a reporter consider:

- informing the reporter of the procedure for obtaining a transcript of the proceedings,
- explaining the ethical constraints on a judge's ability to discuss pending cases and directing the reporter to the location and language of the relevant provision of the code of judicial conduct, and
- providing the reporter with a copy of the advisory opinion.

The New York State Commission on Judicial Conduct concluded that a judge should not have attempted to repeat or summarize out of court what was said in the courtroom. *In the Matter of McKeon*, Determination (August 6, 1998) ([www.scjc.state.ny.us/mckeon.htm](http://www.scjc.state.ny.us/mckeon.htm)) (censure for this and other misconduct). The judge received a telephone call from a *New York Times* reporter requesting a summary of a court proceeding over which the judge had presided a few hours earlier in a case challenging the suspension of a Bronx community school board. The *Times* accurately quoted the judge as saying, "I felt a degree of uneasiness about using standards of academic achievement as some kind of criteria about whether the board should remain in office. Simply to say things haven't gotten better, and laying that at the doorstep of people who are unsalaried and meet

several times a month, that disturbs me." The *Times* also reported that the judge stated that he wanted the chancellor's attorneys to offer specific examples of how the school board had failed to take steps to improve academic performance. The *Times* reported that the judge's "remarks could provide a clue about how he might rule in the case."

In disqualifying the trial judge in *United States v. Microsoft Corp.*, Nos. 00-5212 and 00-5213 (U.S. Court of Appeals District of Columbia Circuit June 28, 2001), the court of appeals held that the judge's "opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth" expressed in his interviews with reporters were not discussions on purely procedural matters that fell within that narrowly drawn exceptions. The court explained that the judge's conduct could not be excused by an intention to "educate" the public about the case or to rebut 'public misperceptions' purportedly caused by the parties."

If those were his intentions, he could have addressed the factual and legal issues as he saw them — and thought the public should see them — in his Findings of Fact, Conclusions of Law, Final Judgment, or in a written opinion. Or he could have held his tongue until all appeals were concluded.

### *Comments following reversal on appeal*

When reversed on appeal, a judge may be tempted to defend the original decision or criticize the appellate decision. Such an analysis, however, is an inappropriate comment on a pending case, creates the appearance that the judge intends to ignore the appellate court's order, and undermines the proper administration of justice.

For example, the Maine Supreme Court held that the exception for explaining for public information the procedures of the court did not justify a judge's defense of sentences that he had imposed after the sentences had been reversed on appeal. *In the Matter of Benoit*, 523 A.2d 1381 (1987). The nine cases had been remanded for re-sentencing to the judge who imposed the original sentences. In letters to the editors of four newspapers, the judge criticized the decision vacating the sentences, defended

the sentences he had previously imposed, and commented on the facts of the cases and the sentencing factors he had applied. Newspapers throughout the state published his letters. The court concluded:

It is difficult to conceive of a more egregious violation of the plain proscription of [the prohibition on commenting on pending cases] than that which has occurred in this case. By publishing his letters, the content of which made readily apparent his lack of impartiality, Judge Benoit, at the very least, created the appearance that the judicial system was unfair. More specifically, citizens whose legal rights and freedoms were at risk, were subjected to a public prejudgment of their cases by the very judge who was assigned to reimpose sentence. We cannot tolerate such a conspicuous display of judicial bias regarding pending cases.

Similarly, the New York State Commission on Judicial Conduct disciplined two judges for commenting on cases remanded to them by the appellate court. In one case, speaking with a reporter for the *Buffalo News* about two criminal cases that had been reversed and remanded to him, the judge discussed the basis for his rulings, indicated that he continued to believe that his original decisions were correct, and stated, “I stand firmly by my ruling.” *In the Matter of Maislin*, Determination (August 7, 1998) ([www.scjc.ny.us/maislin.htm](http://www.scjc.ny.us/maislin.htm)) (admonished for this and other misconduct).

The Commission also stated a second judge should not have commented to a reporter after an appellate court had overturned the conviction of a defendant on the ground that the judge had improperly responded to a note from the jury during deliberations without notice and outside the presence of the defendant and his counsel. *In the Matter of O'Brien*, Determination (March 4, 1999) ([www.scjc.ny.us/o'brien.html](http://www.scjc.ny.us/o'brien.html)) (admonished for this and other misconduct). Based on the judge’s comments, a story was published about the case, with the headline, “Judge and DA at Odds. A Man’s Convictions Were Overturned. The Prosecutor Said He Is Offended That the Judge Is ‘Shifting Blame’ to His Office.” The story said that the judge was “satisfied it was the right thing to do,” and reported the judge’s remark that the outcome of the appeal might have been different had the district attorney presented oral argument. The Commission held that the rule against

commenting on pending cases was clear and unequivocal, rejecting the judge’s argument that there is an exception for explanations of a judge’s decision-making process. Noting that the judge had insisted that his actions in the case had been appropriate even though a higher court had ruled otherwise, the Commission concluded that the judge had undermined the proper administration of justice by implicitly criticizing the appellate court. The Commission also noted that the judge had improperly blamed the district attorney for failing to argue the case on appeal, that the judge’s statements were misleading in that they described the reversal as merely a disagreement between the two courts, and that the judge should not have publicly suggested that the district attorney appeal the decision.

Further, the Minnesota Board on Judicial Standards publicly reprimanded a judge for making statements in a television broadcast concerning a defendant in two murder cases pending before another judge in the same court, when at the time of the telecast, the jury selection in the case had been completed, the trial was in progress, and the jury was not sequestered. The judge had presided over the defendant’s first murder trial, which had been reversed on appeal. According to newspaper reports, the judge stated the defendant “does a good job of portraying himself as innocent. I think his first conviction was amply supported by the evidence, and I think that the facts that were brought in that case show that he is a dangerous person.” *Press Release (Porter)* (May 28, 1992). *But see Office of Disciplinary Counsel v. Souers*, 611 N.E.2d 305 (Ohio 1993) (a judge’s defense of his sentencing order, while less than judicious, was provided to publicly explain his procedure in the underlying criminal case and could not be the basis for discipline).

### *Responding to criticism about a pending case*

The temptation for a judge to make a comment in a pending case is probably strongest if the judge is publicly criticized about his or her handling of the case. In response to such criticism, a judge may:

- explain court procedures,

- respond to criticism directed toward judicial procedures, the law, or the courts generally in regard to litigation, and
- give information to the public as to the status of the litigation.

*California Advisory Opinion 24* (1976). However, the judge's remarks must be circumspect and without suggestion of partiality or premature determination. According to the California judicial ethics committee, a judge should not:

- comment as to future decisions the judge or another trier of fact may make,
- comment as to his or her opinions regarding the credibility of witnesses or the validity of evidence, or
- respond to criticism directed toward the judge on the merits of the litigation.

Similarly, the Texas judicial ethics committee stated that a judge may not respond publicly to unfair criticism of his actions in a case that was still pending. *Texas Advisory Opinion 209* (1997). Critics had alleged that the judge, who was presiding in a massive tort litigation action, was biased because of personal ties to the attorney for the plaintiffs and suggested that the judge's political interests favored plaintiffs, who resided in the judge's county.

The committee noted that it sympathized with the judge's desire to refute unfair or false criticism of his actions and defend his reputation. However, it concluded that a public response to unfair criticism went beyond explaining procedures to the public and was, therefore, prohibited.

To engage in an editorial debate with his critics about the merits or motivations of his decision not to recuse himself or his ability to be impartial would place the judge in the position of taking sides outside the courtroom for or against parties urging certain positions inside the courtroom. That is to say that the judge's editorial efforts to defend his impartiality could unwittingly cast further doubt on his impartiality.

A judge asked the Louisiana advisory committee whether the judge could respond to questions from the press prompted by a citizen's letter published in

the local newspaper that contained inaccurate or misleading statements about a ruling or other action by the judge in a pending case. The committee advised that the judge could not respond "except to the limited extent of explaining procedures of the court." *Louisiana Advisory Opinion 144* (1997). The committee stated that such an explanation could include:

- general background information relating to the operation of the court system, and
- an explanation in legal terms of the concepts, procedures, and issues involved.

The committee stressed that the judge's primary goal in responding must be to educate the public and to maintain the dignity of the judicial office and cautioned that the judge should avoid personalizing his or her comments and should be objective and dispassionate.

Several other committees have given similar advice in the context of a pending case.

- A judge may not discuss issues involving a pending case with a group that was formed as a result of the judge's sentence in the case (*Florida Advisory Opinion 85-9*).
- A judge may not publicly respond to letters to the editor criticizing his or her conduct involving a pending case in which the judge had recused (*Florida Advisory Opinion 85-9*).
- A judge may not comment publicly about a pending matter in the judge's court despite false, misleading, and inaccurate public statements made by a litigant (*New York Advisory Opinion 94-22*).

The California committee concluded that "criticism directed toward a judge in the context of the merits of pending or imminent litigation is more appropriately answered by a bar association or bar officials." *California Advisory Opinion 24* (1976). Recognizing that judges cannot publicly defend themselves against improper criticism, many state and local bar associations have such committees. For example, the Committee on Public Comment of the Delaware Bar Association was created "to advise and consult with the President [of the Association] in identifying and framing responses to unwarranted

criticisms of members of the judiciary and to matters appearing in the media that affect the legal profession, the judicial system, or the administration of justice,” and to assist “in preparing statements in connection with such criticisms and matters on behalf of the Association.” See also American Bar Association, *Model Program Outline for State, Local and Territorial Bar Associations: Suggested Program for the Appropriate Response to Criticism of Judges and Courts* (Judicial Division 1998).

## COMMENTING ON A CASE PENDING ON APPEAL

Continuing the limitation on public comments until appeals are exhausted was implied in the 1972 code. Commentary to Canon 3B(9) of the 1990 model code expressly provides that the “requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.”

The New Jersey advisory committee prohibited a judge from participating as a panelist for a symposium to discuss a decision authored by the judge and pending before the supreme court. *New Jersey Advisory Opinion 3-88*; *New Jersey Advisory Opinion 2-88*. The committee explained its advice.

- Extra-judicial comments might be used by counsel in their briefs.
- If the judge sought to defend the opinion, the perception of impartiality would be destroyed.
- Commenting on a case to assist the appellate court is tantamount to an amicus curiae brief in support of the judge’s own opinion, which is unacceptable.
- The opinion should rest on its own footing without further elaboration.

Other advisory committees have given similar advice:

- A judge may not write a book about one or more cases over which the judge presided before final disposition of the case. A judge should not write about a capital case in which the death penalty was imposed before the sentence is carried out (*Alabama Advisory Opinion 99-739*).
- A judge may not appear in a television documentary about a case the judge recently tried if the case is pending on appeal (*Florida Advisory Opinion 98-28*).

Judges have been disciplined for commenting on

cases that were no longer pending before them but were on appeal.

- A judge should not have given interviews to *West Magazine* and *Time*, in which he publicly commented on the “no pregnancy” probation conditions he had imposed in two cases while those cases were pending on appeal (*Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998), *cert. denied*, 525 U.S. 1070 (1999) (censured for this and other misconduct)).
- A judge should not have discussed a child custody case on a nation-wide television program while an appeal from his decisions was pending. (Prior to the discipline proceedings, the judge had been disqualified from the custody case as a result of his remarks. *See* discussion at page 4.) The judge had said, among other things, “My primary concern, and I want to make this clear, is for the welfare of that child, and I don’t think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one” (*In the Matter of Hey*, 425 S.E.2d 221 (West Virginia 1992) (censure). (Subsequently, the West Virginia Supreme Court of Appeals held that the judge’s remarks were not “judicial acts” for which he should have absolute immunity from the mother’s suit for defamation. *Roush v. Hey*, 475 S.E.2d 299 (1996).)
- A judge should not have commented about a lawsuit while her decision was on appeal. The judge had presided over the jury trial of an action for breach of contract based on the alleged withdrawal by the defendant, actress Kim Basinger, from the plaintiff’s movie “Boxing Helena,” which was completed and released with a different female lead. There was a verdict for the plaintiff, and the defendants filed a notice of appeal. While the appeal was pending, the judge was quoted in a newspaper article as saying, “The fact of the matter is that throughout the trial, a significant portion of

my rulings were in favor of Kim” (*Public Admonishment of Chirlin* (California Commission on Judicial Performance August 28, 1995) (admonishment)).



## COMMENTING ON A CASE PENDING BEFORE ANOTHER JUDGE IN THE SAME JURISDICTION

Comments about a case pending before another judge or jury in the same court or jurisdiction as the commenting judge can also be reasonably expected to affect its outcome or impair its fairness or at least create that appearance, and, therefore, falls within the proscription of Canon 3B(9). A rule prohibiting such comments guards against the danger that a judge would feel pressured or would appear to feel pressured by the comments of a peer and colleague or that a jury would accord deference or would appear to accord deference to an opinion expressed by a judge. Moreover, such a rule ensures that proceedings remain immune from outside influences, even if such influences are not specially prejudicial. Finally, the prohibition guards against the creation of a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law. Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589 (1989); *Matter of Benoit*, 523 A.2d 1381 (Maine 1987).

- A member of the supreme court may not respond to media reports concerning the action or inaction of members of the court based on testimony from a completed trial in a criminal case in federal district court (*Arkansas Advisory Opinion 2000-2*).
- A judge may not participate on a media response team that responds to negative or inaccurate media stories about the legal profession, the judiciary, and the courts (*Texas Advisory Opinion 265* (2000)).

## COMMENTING ON AN IMPENDING CASE

The prohibition on making public comments applies to impending cases as well as pending cases. Thus, "the prohibition begins even before a case enters the court system, when there is reason to believe a case may be filed." *United States v. Microsoft Corp.*, Nos. 00-5212 and 00-5213 (U.S. Court of Appeals District of Columbia Circuit June 28, 2001). For example, a case is "impending" if a crime is being investigated, if someone has been arrested although not yet charged, if legislation has been passed that will probably be challenged, or if there are other indications that a case will be filed.

For example, the Missouri Supreme Court held that a judge should not make comments about possible charges that might be filed against a man arrested for abusing his ex-wife. *In re Conard*, 944 S.W.2d 191 (Missouri 1997) (30-day suspension for this and other misconduct). The judge had stated, "At the most, this is a third degree assault, at the very most, and it probably won't even be filed, so there was no merit to the claims." The Court held that the statement reflected a pre-judging of the merits of criminal charges that might be filed without the benefit of investigation, evidence, or argument, revealed an attitude that was a discredit to the judiciary, and could be interpreted as an attempt to influence whether charges would ultimately be brought against the ex-husband.

Similarly, the Indiana Commission on Judicial Qualifications held that a judge is prohibited from making public comments about the credibility or good faith of a witness in an impending proceeding. *Statement of Admonition of Letsinger* (June 13, 1997). In response to allegations that more than \$8,000 was missing from the court probation department funds, the judge stated that the head of the probation department, who presumably would play a key role in the investigation and possible court proceedings, was stonewalling and being less than candid and forthcoming. *See also In re Schenck*, 870 P.2d 185 (Oregon), *cert. denied*, 513 U.S. 871 (1994) (a judge's letter to the editor and guest editorial criticizing the district attorney were a direct comment on the quality of prosecution to be expected in pending

and impending criminal matters that were to come before him).

Judicial ethics committees have given similar advice.

- When it was evident that parents of children initially placed in the care of the Department of Children and Families were seeking recovery of their attorney's fees for defending the matter from the state after the dependency petition was denied and the children were returned to the state, a judge should not answer extensive, detailed questions in response to a letter from a local newspaper, about the emergency shelter hearing (*Florida Advisory Opinion 2000-30*).
- Following published reports criticizing a judge's actions in a case indicating some parties may move to overturn the actions, a judge should not comment publicly out of court about the merits of the impending motions (*U.S. Compendium of Selected Opinions, § 3.9-1* (2001)).

## COMMENTING ON A PENDING CASE IN ANOTHER JURISDICTION

It might be argued that, under the 1990 model code, a judge may comment about a pending or impending case in another jurisdiction because, for example, a California judge or jury is not likely to hear about, much less be affected by, the comments of a New Jersey judge. However, inferring an exemption for cases in other jurisdictions from the prescription on public comments would be contrary to the retention of the "in any court" language in the 1990 model code revision.

Moreover, comments on a case pending in another jurisdiction may be prohibited by the Canon 2A requirement that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." A judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction" threatens public confidence. *In re Broadbelt*, 683 A.2d 543 (New Jersey 1996), *cert. denied*, 520 U.S. 1118 (1997). One commentator has decried the "unseemly spectacle" of judges commenting on other judges' cases. Rothman, *California Judicial Conduct Handbook* at 142 (2d ed. 1999).

Similarly, in advising that a judge could not appear on Court TV to identify important legal issues in out-of-state actions and to discuss their procedural settings, the New York judicial ethics advisory committee stated:

[W]hat constitutes an important legal issue in the particular case being commented on may very well be a subject of dispute between the litigants. Remarks by the judge could thus be seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined.

*New York Advisory Opinion 93-133*. The code adopted for New York judges in 1996 affirms that the rule applies to cases in other jurisdictions, adding "any court within the United States or its territories" to its version of the comment restriction.

A judge who had made repeated television appearances to comment on the O.J. Simpson case was sanctioned by the New York State Commission on Judicial Conduct. The judge commented on the quality of proof, the effectiveness of the strategies employed by the attorneys and the credibility of witnesses, including Simpson. The Commission noted that “his television appearances went well beyond explanations of the law and the legal system.” *In the Matter of McKeon*, Determination (August 6, 1998) ([www.scjc.ny.us/mckeon.htm](http://www.scjc.ny.us/mckeon.htm)) (censure for this and other misconduct).

Unlike the model code, several states have expressly established different rules for a judge’s public comments depending on where the case is pending. The restriction in North Carolina, for example, applies only to “a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law.” Similarly, the restriction applies only to comments about proceedings “in any court within the judge’s jurisdiction” in the Oregon code and about proceedings that “may come before the judge’s court” in the Texas code.

## SCHOLARLY TEACHING AND WRITING

One category of comments the 1990 model code intended to permit by adopting the “might reasonably be expected to affect [a proceeding’s] outcome or impair its fairness” qualification in the restriction on public comments were comments made during scholarly presentations on cases pending in other jurisdictions. The reporter for the ABA committee that drafted the 1990 model code explained that “judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality.” Milord, *The Development of the ABA Judicial Code* at 21 (1992).

This exception was also implied in the 1972 model code restriction. Interpreting that provision, the New York advisory committee stated that a judge who teaches a course in criminal justice and related topics may comment in the classroom on actual cases pending in courts in other jurisdictions. *New York Advisory Opinion 95-105*. The committee reasoned that the code provision allowing judges to lecture and teach about the law “obviously contemplate[d] a reasonable degree of academic freedom within the confines of a class room.” The committee concluded that “[e]ngaging in discussion with students about current events involving cases being tried in other localities, generally speaking, can in no way negatively impact the criminal justice system.” The committee did caution that the judge should:

- refrain from making gratuitous and unnecessarily controversial statements about pending cases, and
- avoid any discussion of cases pending within the general jurisdictional locale of the judge’s court and the college campus.

In a subsequent opinion, the committee stated that a judge may not lecture at a law school about a case over which the judge recently presided and in which an appeal was likely. *New York Advisory Opinion 97-132*. The committee also stated that a judge who is presiding over a criminal proceeding that was originally a capital punishment case may

not comment specifically on the case, but may speak at a law school alumni gathering on capital punishment issues generally, including potential amendment of statutes governing fees for capital defense counsel. *New York Advisory Opinion 98-126 and 129*.

Some states have added an express “education exemption,” at least for cases not involving the judge making the comments.

- The **Delaware** code and the **Code of Conduct for U.S. Judges** add that the proscription does not extend “to a scholarly presentation made for purposes of legal education.” Commentary states, “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.”
- The **California** code adds: “Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.”

## COMMENTING WHEN A CASE IS NO LONGER PENDING

Some judicial ethics committees allow a judge to comment about a case the judge has decided after final disposition (including all appeals), although advising that caution is still necessary.

- In referring to a final criminal case, the judge should consider whether the comments might afford a basis for collateral attack.
- In referring to any final case, the judge should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the judicial office.
- A judge should not reveal deliberative processes or place in question the judge’s impartiality in future cases.

*U.S. Advisory Opinion 55* (1977); *U.S. Compendium of Selected Opinions*, § 3.9-1 (2001).

The Arizona judicial ethics committee stated that a judge may write articles for publication about the reasoning process by which he or she reached a decision in a particular case if the case has been fully resolved, but the committee imposed conditions on the judge’s commentary. *Arizona Advisory Opinion 95-4*. The article:

- must be written in a manner that casts no reasonable doubts on the judge’s capacity to act impartially (Canon 4A(2)),
- must promote public confidence in the integrity and impartiality of the judiciary (Canon 2A),
- must not demean the judicial office (Canon 4A(2)),
- must not interfere with the proper performance of judicial duties (Canon 4A(3)), and
- must not disclose any non-public information about the case that was acquired by the judge in his or her judicial capacity (Canon 3B(11)).

In contrast, other judicial ethics committees

have advised against commenting about a case even when the case is final. For example, the New Jersey advisory committee stated that a judge should not “clarify, defend, or justify any of the judge’s decisions or opinions, or reasoning therein even in the absence of an appeal.” *New Jersey Guidelines for Extrajudicial Activities, III.A.2.b*. The Alabama judicial ethics committee discouraged a judge from writing a book about one or more cases over which the judge presided even after final disposition. *Alabama Advisory Opinion 99-739*.

The Texas advisory committee stated that a judge may not write a newspaper article discussing his or her position in a case in which the judge participated even though the case had been finally resolved. *Texas Advisory Opinion 191* (1996). That committee stated, “Even though a matter has already been decided it can be revisited and the opinion/editorial would be talking about more than just particular procedures of the court.” (The Texas code prohibits public comment that “suggests to a reasonable person the judge’s probable decision on any particular case.” However, that difference between the model code and the Texas code does not seem to affect the reasoning of the advisory committee.) Further, as the request was from an appellate judge, the opinion cited a unique provision in the Texas code that provides:

The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court’s judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

***If a judge is criticized about a case that is no longer pending***

“Nothing in the Code of Judicial Conduct prevents a judge from making a dignified response to public criticism” that does not involve a case pending or about to be brought before the court. *California Advisory Opinion 24* (1976). A judge who had been the subject of a negative letter to the editor about a case that was no longer pending asked the New York advisory committee if he could respond. Entitled “System is Frustrating,” the letter published

in a local newspaper was critical of a court system where “judges and lawyers get together and decide who is right and who is wrong before they know the whole story.” It also stated that the “whole country is slowly going down the tube and people of the judicial system don’t care.” The article did not identify by name any particular case or judge, but the inquiring judge knew which case the letter referred to by the names of the writers. The judge wanted to respond in a letter indicating that the author’s statements were “completely false and unfounded, since both parties were represented by counsel, a fact-finding was held at which the parties testified under oath, there never was a pre-trial conference with or without the parties, and the entire matter is on the record.”

The New York committee advised that, because the case was no longer pending, the judge was at liberty to publicly correct any of the procedural misconceptions in the letter. *New York Advisory Opinion 92-13*. However, the committee warned that the judge must:

- scrupulously avoid personalizing the comments,
- refrain from invective, and
- be objective and dispassionate so as not to detract in any way from the dignity of the judicial office.

In addition, the committee stated that “[w]hile no ethical objection is apparent to the judge’s answering, the Committee considers this an unwise course,” noting that a “judge must expect to be the subject of public scrutiny and, therefore, must accept criticism, however meritless, that might be viewed as opprobrious by the ordinary citizen.” See also *Alabama Advisory Opinion 97-649* (a trial judge should not explain the rationale for a sentence imposed in a criminal case to a critic of that sentence even if the time for an appeal has expired and the judge is willing to recuse from any post-conviction petition brought by the defendant).

## THE FIRST AMENDMENT

Any limitation on speech invites a challenge on First Amendment grounds, but the prohibition on judges commenting on pending cases has withstood constitutional scrutiny. The decisions acknowledge that judges do not give up their First Amendment rights when they take the bench but stress that those rights can be circumscribed in light of the state's critical interest in an independent and impartial judiciary.

In response to a judge's challenge to an advisory opinion forbidding the judge from appearing on television to comment on cases pending in other jurisdictions, the New Jersey Supreme Court rejected the judge's argument that the prohibition violated the First Amendment. *In re Broadbelt*, 683 A.2d 543 (1996), *cert. denied*, 520 U.S. 1118 (1997). The court applied an analysis that allows the regulation of speech if it furthers a substantial governmental interest unrelated to suppression of expression, and if it is no more restrictive than necessary. The court held that avoiding material prejudice to an adjudicatory proceeding, preserving the independence and integrity of the judiciary, and maintaining public confidence in the judiciary are obviously interests of sufficient magnitude to uphold the restrictions. The court also stated it was satisfied that the restriction on a judge's speech was no greater than necessary.

In *Broadman v. Commission on Judicial Performance*, 959 P.2d 715 (California 1998), *cert. denied*, 525 U.S. 1070 (1999), the California Supreme Court applied an analysis from cases involving the free speech rights of public employees. The California Commission on Judicial Performance had recommended that a judge be censured for giving interviews to two magazines in which he had publicly commented on the "no pregnancy" probation conditions he had imposed in two cases while those cases were pending on appeal (as well as other misconduct).

The judge argued that the standard for lawyers commenting on cases applied to judges and, therefore, under *Gentile v. State Bar of Nevada*, 510 U.S. 1030 (1991), he had a First Amendment right to make public comments on pending cases unless those comments posed a substantial likelihood of material prejudice to a fair trial. Rejecting that standard, the

California Supreme Court stated that the public does not expect a high degree of neutrality or objectivity from lawyers but judges must be and be perceived to be neutral arbiters of both fact and law who apply the law uniformly and consistently. The court also stated that judges' public comments will be received by the public as more authoritative than those of lawyers and inappropriate public comments by judges pose a greater threat to the fairness of judicial proceedings than improper comment by lawyers.

Using the standard from public employee speech cases, the court balanced the interest of the judge, as a citizen, in commenting on matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

The *Broadman* court concluded that the general interest of judges in making public comments on court proceedings is outweighed by the interest of the judicial system in maintaining impartiality. Specifically, the court stated that a judge's comments on a case on appeal from the judge's decision may create the impression that the judge has abandoned the judicial role to become an advocate for the judge's own ruling or for the position advanced by one of the parties. The court also held that the restrictions are narrowly drawn because they do not apply to final proceedings, to public statements by judges in the course of their official duties, or to explanations of court procedures.

Applying the analysis from public employee speech cases, the Oregon Supreme Court also concluded that imposition of a sanction on a judge for criticizing a district attorney did not violate the judge's freedom of speech. *In re Schenck*, 870 P.2d 185, *cert. denied*, 513 U.S. 871 (1994). The judge had criticized the prosecutor in a letter to the editor and guest editorial, both published in a local paper. The court found that the code restriction promoted an interest in protecting both the fact and the appearance of the impartiality and integrity of the judiciary and that that interest is "profound." The court held that the prohibition on making comments on pending cases is a limited restriction on the judge's right to speak that directly related to and was narrowly drawn so as to further the governmental interest.

## SUMMARY

Canon 3A(6) of the 1972 American Bar Association Model Code of Judicial Conduct stated: “A judge should abstain from public comment about a pending or impending proceeding in any court.” Canon 3B(9) of the 1990 model code provides, “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*” (emphasis added).

Under both the 1972 and 1990 model codes, a judge is clearly prohibited from commenting on the merits of cases pending before the judge because any such comments could “reasonably be expected to affect its outcome or impair its fairness.” The rule restricts any comment that reflects a predisposition in the case but also comments that might be characterized as minor or not on the merits. Off-the-bench comments about a pending case may also disqualify the judge from the case if the comments cast doubt on the judge’s ability to act impartially.

An express exception to the prohibition on making public comments on pending cases, under both the 1972 and the 1990 model codes, allows a judge to make public statements “explaining for public information the procedures of the court.” Thus, judges may explain the legal elements of cases, and legal concepts or principles such as burden of proof, innocent until proven guilty, and knowing waiver of constitutional rights, and procedural phases of lawsuits.

An extra-judicial explanation by a judge of his or her ruling, however, is not considered an explanation of court procedures. A judge may not attempt to explain an action taken in court with statements that are not in the official transcript, court orders, or written opinions. This restriction includes repeating or summarizing out of court what was said in the courtroom.

When a judge is reversed on appeal, he or she should not defend the original decision or criticize the appellate decision. Such comment creates the appearance that the judge intends to ignore the appellate court’s order and undermines the proper administration of justice.

In response to public criticism about his or her decision in a case a judge may explain court proce-

dures, respond to criticism directed toward judicial procedures, give information as to the status of the litigation, inform a reporter or the public of the procedure for obtaining a transcript or order, and explain the ethical constraints on a judge’s ability to discuss pending cases. However, the judge should not discuss his reasons for the ruling.

Judges are expressly prohibited from commenting on a case that is on appeal. Comments about a case pending before another judge or jury in the same court or jurisdiction are also prohibited because such comments could reasonably be expected to affect its outcome or impair its fairness or at least create that appearance. Finally, the prohibition on making public comments applies to impending cases, in other words, cases where charges are under investigation or it otherwise seems probable that a case will be filed.

Because the prescription on public comments applies to cases pending “in any court,” the rule applies even to a case in another jurisdiction. That interpretation is also consistent with the Canon 2A requirement that a judge “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Comments on pending cases during scholarly presentations are permitted. However, while lecturing, a judge should not make controversial statements about pending cases, discuss cases pending within the general jurisdictional locale of the judge’s court and the lecture, or discuss a case over which the judge recently presided and in which an appeal is likely.

Some judicial ethics committees allow a judge, with caution, to comment about a case the judge has decided after final disposition (including all appeals). Other advisory committees, however, have advised against commenting about a case even when the case is final.

The restriction on commenting on pending cases has withstood constitutional challenge. The decisions acknowledge that judges do not give up their First Amendment rights when they take the bench but stress that those rights can be circumscribed in light of the state’s critical interest in an independent and impartial judiciary.

## CODE VARIATIONS

- As of April 2001, Alaska, Arizona, Arkansas, the District of Columbia, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have adopted the “might reasonably be expected to impair [a proceeding’s] outcome or impair its fairness” language from the 1990 ABA Model code.

- The **California** code of judicial conduct provides: “A judge shall not make any public comment about a pending or impending proceeding in any court . . . .” The California code also states:

Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case.

- The **Delaware** code provides (emphasis added): “A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge’s direction and control. This proscription does not extend to public statements made in the course of the judge’s official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.” Commentary provides in part: “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.”

- The **Nebraska** code provides: “A judge shall not, while a proceeding is pending or impending in any court, make any public comment that reasonably might be expected to interfere substantially with a fair trial or hearing.”
- The **New York** code provides (emphasis added): “A judge shall not make any public comment about a pending or impending proceeding within the United States or its territories.”
- The **Connecticut** code provides (emphasis added):

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge’s direction and control. This subdivision does not prohibit judges from making public statements in the course of their official duties, from explaining for public information the procedures of the court, or from correcting factual misrepresentation in the reporting of a case.

- The **Georgia** code adds a definition for “comment”:

“Comment” in connection with a case refers to evaluative statements judging the professional wisdom of specific lawyering tactics or the legal correctness of particular court decisions. In contrast, it does not mean the giving of generally informative explanations to describe litigation factors including: the prima facie legal elements of case types pending before the courts, legal concepts such as burden of proof and duty of persuasion or principles such as innocent until proven guilty and knowing waiver of constitutional rights, variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct, procedural phases of unfolding lawsuits, the social policy goals behind the law subject to application in various cases, as well as competing theories about what the law should be.

- The **Louisiana** code 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 out-



come or impair its fairness or bring the judiciary into disrepute . . . .” Louisiana did not adopt the provision permitting comment on a case in which a judge is a party.

- The **North Carolina** code provides (emphasis added): “A judge should abstain from public comment about a pending or impending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law . . . .”
- The **Oregon** code provides (emphasis added): “A judge shall not, while a proceeding is pending in any court within the judge’s jurisdiction, make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding.” The Oregon code adds that the rule does “not prohibit a judge . . . from establishing a defense to a criminal charge or civil claim against the judge or from otherwise responding to allegations concerning the judge’s conduct in the proceeding.”
- The **Texas** code provides (emphasis added): “A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge’s court in a manner which suggests to a reasonable person the judge’s probable decision on any particular case.” The Texas code also provides: “A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court’s judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.”
- The **Code of Conduct for U.S. Judges** provides (emphasis added): “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 proscrip-

tion 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.” Commentary provides in part: “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.”