

024 MCLE: Ethical Issues for In-house Counsel Dealing with the Judiciary

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Faculty Biographies

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Alan B. Rabkin is the executive director and general counsel of the Nevada Commission on Judicial Discipline. The commission is responsible for investigating and resolving claims of judicial misconduct, violations of the Supreme Court's Code of Judicial Conduct, and resolving disabilities of Nevada judges.

Prior to assuming the commission responsibilities, Mr. Rabkin was a general counsel at several financial institutions in Nevada and the Lake Tahoe Region, including a private practice bank and securities attorney in Scottsdale, Arizona, and a former special assistant United States attorney/agency attorney advisor assigned to the U.S. Small Business Administration in Phoenix.

Mr. Rabkin is an active member of the bar and has served as chair of the publications and continuing legal education state bar committees. He is a former appointed member of the five person State of Nevada Board of Continuing Legal Education. Mr. Rabkin has served ACCA as the vice chair of the Council of National Committees and as chair of the Corporate and Securities Law Committee. He received ACCA's 1999 "Committee Person Of The Year" award before returning to governmental service.

Mr. Rabkin is a *magna cum laude* graduate of the University of California at Los Angeles, a *cum laude* graduate of Loyola University School of Law; and also holds both an LLM (Taxation) and CRCM (Banking) post-doctoral degrees and certifications.

**GUIDE TO THE ETHICAL OBLIGATIONS OF NEVADA JUDGES AND
FILING A COMPLAINT WITH THE NEVADA COMMISSION ON JUDICIAL
DISCIPLINE**

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NEVADA COMMISSION ON JUDICIAL DISCIPLINE

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Thank you for inquiring about judicial conduct and disability with the Nevada Commission on Judicial Discipline (the "Commission"). The Commission has been in existence since the mid-1970's and its authority is defined by the Nevada Constitution (Article 6, Section 21), the Nevada Revised Statutes (NRS §1.425, et seq.) and by its own adopted Procedural Rules. The current versions of these requirements can be found in the laws of the State of Nevada, commonly called the Nevada Revised Statutes, available at local law or larger public libraries or the same information can be accessed on the Commission's web site found at www.judicial.state.nv.us.

At the start of our explanation about what the Commission does, and how it can assist you, it is important to understand that the Commission's powers are limited by Nevada law and are solely those of a regulator of judicial conduct and disability. The Commission is *not* an appellate court and generally has *no power to overturn a decision of a judicial officer*. Rather, the matter of reviewing and addressing questions of legal error are normally reserved to Nevada's appellate courts.

Rather than focus on the correctness of a decision, the Commission focuses on a judicial officer's conduct or disability. If the Commission finds that a judicial officer failed to adhere to the Nevada Code of Judicial Conduct (Part VI of the Nevada Supreme Court Rules) (the "Code"), as that Code is periodically amended by the Nevada Supreme Court, the Commission is granted the independent power to discipline or caution a judicial officer for failure to abide by the Code governing his or her conduct. In addition, if the Commission finds that a judicial officer can no longer carry out his or her judicial

duties due to a significant disability, it may temporarily or permanently remove a judicial officer or impose conditions regarding the judicial officer's future duties.

Nevada Supreme Court Rules
**Part VI. NEVADA CODE OF JUDICIAL
 CONDUCT**

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.

FREQUENTLY ASKED QUESTIONS ABOUT THE COMMISSION

1. What does the Code regulate and what is a Canon?

The Code is based upon a model set of five Canons plus explanations (called Commentaries) that most of the States in the United States have adopted in the same or nearly the same form so as to govern judicial conduct similarly across the country. Canons are separate sections designed to state ethical rules applicable to judges. Each of the Canons express a related group of requirements that a judicial officer must abide by while serving in Nevada and acting as a judicial officer. These are not advisory or aspirational rules; rather, they are mandatory and binding. The five Canons deal with topics such as a judge remaining dignified or impartial; not deviating from the law; not failing to disqualify from a case due to bias or other reasons; what judicial officers can do with regard to outside interests including their own; how a judge should campaign for judicial office; and many additional topics.

2. Does the Code cover full-time and part-time judicial officers? How about magistrates and referees? How about attorneys?

The Code (and therefore the Commission) broadly covers full-time, part-time, pro tem and senior judicial officers, magistrates and referees who are part of the court system in Nevada. The Code and the Commission does not cover Federal system judges (even in Nevada), tribal or out-of-state judges. The Code and the Commission regulate only the conduct of judicial officers and not the conduct of other elected officials. The Code and the Commission do not regulate attorneys unless they are also judicial officers. If you wish to complain about a Nevada attorney please contact the State Bar of Nevada at (800) 254-2797 or (702) 382-2200.

3. I do not like the way a Nevada judicial officer handled my civil or criminal case. Should I file a complaint against him or her?

The decision to file a complaint is a serious step you should not take lightly or file simply to "get back" at a judicial officer for a decision you disagree with. You will be asked to sign a verified (sworn) complaint against the judge and this raises serious charges. If you

file a complaint not within the jurisdiction of the Commission or a complaint that does not provide a reasonable inference of violation of one or more of the Code's Canons, it will likely be dismissed. Therefore, you should attempt to carefully state what the judicial officer did to violate the Code and provide reasonable and accurate details to support your claim. Recent statistics regarding Commission disciplinary activity efforts may be found on the Commission's Internet web site listed above.

4. If I file a complaint, can the judicial officer retaliate against me? Will the judge know I filed the complaint? Should I mention that I filed a complaint in court and try to change judges?

If the judicial officer retaliates against you for filing a complaint, that would be an unwise decision and could lead to additional charges of misconduct being lodged against the judicial officer. You should inform us if the judicial officer does engage in conduct of this type. Generally, the judicial officer will not be told you have complained about him or her (unless someone out of the Commission's control informs him or her, which could violate Commission rules). Only if the matter proceeds to an investigatory stage or to a stage where the judge's response is requested will the judicial officer learn of the complaint. You may not mention that you have filed a complaint with the judge or any other party until advised that this public disclosure is appropriate by the Commission or its staff. This means you cannot use the fact you filed a complaint to justify your removal of the judge from your case. Instead, you must keep the fact that you have filed a complaint confidential (even from the judicial officer) until advised otherwise by the Commission.

5. What discipline can the Commission give to a judicial officer who acts inappropriately? Will the public know if the judicial officer is disciplined?

Forms of punishment are set by the Nevada Legislature and the precise punishment deemed proper in any case is decided upon by the Commission after finding a violation. Punishment currently includes removal as its most serious remedy; however, removal requires an even higher level of proof than other sanctions. Sanctions of a less drastic nature are also possible and the ability to correct minor errors by cautionary warning is an additional option available to the Commission. Whether the general public learns of the final disposition of the case and any sanctions applied by the Commission or the disposition remains confidential depends upon whether the case became a formal (public) case or remained as a confidential matter. You will normally be informed of a case becoming public and until being so informed you should consider your case as confidential. If you are unsure if the case is formal or confidential, please ask the Commission or its staff before publicly announcing any disposition you might be informed about since you could violate existing law by mentioning the disposition of a confidential case.

6. Does filing a complaint give me more time to appeal my case?

No, it does not. You must timely file any appeal with the correct court if you wish to appeal. Filing a complaint with the Commission is a separate process and does not

change any period(s) to appeal your case or decision. Do not file your appeal with the Commission.

7. How soon will the Commission address my complaint if I file one?

Normally Commission meetings are held quarterly (four times per year). You should receive confirming information from the Commission or its staff soon after filing your complaint about the planned date the Commission will fully consider your complaint. You are not asked to attend the Commission meeting since discussions about your matter by law are conducted in private session. If further information about your case is needed, you will be contacted.

8. Where can I obtain a complaint form and more information?

You can obtain a misconduct or disability complaint form and much more information from the Commission's Internet web site listed on the front page of this brochure; or, by writing the Commission; or, by calling or faxing your request to the Commission.

Form NCJD 02-0701

JUDICIAL ETHICS AND IN-HOUSE PRACTICE

*An In-House Counsel's Primer For Understanding
The Relevance Of Judicial Ethics and Judicial Discipline
To Company Practices*

ACCA ANNUAL MEETING 2001
Hyatt Regency San Diego
October 15, 2001
10:30 a.m. to Noon

Your Speaker:

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TOPICAL OUTLINE

I. Why should I be concerned with the area of judicial ethics and discipline?

Here are just some of the many ways judicial ethics can impact you, your company and events you seek to involve yourself and judges in:

- ✓ Your prior or current judicial or career contacts could impact your company's litigation effort by triggering a serious recusal or other conflict. This could result in costly delays and possible re-litigation of all or some of the issues your company thought completely resolved.
- ✓ Codes of judicial conduct could preclude a judicial officer's involvement with your company; it's board(s); it could also impact a judge as a shareholder; or, as an employee or consultant. Board members, employees and close relatives could similarly impact a judge assigned to a case involving your company.
- ✓ Judges cannot participate in certain events or that participation is restricted. Codes of judicial conduct could preclude charitable or political activities you or your company may wish to get the judge involved with.
- ✓ Your company's actions could be attributed to a judicial candidate. Codes of judicial conduct could restrict your companies efforts to help elect or reelect a judicial officer or aspirant for judicial office.
- ✓ You could be personally impacted by codes of judicial conduct if you volunteer as a small claims, traffic, pro tem or part time judge. You do not have to be an appointed or elected judge or even paid.
- ✓ Your company could be impacted because members of your company could become a witness to disciplinary proceedings or your company could be a source of evidence for a conduct commission investigation.

II. All right. You convinced me. I can see where judicial ethics actually is relevant to my work as in-house corporate counsel. So tell me, what are these judicial canons, to whom do they apply and where can I find them?

- ✓ There has been a gradual evolution of codes of judicial conduct from the first formal attempt in 1924 (drafted by a Committee headed by Chief Justice Howard Taft) leading through a series of updates to the 1990 ABA Model Code of Judicial Conduct. The 1990 Model Code is just that—a recommended model—and has no legal effect unless adopted in appropriate manner by a particular State. Although almost all the States have previously adopted the 1972 Code (the immediate predecessor to the 1990 Code), as of now about half of the States have adopted the 1990 Code after a decade of its availability. Most striking of the 1990 changes are the gender-neutral language and the additional mandatory language requiring an action (using the word “shall”) rather than the less forceful use of “should”. The 1990 revisions also include a preamble, terminology and other helpful improvements. In the coming years it is possible that the 1990 Model Code will again be refined to take into account new trends and technological changes. The 1990 ABA Model Code sets forth five sections (called *Canons*) that deal with proper conduct of judicial officers. They are summarized as follows:

- Canon 1** A brief but broad Canon confirming that judges are held to a high standard of integrity and independence.
- Canon 2** A broad Canon precluding even the appearance of impropriety. This requires strict adherence to actions that promote public confidence and are not intended to assist the judicial officer personally. It also precludes using the office of a judicial officer to promote personal agendas and thereby affecting or diminishing the prestige of the office.
- Canon 3** Canon 3 is one of the longest and detailed Canons and along with its helpful commentaries that follow each subpart it is the Canon most frequently cited as a basis for judicial misconduct by conduct commissions. This Canon addresses conduct “on the bench” including, but not limited to, demeanor, absence of prejudice, efficiency in case administration, timely decision making, decorum, patience, absence of conflicts, no *ex parte* communications and adherence to the law. If you do any courtroom work, this is the one you need to know and know well.
- Canon 4** Canon 4 addresses conduct “off the bench” including legal, political, governmental, charitable and personal financial matters. For example, whether a judicial officer can be listed

on a dinner invitation, if he or she can solicit funds for a charity or if a judge may teach a legal course are just some of the topics addressed in this Canon. If you are active in community events or bar groups, you should understand this Canon before involving judicial officers in those activities.

Canon 5 Canon 5 is the Canon that regulates the selection, election and conduct of judicial campaigns. Rules include what can be done to seek appointments to judicial office (to fill vacancies or new positions, for example) or what may be done to seek a judicial officer position by election. This Canon specifically covers topics such as when a judicial officer or candidate can start to raise funds for office, what that aspirant for judicial office may say or do while campaigning or seeking selection, how he or she can respond to attacks during the campaign and what to do with any surplus funds left after the campaign. It applies to both incumbent judges and aspirants for judicial office.

✓ Application of codes of judicial ethics. Who is a judicial officer?

Following the 1990 Model Code is an Application Section that broadly defines the term *officer of the judicial system* to include full-time, part-time and senior judges as well as many pro tem, commissioner, magistrate and referee positions. Your State's codes of judicial conduct will clarify which officers are covered. Also, judicial officers are not just elected judges. Most states include ***appointed judges and pro tem judges***, even if complete volunteers and unpaid.

Administrative Courts. Almost all states and localities do not include within the term *judicial officers* hearing officers whose authority can be traced to a non-judicial branch agency or department (usually a state or local executive branch agency) such as matters, grievances and hearings relating to taxes, motor vehicles, labor, disability, educational or civil service. Often these positions are labeled as an administrative law judge and titles of that nature are often good indicators of the absence of jurisdiction by a judicial conduct or performance commission over that "administrative judge". However, check with your State's conduct commission to verify that is the case in your State since codes differ.

Federal Courts. Federal District Court judges are primarily regulated by their applicable Circuit Court of Appeal; and, in similar fashion the Federal Circuit Court Judges are subject to review by the United States Supreme Court. While the codes of judicial conduct used in the Federal system are

very similar to the 1990 Model ABA Code, due to lifetime tenure for good behavior for Article III judges, removal of many Federal judges is understandably complex and must comply with Constitutional precepts and is normally handled by serious proceedings (including impeachment) that are beyond the scope of our concerns. Other Federal judges and magistrates (for example, Bankruptcy Judges and Magistrate Judges) appointed for terms are easier to address from a judicial conduct standpoint. More information on judicial misconduct in a Federal proceeding (including any Federal court) can be obtained from the Administrative Office of the United States Courts found at www.uscourts.gov.

Special Courts; Arbitration and Mediation. Other courts (including international or foreign tribunals), and many tribal courts in the United States, may have their own unique system of judicial ethics or may have no codes of judicial ethics at all. In such a situation an experienced practitioner in that court or tribunal may be able to explain the procedure, or lack of one, to your company. Also, be aware that arbitration and mediation rules have a checkered history of disclosing items or status that might contravene a well-accepted judicial conduct code. It never hurts to inquire about areas similar to those covered by ethical codes for judges.

- ✓ Where can the Canons applicable to your jurisdiction be found?

It is likely your codes of judicial ethics are incorporated into your State's Supreme Court Rules. If that is not the case, contact your State's judicial conduct or performance commission and they can direct you to where to locate the ethical codes for your area.

III. What are judicial conduct or performance commissions? How can they remove elected or appointed judges from office or otherwise discipline them? Why should the judicial officer even listen to them?

- ✓ What is the source of authority for conduct commissions?

Generally, conduct commissions are created by Constitutional authority since in order to remove an elected judge, authority at the highest State level must be granted to the removing commission. Therefore, these are often "constitutional commissions". Normally the broad constitutional grant is filled in by legislative statutes and commission-adopted procedures.

- ✓ Single tiered vs. Multiple tiered conduct commissions

Single tiered systems are where the conduct commission determines both probable cause to continue a misconduct or disability case and then, having found a basis to continue, the same commission investigates the claims and determines if the requisite standard has been met. If the standard has been met, the same commission determines the punishment or other remedy and the entire case is subject to review by the judicial system similar to a normal appeal. In this model, stages of the proceeding are undertaken by the same commission. Several courts have found this system to not be subject to due process concerns.

Another model is that of a multiple tiered system. This model continues to allow the commission to study complaints and investigate charges and find probable cause. However, much as a grand jury then passes an indictment to the court system this model then allocates to the judicial system the obligation to conduct a full hearing on the claims. The disadvantage is that generally there is no clear right of appeal in a multiple tiered system to the resulting decision since the commission is only used to find probable cause and then a single hearing is normally held before the State's Supreme Court whose decision is normally final.

✓ Membership on commissions

A typical commission contains representatives of the judiciary, the state bar and the general public. In Nevada, the greatest weight is given to public members since there are more public members than any other single group and a public member must be both the Commission Chair and Vice Chair.

✓ Confidential and public (formal) proceedings

Some States only allow formal (public) cases to be brought. Most states, however, understand that questions of degree can be encountered and provide the ability to resolve many minor violations of the codes of judicial conduct on an informal (confidential) basis by use of deferred disciplinary agreements or cautionary letters.

✓ Disciplinary powers

Commissions are normally given broad powers ranging from cautionary letters to the right of removal. However, the right of removal normally requires a very high standard of willful misconduct to have been proven.

✓ Standards of proof

Usually a standard greater than a preponderance is required. In Nevada, the standard is *clear and convincing*.

IV. Give me something to use as I leave here today. Show me some real world hypothetical examples and make sure you tell me what I can do as to each hypothetical during the presentation.

- ✓ You find out that the outside mega-firm you came from and which is currently being used as counsel by your company in a big case has been reassigned to Judge Alan Rabkin—a judge you clerked for 20 years ago and you still stay in touch with. Judge Rabkin never was great remembering the codes of judicial conduct and you use to remind him about them. This is obvious because he quickly calls you to see what you think about the case since he knows you are now with the litigant-company. But you attended a recent ACCA conference and know this may be a problem. What should you do? Must you tell your lawyers even if you refused to discuss the case with him and what must they do?

Applicable Canon: Canon 3B(7) (no impermissible *ex parte* contact)

- ✓ You think you would make a superb judge someday and want to practice that craft in your “spare time”. So you decide to grace your local courts with your sage wisdom by volunteering as a judge *pro tem* in night traffic court. One Tuesday during a bench trial you find yourself screaming at a female witness who keeps changing her mind as to whether the light was red or yellow and the tape of the proceedings evidences that in response to your withering attack she is reduced to sobs and nearly collapses when you are heard saying “*you broads never seem to remember anything! I’m sorry, but its just like my old lady. Too busy with your hair and make-up to notice important things. Guess that’s why you are all such bad drivers.*” The witness has always been fearful of judges and now needs counseling after this event. If the someone sitting in the back of the audience reports you to the State judicial conduct commission are you in trouble even if you were volunteering and this witness was clearly a frustration? Is your future career as a jurist in jeopardy?

Applicable Canons: Canon 3B(4-6) and Applications Section

- ✓ You corner Presiding Family Court Judge Rabkin at a bar event cosponsored by your own company. You feel this gives you certain rights to approach the attendees. You want his honor to speak to another civil court judge so as to make that other jurist aware of a point in the Yada-Yada litigation assigned to that jurist that seems to be getting lost between the twelve law firms involved. This point is a matter of personal frustration to you since you have researched the issue completely and are the local expert in that area and you are also the in-house “contact” on the case.

The case is way over budget and it would be nice to get it moving in the right direction (nice for your bonus as well). A few sentences into the discussion the Presiding Family Court Judge starts to turn pale, excuses himself abruptly and makes a rapid bee-line for the dessert table to escape your monologue all along looking back annoyed and noting your name tag for future reference (and possible future shunning). You think to yourself, that's odd. This is a free country, right? No harm trying to influence another judge to help out your company. Hey, its your bonus and options, right? You gotta be pushy to make it in the busy world, right?

Applicable Canons: Canon 2, 3B, 3C and 4

- ✓ Your committed but difficult-to-control Board Chairman adds an agenda item supporting a judge he heard was in trouble in the polls as to her reelection. He likes her since she expresses your company's (pick one: Republican, Democratic or Independent) ideals. Of course, it happens that this judge's son is also dating your Chairman's daughter, but what's wrong with that? Your Chairman asks the CEO to list the Board's unwavering support for those shared ideals in your Company's employee newsletter and "*give her as much money as you can in as many ways you can think of*". The minutes also read that the Board Chairman will contact the State Central Committee of that party to make sure they "*are doing all they can for this judge—she's a good one.*" It's even suggested in the minutes that she be asked to deliver the next keynote speech at one of their upcoming political fund-raising events. The corporate secretary asks you to approve this portion of the minutes. You check and find you have used all your vacation time before pulling the Canons.

Applicable Canon: Canon 5

- ✓ Your CFO learns that well-known and funny lawyer-comedian--Big Al! Rabkin--has on short notice backed out of a commitment and will not be able to attend a charitable foundation event sponsored by your company. Your company now urgently needs a "big name" auctioneer for its charity auction of lots of nice company stuff with all the proceeds going to a worthy Boys and Girls Club in your area. Desperate since he still has not found anyone, your CFO (who is in charge of the event) spots a well-known judge who was just arriving as a normal guest at the event having paid his own way to help this good cause. He recalls this same judge was on the Channel 52 news lately in the *Bongo Bongo* litigation where he presented an ominous but respected presence over the courtroom nightly on the news. This guy's a celebrity, your CFO thinks! Thrusting the auctioneer gavel in his hands your CFO (who is an excellent accountant but has never heard of codes of judicial ethics before) asks our arriving judge to be your company's guest auctioneer and further adds in a loud voice that he should use the same great persuasion and intimidating presence he used at trial to "*get every damn cent out of them you can,*

your honor.” The judge—clearly *put-on-the-spot*—quietly declines the invitation to raise money for the charity event and is so privately embarrassed he finds an excuse to make an early exit. But not to worry. You will luckily be appearing before this judge on a motion next month and it is strongly suspected he will call you in to chambers to discuss your CFO’s conduct. What will you say? Did your CFO do anything wrong? Or is our judge merely a shy, party-pooper who hasn’t had a fun moment in years?

Applicable Canon: Canon 4C

V. **And just in case it looks like you are still unconvinced and getting out on a limb, let’s look at a very recent high-profile case showing your company how bad it can really get if you ignore the codes of judicial conduct.**

- ❖ United States of America v. Microsoft Corporation (No. 00-5212, DC Circuit) (Decided June 28, 2001)

Lesson #1: If you are a judge, be very, very wary of becoming enamored with the media and feeding them tidbits during the pending matter. Judicial officers are precluded from speaking about pending or impending cases.

Lesson #2: If you are a judge, it is not at all a good idea to characterize a key employee of a litigant as “*Napoleon*”, the original employees of that litigant as “*shaggy-haired*” misfits, or to compare corporate executives to “*drug traffickers*”. While credibility is important in any case, personal insults and attacks of the personal kind create strong indications of an atmosphere of unfairness and partiality.

VI. **Q&A! Additional questions? You can e-mail Alan Rabkin at arabkin@judicial.state.nv.us.**

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THE CANON CORNER:

JUDICIAL MISCONDUCT IN THE MICROSOFT CASE

THE DC CIRCUIT FINDS A WELL KNOWN FEDERAL JUDGE'S CONTACT WITH THE MEDIA AND HIS CHARACTERIZATION OF MICROSOFT WORTHY OF STRONG CRITICISM

Canon Corner Editor:

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Nevada Lawyer presents this column each month to further a more comprehensive understanding of the Judicial Canons and decisions governing full-time, part-time and magistrate judges and referees. Featured is a summary of an out-of-state decision or current issue regarding judicial conduct and how it compares to the Nevada Code of Judicial Conduct. All decisions may be subject to further disposition and appeal. The opinions expressed in this column are those of its author.

U.S. v. Microsoft Corporation. OK, this is not your usual appellate decision. First, it was one of the most contentious antitrust cases in United States history. And one of the best covered by the general and business media. Also, not many United States Court of Appeals ("Court of Appeals") decisions have over a page of counsel listings or a Table of Contents as the next item to follow. A Table of Contents! Oh, and the small phonebook size 125 pages of opinion thereafter is also pretty amazing. But I never thought my little corner of the judicial ethics world would become a big part of this opinion. Judicial misconduct in the Microsoft case? Get real. This case was decided by Thomas Penfield Jackson--a well known and respected Federal judge. Wasn't even on my radar screen. But I was wrong. It does involve misconduct and let's briefly explore why.

On June 28, 2001, the DC Circuit Court of Appeals issued its long-awaited opinion and gave all sides both a measure of affirmation and a measure of reversal. Yes, Microsoft was found responsible for certain monopolistic violations; but, no, the standard was not applied right; and yes there was a lot of discussion of the specific antitrust law issues. In

fact, the antitrust jargon made my eyes spin. This being a judicial ethics column, most of that discussion is well outside its scope. But not all of the opinion. Starting on Page 6 of the decision, the following additional stated ground for vacating the Final Judgment on remedies was provided by the Court's opinion and just as I was about to put the opinion aside caused me to have to read almost 100 more pages before getting to what this all meant:

“Finally, we vacate the Final Judgment on remedies, because the trial judge engaged in impermissible *ex parte* contacts by holding several secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of the courtroom, giving rise to the appearance of partiality. Although we find no evidence of actual bias, we hold that the actions of the trial judge seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process.”

Huh? Almost spilled my coffee at this point. What is this all about? That this should be cited as a vacating ground in one of the biggest and most closely watched cases in history was, well, *sort of surprising*. While it is well known that the DC Circuit never really appreciated all the opinions and views of this particular trial judge, a new level of criticism had obviously evolved. So I read on, and on, and on.

I'll save you the suspense. Fast forward to Page 106. The Court of Appeals arrives at the, “Judicial Misconduct” section (Part VI) and I perk up. You know it will be a bad day when an entire “Part” will now officially be dedicated to you, the trial judge, and your conduct. Not a good sign. Promptly citing Canons 2, 3A(4) and 3A(6), as well as specific United States Code provisions, the Court of Appeals wasted little time bringing out the big guns and blasting away finding several actions of the trial judge in the case, well, shall I say (and I may be accused of being unduly kind), *lacking*.

The Court noted that it did not necessarily have to adjudicate this issue but felt obligated to do so. Translation: this appellate court was going to discuss this issue whether or not we liked it or needed it. Also, the Court noted that they pushed aside the normal rules that matters raised on appeal for the first time are disfavored in argument since much of this bad conduct occurred post-decision. OK, with the disclaimers out of the way, what, already, did the trial judge do wrong to justify the Page 6 findings?

First, it appears to the appellate court the trial judge had been poisoned by the passion of pandering to a press unconcerned with judicial ethics. It described the trial judge's contact with the media as “...deliberate, repeated, egregious, and flagrant.” *Guess they didn't like it*. The Court of Appeals likened this media contact to a type of disease. And judicial officers need to avoid catching the illness. They severely criticized the trial judge's communications with the press on the case and in speeches he had made across the country—before and after the case was over. In fact, they used these very

speeches against the trial judge. The Court of Appeals determined that the trial judge had been giving secret interviews to the press two months before issuing findings of fact and it got worse from that point. He improperly revealed his planned remedy to the media and he telegraphed if he would restructure the company. While the Court made it clear they gained this information from second-hand accounts of what the trial judge supposedly said on the speaking circuit, the Court felt they needed to assume the press accounts were true since the Government all but conceded the issue and agreed with Microsoft that the trial judge had said the things claimed; had thereby shown a lack of impartiality; and, therefore, exceeded judicial and ethical bounds with these interviews and speeches. The Court of Appeals, using these findings, felt it had no choice but to disqualify the trial judge for that reason alone.

Yet, other issues bothered the Court of Appeals. For example, characterizations he made of Microsoft and its key employees. Likening Microsoft to a status akin to a drug-trafficker was one example given. Other examples are given as well. The appellate court in reviewing other precedent found the characterizations made by the trial judge in this case as much worse than in other cases where a judicial officer was disqualified for less vitriolic comments.

Its hard to believe an experienced trial judge ignored the cardinal rule of not discussing pending or impending cases. But, that is what the Court of Appeals found. The Court of Appeals concluded that so significant and repetitive were the apparent violations of the Code of Judicial Conduct (which standards are based upon the same model code as our own Nevada Code of Judicial Conduct), that upon remand to decide some of the remaining substantive issues the case would not be returned to the trial judge and he would be disqualified from hearing the matter further.

An unmistakable message was being delivered in the final 19 pages of misconduct discussion in this decision. Judges involving the media and giving interviews that prejudice or telegraph intentions in pending cases are nearly certain to trip the ethics wire. Further, using inappropriate language and characterizations about litigants in media interviews creates the appearance of impropriety and is no safer a position for a judge to retreat to. The Court of Appeals makes it clear that these actions are the antithesis of a fair trial and it is shocking they were tested to the degree portrayed in this case. State courts need to take note since frequently their decisions are reviewed in a Federal forum.

The decision can be found at www.cadc.uscourts.gov/opinions/opinions.asp This is a must read case and will likely be considered a landmark case not only in the area of antitrust but in the surprising separate area of judicial ethics for years to come. For more information about judicial conduct in Nevada, or about judicial elections, please visit the Nevada Commission on Judicial Discipline's web site at www.judicial.state.nv.us. Alan Rabkin can be reached at arabkin@judicial.state.nv.us.

without the express permission of the Commission and that violations of this confidentiality may be punishable by contempt or other remedy. I understand that I may not use the filing of my complaint as a basis to seek disqualification of the judge in my case (if my case is still pending) but that I am precluded from seeking disqualification based on the underlying facts so long as I do not mention that I have filed this complaint. I understand that the Commission retains the right to discuss this complaint with the judicial officer named above at any time or any stage to determine if it is true and correct.

Part III **Obligations Of Complainant** (Con't)

Full Cooperation. I agree to fully cooperate with the Commission, staff and its designated contractors with regard to my complaint. I understand that even if I wish to withdraw my complaint that the Commission retains independent grounds to pursue it and that the information contained within and attached to the complaint becomes the property of the Commission and the Commission may pursue the complaint even if I seek to withdraw it.

Appeal Warning. I understand that the Commission, its staff and contractors are not an appellate court and that my filing of a complaint does not stay or stop any time I am provided to appeal a decision I disagree with or any decision that adversely affects me. I understand that I must timely file an appeal to preserve those rights. I acknowledge that filing a complaint with the Commission does not and cannot preserve those rights.

Legal Advice. I understand that the Commission, its Commissioners, Commission staff, investigators and contractors are precluded from giving me legal advice regarding my case or actions I should be taking in my case and I understand that should I require advice I will seek appropriate assistance apart from the Commission, its Commissioners, Commission staff, investigators and contractors.

Part IV: **Signature and Verification of Complaint**

After being duly sworn, I state under penalty of perjury that I am the above-referenced complainant whose name appears in Part I and who submitted this complaint; I know the contents thereof; and the matters set forth in this complaint are true and correct of my own knowledge, except as to matters stated to be on information and belief, and as to those matters are believed to be true and correct by me. I request that the conduct set forth above or referenced in the attachments and exhibits provided with the complaint be investigated by the Nevada Commission on Judicial Discipline. I have read and understood the obligations of confidentiality placed upon me as summarized above and I agree to fully abide by those confidentiality obligations.

Signature of Complainant

Dated

How Do I Submit My Complaint? Where Can I Obtain Additional Assistance? This complaint, along with any supporting materials you may wish to submit, should be sent by mail to the: **Nevada Commission on Judicial Discipline, P.O. Box 48, Carson City, Nevada 89702.** If you have questions regarding the completion of this form, please contact the Commission on Judicial Discipline at **(775) 687-4017.** In addition, if you have access to the Internet, or can obtain access at a local library or other Internet facility, the Commission's web site located at www.judicial.state.nv.us provides additional information to help you prepare your complaint. The web site also includes the full and current text of the Nevada Code of Judicial Conduct and other laws, statutes and rules governing the Commission.

STANDARD COMPLAINT SUPPLEMENTARY FORM (STATEMENT OF FACTS)

The following is my explanation as to why the judicial officer named in this complaint has violated the Nevada Code of Judicial Conduct or suffers from a disability.

I am [*select one*]: one of the litigants a witness or interested party a member of the general public who witnessed or viewed this conduct (but not otherwise involved).

The judge did the following things that I believe constitute misconduct (please be as specific as possible about the event or action and attach additional pages, if required)

I feel that what the judicial officer should have done is the following (for misconduct complaints only):

I have [*select one*]: appealed the judge's decision not appealed the decision
 have not decided yet not applicable