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## Judicial Self-Defense in the Court of Public Opinion

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# Comments

## Judicial Self-Defense in the Court of Public Opinion

### I. INTRODUCTION

Cook County Circuit Judge Lawrence A. Passarella made a fateful decision on February 26, 1986. By acquitting a man accused of severely beating a Chicago policewoman with a steel bar, Passarella set off a wave of criticism that resulted in his failure to win retention in the November 1986 general election.<sup>1</sup> Among the judge's critics were then-Cook County State's Attorney Richard M. Daley, who said Passarella showed a "total disregard of the facts of the case," the Fraternal Order of Police, which organized an anti-retention campaign, and then-Chicago Police Superintendent Fred Rice.<sup>2</sup>

Passarella was not without defenders, however. The Chicago

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1. See Chicago Tribune, Nov. 6, 1986, § 2, at 8, col. 5; Chicago Sun-Times, Nov. 6, 1986, at 8, col. 1; Chicago Sun-Times, March 7, 1986, at 11, col. 1; Chicago Tribune, March 6, 1986, § 2, at 1, col. 2. See also Royko, *Cops' Verdict on Judge Already in*, Chicago Tribune, Oct. 24, 1986, § 1, at 3, col. 1 (police anti-retention effort); Royko, *Justice Can Be So Blissfully Blind*, Chicago Tribune, Oct. 9, 1986, § 1, at 3, col. 1 (a juror in another case in which Colella was acquitted reacts to Passarella's ruling); Royko, *Amazing Stories of Face-altering*, Chicago Tribune, March 6, 1986, § 1, at 3, col. 1 (discussing another incident involving Michael Colella, the defendant Passarella acquitted, and imagining how Passarella might view that incident). Passarella's handling of the case is reportedly being investigated by a federal grand jury. Chicago Tribune, Dec. 5, 1989, § 1, at 1, col. 2.

2. See Chicago Tribune, March 6, 1986, § 2, at 1, col. 2. Daley added that "[t]his case again showed what has been happening in [Passarella's] courtroom for a number of years." *Id.* Cathy Touhy, the policewoman whose assailant was acquitted, filed a disciplinary complaint against Passarella with the Illinois Judicial Inquiry Board that was later dismissed. Chicago Sun-Times, March 25, 1986, at 2, col. 6 (complaint filed); City News Bureau of Chicago, May 12, 1986 (dispatch CNB-55) (complaint dismissed). Touhy said she filed the complaint "to make sure this doesn't happen to somebody else. . . . We would have been justified in killing this man, but we showed restraint. We relied on the criminal justice system. It failed us." Chicago Sun-Times, March 25, 1986, at 2, col. 6.

A Mike Royko column on the police effort against Passarella included a policeman's anonymous comment that the group was doing the judge a favor. "He wants to send creeps back out on the street? Fine. He can open an office and become a defense attorney," the policeman said. "Then when he gets a creep off the hook, he can charge a fee." Royko, *Cops' Verdict on Judge Already In*, Chicago Tribune, Oct. 24, 1986, § 1, at 3, col. 1.

Bar Association ("CBA") recommended Passarella's retention,<sup>3</sup> and several attorneys publicly attested to the judge's ability and integrity.<sup>4</sup> But the most potentially effective defender — Judge Passarella himself — was silent throughout the controversy. The judge announced the acquittal without explanation and offered none later.<sup>5</sup> An active public defense by Passarella might have saved his judgeship, particularly in view of the narrow margin by which his retention bid failed.<sup>6</sup>

As evidenced by Judge Passarella's experience, an elected judge is vulnerable to public criticism.<sup>7</sup> The court system and the rules that constrict judicial discretion are poorly understood by the average voter.<sup>8</sup> Rules restricting the substance and style of a judge's

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3. Telephone interview with Terrence Murphy, Executive Director of the CBA. (Oct. 23, 1989). Mr. Murphy explained that the CBA issued a statement expressing the belief that Passarella tried to follow the law in his ruling. Mr. Murphy also said the CBA recommended Passarella's retention. *Id.*

4. Chicago Tribune, March 6, 1986, § 2, at 1, col. 2. The article stated that several attorneys "spoke highly" of Passarella. *Id.* Attorney Keith Davis, former chairman of the Chicago Council of Lawyers' Criminal Justice Committee, said "Passarella is a fine judge. He is considered by many to be defense-oriented in the sense he is not biased toward the state . . . . He's a gentleman, and as far as I know, he's as honest as they come." *Id.*

5. See Chicago Tribune, March 6, 1986, § 2, at 8, col. 1.

6. Passarella's retention bid was approved by fifty-seven percent of the voters, while sixty percent approval was needed. Chicago Tribune, Nov. 6, 1986, § 2, at 8, col. 5. Passarella attempted a comeback in 1988 by writing a letter to Cook County's full circuit judges asking them to elect him as an associate judge and describing the 1986 campaign against his retention as "unfair." Chicago Tribune, Oct. 15, 1988, § 1, at 5, col. 2. CBA President Roy E. Hofer criticized Passarella's campaign as an effort to circumvent the CBA's screening process for associate judges. *Write-in Candidacy Criticized*, Chicago Daily Law Bulletin, Oct. 18, 1988, at 1, col. 5.

7. Former Justice Joseph Grodin of the California Supreme Court, among three members of that court who lost retention bids in 1986, has observed that the voters decide whether a judge should be retained based on the results of his rulings. "This is the standard with which voters are most familiar; it is the easiest standard on which to posit thirty-second television spots; it is also the easiest standard for voters to apply . . ." Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988).

A law professor, writing in the same law review symposium, said "[i]t appears that judges are inevitably going to be evaluated based on their past or likely rulings on specific, controversial topics." Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1989 (1988).

8. Judge Nat H. Hentel of the New York Supreme Court, participating in a panel discussion at an American Judicature Society meeting, said:

The judge's role is clear. He must rule under the law as it is given to him and as he understands it, without fear of failure. Many good judges have gone down the drain in the history of this country at election time because they made unpopular rulings which were correct under the law and the public didn't understand it. So it behooves the judge to make sure that his decision is understood and go completely on the record about it.

explanation compound the problem.<sup>9</sup> A judge trying to defend a controversial ruling faces a tough task with a partially tied tongue.

The Passarella situation, with a single controversial decision provoking a successful anti-retention campaign, was quite unusual. Nonetheless, criticism of judicial rulings by newspaper columnists,<sup>10</sup> politicians,<sup>11</sup> and others is commonplace. To balance the

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Hentel, *Judges, Critics and the Public Interest: Balancing Competing Values*, 72 JUDICATURE 226, 229 (1989).

Justice Hans A. Linde of the Oregon Supreme Court has observed:

To most people, law and courts mean criminal law and criminal trials. . . . Most judges may see themselves as umpires between the state and the citizen, but many citizens regard judges as part of law enforcement, and plenty of [judicial] candidates will offer themselves for that role. . . . The theme is hard to transfer to appellate court elections . . . but it is done nonetheless . . . It simply becomes a matter of luck whose term is up in time to draw the brunt of the most recent controversy.

Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000-01 (1988).

Professor Roy A. Schotland stated the problem more succinctly: "Most Americans understand far too little about how courts operate, let alone their place in our system." Schotland, 1986—*A Historic Year for Judicial Elections*, 70 JUDICATURE 246, 247 (1987).

9. See *infra* notes 15-26 and accompanying text (discussion of Canons 2(A) and 3(A)(6) of the Code of Judicial Conduct). See also Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207, 250 (1987) ("One way to dispel voter ignorance and lack of interest regarding [judicial] elections would be to remove the shackles placed on candidates by the Judicial Code and permit them to address the issues that concern the public.")

10. Mike Royko, for example, commonly criticizes judicial rulings he considers outrageous. Prior to the Spring 1990 primary election, Royko wrote a column opposing Cook County Circuit Judge Leo Holt's appellate court candidacy because Holt acquitted a man in the death of an 18-month-old girl despite the man's confession to beating the child. Royko, *Voters are the Jury on Holt, Pincham*, Chicago Tribune, March 15, 1990, § 1, at 3, col. 1. In the same column, Royko criticized R. Eugene Pincham, a former trial and appellate judge who was then running for Cook County Board President, for freeing a high percentage of rape and drug defendants while a trial judge. *Id.* Royko felt defeat might benefit Pincham because "he could return to law practice and again display his brilliant talent for getting rapists and drug pushers off the hook." *Id.* An earlier Royko column condemned Cook County Circuit Judge Philip Carey's acquittal of a man for the alleged sexual assault of a sixteen-month-old girl whose rectum was torn in three places. Royko, *Verdict is Clear, But You Be Judge*, Chicago Tribune, Dec. 15, 1988, § 1, at 3, col. 1. Cook County Circuit Judge Donald Joyce was also criticized by Royko after Joyce convicted a man, who shot his wife in the face, of aggravated battery instead of attempted murder. Royko, *You are the Jury on Judge Joyce*, Chicago Tribune, Nov. 4, 1988, § 1, at 3, col. 1.

11. A year before the Passarella controversy, Cook County Circuit Judge E.C. Johnson faced similar criticism for acquitting on bribery charges an attorney who allegedly solicited \$7,000 from a client to fix a rape case. Chicago Tribune, Jan. 26, 1985, § 1 at 1, col. 1. Johnson held that the attorney's solicitation of the bribe did not violate Illinois law because lawyers are allowed to receive money from clients. *Id.* The lead prosecutor in the bribery case called the acquittal "the most outrageous, incredible ruling I have ever seen." *Id.* The prosecutor's boss, Cook County State's Attorney Richard M. Daley, held a press conference four days later to condemn Johnson's ruling. Chicago Tribune, Jan.

dialogue, judicial participation is essential.

This Comment will discuss the problems judges face when confronted by public criticism and will offer suggestions for dealing with these problems. First, this Comment will cover the two most applicable provisions in the Illinois Code of Judicial Conduct: Canon 2(A), requiring judges to promote public confidence in the courts' "integrity and impartiality,"<sup>12</sup> and Canon 3(A)(6), barring judges from publicly commenting on "pending or impending" cases.<sup>13</sup> Recent cases from other states that interpret or apply these canons will then be examined.<sup>14</sup> Next, this Comment will consider the role of bar groups in view of guidelines for publicly defending judges set forth by the American Bar Association ("ABA"), Illinois State Bar Association ("ISBA"), and Illinois Judges Association ("IJA"). Finally, this Comment will conclude that Illinois judges have substantial freedom to respond publicly to criticism, and it will suggest ways to exercise that freedom.

## II. THE ILLINOIS CODE OF JUDICIAL CONDUCT

Canons 2(A) and 3(A)(6) of the Code of Judicial Conduct govern the tone and substance of comments by Illinois judges on par-

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30, 1985, § 2, at 3, col. 1. "Apparently everyone but Judge Johnson knows that it's a crime for a lawyer to shake down a client for a bribe," Daley said. *Id.*

12. ILL. S. CT. R. 62(A), ILL. REV. STAT. ch. 110A, para. 62(A) (1987). Canon 2(A) provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.*

13. ILL. S. CT. R. 63(A)(6), ILL. REV. STAT. ch. 110A, para. 63(A)(6) (1987). Canon 3(A)(6) provides: "A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court." *Id.*

14. The Illinois Code of Judicial Conduct, adopted by the Illinois Supreme Court effective January 1, 1987, is based on the American Bar Association Code of Judicial Conduct adopted in 1972. See ILL. S. CT. R. 61, ILL. ANN. STAT. ch. 110A, para. 61 (Smith-Hurd 1989) (Background and Committee Comments preceding Rule 61). Forty-seven states (all but Montana, Rhode Island, and Wisconsin), the District of Columbia, and the Federal Judicial Conference have adopted judicial conduct codes based on the ABA Code. J. SHAMAN, S. LUBET & J. ALFINI, JUDICIAL CONDUCT AND ETHICS 4, n.18 (1990). It was largely adopted in Illinois to promote national uniformity and expand the body of caselaw and other materials that Illinois judges could consult for guidance. ILL. S. CT. R. 61, ILL. ANN. STAT. ch. 110A, para. 61 (Smith-Hurd 1989) (Committee Comments preceding Rule 61). Canons 2(A) and 3(A)(6) of the Illinois Code were taken verbatim from the ABA Code and are therefore identical to the same-numbered canons in many other state codes. *Id.* (Committee Comments following Canons 2 and 3). For purposes of convenience, this Comment refers to these Canons without specifying the particular state judicial conduct codes from which they are drawn.

ticular cases, made on or off the bench.<sup>15</sup> Canon 2(A) states that “[a] judge should . . . conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”<sup>16</sup> Canon 2, in essence, reminds judges that they represent a branch of government that should appear disinterested, calm, and rational regardless of the circumstances. To promote that image, judges should keep their emotions and biases in check at all times, expect “constant public scrutiny,” and accept restrictions that an “ordinary citizen” might find “burdensome.”<sup>17</sup>

Public comments by judges are more specifically governed by Canon 3(A)(6), which states that comments concerning “a pending or impending proceeding in any court” should be avoided.<sup>18</sup> The Canon, however, allows public statements in the course of judges’ official duties or to explain court procedures.<sup>19</sup> Much of the Illinois Code, including Canons 2(A) and 3(A)(6), was taken verbatim from the ABA Code of Judicial Conduct, making the reporter’s notes to the ABA code<sup>20</sup> a source of additional guidance. The

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15. ILL. S. CT. R. 62(A), 63(A)(6), ILL. REV. STAT. ch. 110A, paras. 62(A), 63(A)(6) (1987).

16. ILL. S. CT. R. 62(A), ILL. REV. STAT. ch. 110A, para. 62(A) (1987). Canon 2(A) overlaps Canon 1, which states that “[a]n independent and honorable judiciary is indispensable to justice in our society. . . . The provisions of this Code should be construed and applied to further that objective.” ILL. S. CT. R. 61, ILL. REV. STAT. ch. 110A, para. 61 (1987). The Committee Comments for Canon 2 state that “irresponsible or improper” judicial conduct erodes public confidence. ILL. S. CT. R. 62, ILL. ANN. STAT. ch. 110A, para. 62, (Smith-Hurd 1989) (Committee Comments).

17. ILL. S. CT. R. 62, ILL. ANN. STAT. ch. 110A, para. 62 (Committee Comments) (Smith-Hurd 1989). See also *Matter of Bonin*, 375 Mass. 680, 711, 378 N.E.2d 669, 685 (1978) (“A judge, particularly a chief justice [of the superior court], must be sensitive to the impression which his conduct creates in the minds of the public. . . . He has failed to perceive that the public often does not distinguish between a chief justice as a judge and a chief justice as a person.”)

18. ILL. S. CT. R. 63(A)(6), ILL. REV. STAT. ch. 110A, para. 63(A)(6) (1987).

19. *Id.* The Committee Comments state, in reference to pending matters, that a judge should only discuss “matters of public record, such as the filing of documents, and should not comment on a controversy . . . which could come before him.” *Id.* (Committee Comments). Canon 3(A)(6) has been modified, and redesignated as Canon 3B(9), in the new ABA Model Code of Judicial Conduct that is expected to be submitted to the ABA House of Delegates at its 1990 midyear meeting. MODEL CODE OF JUDICIAL CONDUCT 3B(9) (1990) (Final Draft Nov. 1989). The proposed new provision states in part that “[a] judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . . This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.” *Id.* The Comments to the proposed new provision state that the ban on pending cases “continues during any appellate process and until final disposition.” *Id.* (Committee Comments).

20. E. THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT (1973). See *supra* note 14 regarding adoption of the ABA code in Illinois.

notes on Canon 3(A)(6) advise that statements from the bench concerning pending proceedings are permissible because they fall within a judge's duties.<sup>21</sup> Furthermore, the notes state that court personnel may release public information on pending or impending proceedings.<sup>22</sup>

The commentary to the Illinois Code and the ABA reporter's notes thus make clear that a judge can attempt to correct factual inaccuracies in news reports about pending cases, provided the facts involved are of public record.<sup>23</sup> The judge also can inform news reporters about events in open court, either orally, in writing, or through other court personnel.<sup>24</sup> It is important to note that Canon 3(A)(6) does not affect judicial speech from the bench.<sup>25</sup> Thus, judges can respond to criticism in open court or in written opinions, as long as the proper tone is maintained pursuant to Canon 2(A).<sup>26</sup>

Problems arise when judges express their views on the merits of pending cases outside the courtroom<sup>27</sup> or when the views are expressed in an intemperate or otherwise improper manner.<sup>28</sup> Recent caselaw from other states illuminates these problems.

### III. RECENT COURT DECISIONS INVOLVING CANONS 2(A) AND 3(A)(6)

Decisions on the propriety of judges publicly defending their judicial conduct or rulings are rare nationally, and none have come from the Illinois Courts Commission, which has exclusive authority to discipline Illinois judges.<sup>29</sup> The few available decisions are

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21. *Id.* at 55.

22. *Id.* at 55-56.

23. ILL. S. CT. R. 63, ILL. ANN. STAT. ch. 110A, para. 63 (Committee Comments) (Smith-Hurd Supp. 1989); E. THODE, *supra* note 20, at 55-56.

24. ILL. S. CT. R. 63, ILL. ANN. STAT. ch. 110A, para. 63 (Committee Comments) (Smith-Hurd Supp. 1989); E. THODE, *supra* note 20, at 55-56.

25. ILL. S. CT. R. 63, ILL. ANN. STAT. ch. 110A, para. 63 (Committee Comments) (Smith-Hurd Supp. 1989); E. THODE, *supra* note 20, at 55-56.

26. ILL. S. CT. R. 62(A), 63(A)(6), ILL. REV. STAT. ch. 110A, paras. 62(A), 63(A)(6) (1987).

27. *See infra* notes 62-98 and accompanying text (discussion of relevant cases).

28. *See infra* notes 33-38, 47-53, 77-85 and accompanying text (discussion of relevant cases).

29. Disciplinary complaints against Illinois judges are brought by the Judicial Inquiry Board. ILL. CONST. art. VI, § 15(b)-(d). The complaints are heard by the Courts Commission, comprised by five state judges: one supreme court justice, two appellate court justices, and two circuit court judges. *Id.* art. VI, § 15(e)-(g). The Illinois Supreme Court has no power to review decisions of the Courts Commission. *Id.* art. VI, § 15(f). Illinois is among only three states in which the highest state court has no role in the judicial discipline process. *See Wassenberg, A Search for Accountability: Judicial Disci-*

instructive, however, and should have considerable precedential value with the Courts Commission.<sup>30</sup>

Some of the decisions recognize that a judge has a limited right to respond to attacks by fellow judges or lawyers.<sup>31</sup> Other decisions establish that judges must avoid comments on the merits of pending cases regardless of whether the comments were provoked or unprovoked.<sup>32</sup>

### A. Responding to Attacks

The Minnesota Supreme Court recognized a judge's right to explain his side of a public controversy in its 1988 decision in *In re Miera*.<sup>33</sup> In that case, Judge Alberto Miera received a one-year suspension for sexually harassing his male court reporter and other misconduct.<sup>34</sup> The court reporter had won a civil verdict against Miera that prompted several of the judge's fellow county judges to pass a resolution calling for his removal from the bench.<sup>35</sup> When a news reporter called for his reaction, Miera said his colleagues were "blood-thirsty hypocrites"; this statement was later broadcast on local television.<sup>36</sup> The Minnesota Supreme Court found Miera's "outburst . . . at least understandable" in view of his fellow judges' conduct, including the judges' public comments about Miera and their in-chambers party to celebrate the court reporter's verdict against Miera.<sup>37</sup> The court further found that although "a more careful, reasoned" response would have been preferable, Miera's comments did not constitute "an unprovoked, disrespectful attack on the judiciary."<sup>38</sup>

The *Miera* decision is particularly significant for its adoption of the dissenting view in a 1970 Florida case, *In re Kelly*,<sup>39</sup> which held that a judge under attack by colleagues possesses a "qualified privilege" to explain his side publicly "in moderate, unmalicious, and

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pline Under the Judicial Article of the 1970 Illinois State Constitution, 8 N. ILL. U. L. REV. 781, 782 (1988) (historical overview of the Illinois judicial discipline system and an analysis of the Courts Commission's authority).

30. See *supra* note 14 (applicability of judicial discipline rulings from other states in Illinois).

31. See *infra* notes 33-46, 54-61 and accompanying text (discussion of relevant cases).

32. See *infra* notes 62-98 and accompanying text (discussion of relevant cases).

33. 426 N.W.2d 850 (Minn. 1988).

34. *Id.* at 859.

35. *Id.* at 853.

36. *Id.* at 856.

37. *Id.* at 857.

38. *Id.*

39. 238 So. 2d 565 (Fla. 1970), *cert. denied*, 401 U.S. 962 (1971).



unabusive language.”<sup>40</sup> *Kelly* involved a presiding circuit judge, Richard A. Kelly, who had ordered a series of administrative changes that antagonized other judges of the circuit.<sup>41</sup> A majority of the circuit’s judges voted to remove Kelly from the leadership position, prompting Kelly’s resignation.<sup>42</sup> About ten days later, and with ample notice to the press, Kelly filed a court reform petition with the circuit clerk’s office that sharply criticized his fellow circuit judges for their inefficient handling of criminal cases and their refusal to adopt new procedures.<sup>43</sup> The tone and public nature of the petition resulted in a 4-3 Florida Supreme Court decision publicly reprimanding Kelly.<sup>44</sup> The *Kelly* dissenters, led by Florida’s chief justice, argued that Kelly had “an untrammelled right” under the first amendment to the federal constitution to present his side of the dispute with his fellow judges publicly.<sup>45</sup> The dissent argued that, as an elected judge, Kelly had justification to defend his reputation publicly.<sup>46</sup>

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40. *Miera*, 426 N.W.2d at 857 (citing *Kelly*, 238 So. 2d at 575 (Ervin, C.J., dissenting)).

41. *Kelly*, 238 So. 2d at 566-67. Judge Kelly demanded changes in the handling of criminal cases, temporarily transferred a new judge to a county away from his home, planned to transfer all domestic relations cases to one judge, proposed ending the use of special masters in uncontested divorce cases, and directed the official court reporter to report justice of the peace proceedings when requested by a county public defender. *Id.* The Florida Judicial Qualifications Commission, whose report the Florida Supreme Court reviewed, found that Kelly’s plans were presented in a manner that created dissension and confusion. *Id.*

42. *Id.* at 567.

43. *Id.* Kelly’s petition asserted in part that the “simple expediency” of appointing public defenders earlier, which resulted in a large reduction in the number of jail prisoners, was not accepted without “crisis, controversy and ill-will among the judges,” and that “[v]ast and important and much needed judicial reforms await only the interest and action by the judges of this circuit.” *Id.*

44. *Id.* at 574. The majority held Kelly was motivated more by a desire for “personal notoriety” and political benefit, than for court reform and directed Kelly to cooperate with his fellow judges on future reform efforts. *Id.* at 573-74.

45. *Id.* at 575 (Ervin, C.J., dissenting). See also Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1225-50 (1986) (arguing that Canons 2(A) and 3(A)(6) are not constitutionally overbroad on their face but must be confined to their purposes, i.e., ensuring fair trials and maintaining public confidence in the judiciary, to avoid unconstitutional applications); Comment, *First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns*, 47 OHIO ST. L.J. 201, 219 (1986) (judicial candidates should have the same free speech rights as elected officials and attorneys generally).

46. *Kelly*, 238 So. 2d at 575 (Ervin, C.J., dissenting). “Certainly [Kelly] a judge periodically subjected to the elective process to retain his judgeship, had cause to feel aggrieved by the turn of events that affected his public stature . . . and in the constitutional scheme of free expression could seek . . . [to] justify to the public his side of the affair and did not have to stand mute under the circumstances merely because he is a judge.” *Id.*

Twelve years after *Kelly*, the Florida Supreme Court recognized a judge’s general right

In *McCartney v. Commission on Judicial Qualifications*,<sup>47</sup> the California Supreme Court adopted the public explanation exception originated in *Kelly* but added a caveat that, regardless of the provocation, a judge must avoid “personal hostility” in his response to criticism.<sup>48</sup> Shortly after James J. McCartney, a former prosecutor, became a judge in January 1971, the local public defender’s office established a policy of filing affidavits of prejudice against McCartney in all trials, and later expanded the policy to include all proceedings in which McCartney could exercise judicial discretion.<sup>49</sup> McCartney responded in court with loud, angry denunciations of the public defender’s office, once telling a deputy public defender:

I’m not going to be pushed around by the Public Defender’s Office and the abuse and the perversion that they have engaged themselves in emasculating an elected official of the people.

And if you’re ready to do it, I’ll meet you anywhere, any time, any place, buddy, up to the United States Supreme Court, back down again to the court of public opinion. . . .

This thing is being abused badly, and I’m not about to stand for it, and I’ll fight it every time, every place, every corner where justice will permit me to do it.<sup>50</sup>

McCartney sought to defend his outbursts as a reasonable response to the effort to keep McCartney from presiding over any criminal cases.<sup>51</sup> The California Supreme Court rejected this defense because reasoning that even if the public defender’s office acted contemptuously, a judge must always avoid “expressions of personal hostility” and can never defend his character in a manner

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to criticize or protest the state of the law “as long as he does not appear to substitute his concept of what the law ought to be for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge.” *In re Inquiry Concerning a Judge, Gridley*, 417 So. 2d 950, 954 (Fla. 1982). In *Gridley*, a judge wrote a pair of letters to an Orlando newspaper and an article in an Episcopal church newsletter opposing capital punishment. *Id.* He was cleared on Canon 2(A) charges because the letters and article caused no apparent prejudice or loss of public confidence. *Id.* at 954-55.

47. 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974).

48. *Id.* at 538-39, 526 P.2d at 287, 116 Cal. Rptr. at 279. The alleged misconduct in *McCartney* took place prior to adoption of the ABA Code of Judicial Conduct and California’s incorporation of that code. Although the case predates Canon 2(A), it provides a useful discussion of limits on a judge’s “self-defense” rights.

49. *Id.* at 538 n.13, 526 P.2d at 286 n.13, 116 Cal. Rptr. at 278 n.13. The affidavits automatically disqualify the judge under California law. *Id.* at 531-32, 526 P.2d at 281-82, 116 Cal. Rptr. at 273-74.

50. *Id.* at 524 n.8, 526 P.2d at 277 n.8, 116 Cal. Rptr. at 269 n.8 (quotation taken from finding on Count III(D)).

51. *Id.* at 537, 526 P.2d at 286, 116 Cal. Rptr. at 278.

that undermines public respect for the law.<sup>52</sup> McCartney was censured for his angry responses and various other misconduct.<sup>53</sup>

Seven years after *McCartney*, the California Supreme Court further explored a judge's right to public self-defense in *Wenger v. Commission on Judicial Performance*.<sup>54</sup> In *Wenger*, Justice Court Judge Jerrold L. Wenger was removed from the bench for extensive misconduct,<sup>55</sup> but was cleared of an alleged Canon 3(A)(6) violation for his critical comments about a superior court decision freeing a man Wenger had jailed for direct contempt.<sup>56</sup> Wenger criticized the release at length to a news reporter, stating in part, "[t]o divest justice court judges of the dignity and ability to control this potentially explosive environment is to strip away the underlying foundations originally built into these courts . . . . This decision undoubtedly undermines the entire judicial structure on the lower levels, the people's courts."<sup>57</sup>

The California Supreme Court held that Wenger's comments did not violate Canon 3(A)(6) because the contempt proceeding was no longer pending.<sup>58</sup> The court then addressed the tone of Wenger's comments. Wenger had submitted an ethics opinion stating that the California Code of Judicial Conduct allows judges to make a "dignified response to public criticism"; the court ruled Wenger did not exceed that privilege.<sup>59</sup> The court added that although Wenger's comments misrepresented the narrow basis of the supe-

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52. *Id.* at 538-39, 526 P.2d at 287, 116 Cal. Rptr. at 279 ("No matter how provocative are the personal attacks or innuendoes by lawyers against a judge, the judge simply 'should not himself give vent to personal spleen or respond to a personal grievance' because 'justice must satisfy the appearance of justice'.") (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.)).

53. *Id.* at 540, 526 P.2d at 288, 116 Cal. Rptr. at 280. The other misconduct included intemperate outbursts against or bullying of attorneys, pro se defendants, another judge and other court personnel, inefficient handling of cases, and failing to adhere to the judicial function. *Id.* at 522-23, 526 P.2d at 275, 116 Cal. Rptr. at 267.

54. 29 Cal. 3d 615, 630 P.2d 954, 175 Cal. Rptr. 420 (1981).

55. *Id.* at 620, 630 P.2d at 955-56, 175 Cal. Rptr. at 421-22. Wenger was removed for interfering in matters from which he had been disqualified, attempting to dissuade an attorney from representing a specific defendant, abusing his contempt power, and improperly banishing a prosecutor from his court. *Id.* at 622, 652-53, 630 P.2d at 956-57, 975, 175 Cal. Rptr. at 422-23, 441.

56. *Id.* at 635, 630 P.2d at 965, 175 Cal. Rptr. at 431.

57. *Id.* at 635, 630 P.2d at 964-65, 175 Cal. Rptr. at 430-31.

58. *Id.* at 635, 630 P.2d at 965, 175 Cal. Rptr. at 431.

59. *Id.* at 635-36, 630 P.2d at 965, 175 Cal. Rptr. at 431. "[N]othing in the Code of Judicial Conduct prevents a judge from making a dignified response to public criticism except as related to a case pending or about to be brought before the court." *Id.* (quoting Conference of California Judges, Commission on Judicial Ethics, Op. 24 (March 27, 1976)). The court did not mention Canons 1 and 2, that govern the tone of judicial speech, but instead cited CAL. CONST. art. VI, § 18(c), which similarly forbids "conduct

rior court decision voiding the contempt citation,<sup>60</sup> no prejudice to the court system occurred under the circumstances.<sup>61</sup>

### B. Commenting on Pending Cases

In addition, a judge must avoid discussing the merits of pending cases, as a recent California opinion, *Ryan v. Commission on Judicial Performance*, demonstrates.<sup>62</sup> The *Ryan* court removed Municipal Court Judge Richard Ryan from the bench based on over a dozen acts of misconduct, one of which involved comments to the press about three ongoing cases.<sup>63</sup> Regarding one case, Ryan explained his written opinion before it was published to a news reporter, and the newspaper published his comments before the parties learned of his decision.<sup>64</sup> Ryan also commented to the press about a contempt order he entered against an attorney while the order was on appeal.<sup>65</sup> Ryan held the attorney in contempt because he allegedly disparaged Ryan in court.<sup>66</sup> Ryan later told a newspaper he was going to drop the contempt charge but defended the charge, saying in part:

I was told [the attorney] was really out of line, but since there was something negative said about me . . . I don't want to appear biased and will let another judge decide . . . [i]t's not proper for

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prejudicial to the administration of justice that brings the judicial office into disrepute." *Id.* at 636, 630 P.2d at 965, 175 Cal. Rptr. at 431.

60. The superior court judge who voided the contempt citation found that the allegedly contemptuous conduct was invited by Wenger's bailiff. *Id.*

61. *Id.* The only further explanation offered by the court was a quotation from *United States v. Morgan*, 313 U.S. 409, 421 (1941) referring to "a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press." *Wenger*, 29 Cal. 3d at 636, 630 P.2d at 965, 175 Cal. Rptr. at 431. Although the court apparently thought it acceptable for a judge to blow off a little steam after being overruled, Judge Wenger's other instances of misconduct sufficed to warrant his removal from the bench. *Id.* at 441, 630 P.2d at 975, 175 Cal. Rptr. at 441.

62. 45 Cal. 3d 518, 754 P.2d 724, 247 Cal. Rptr. 378 (1988).

63. *Id.* at 542-44, 547, 754 P.2d at 738-39, 741, 247 Cal. Rptr. at 392-93, 395. Ryan was cleared of a charge regarding a fourth pending case because his remarks were made from the bench while the press was present. *Id.* at 544, 754 P.2d at 738-39, 247 Cal. Rptr. at 393. Among other offenses, Ryan's misconduct included abusing his contempt power, imposing an improper sentence for driving-under-the-influence that he supported with a fabricated justification, urging a prosecutor to bring a more serious charge against a defendant, directing a collateral investigation that prejudiced a criminal defendant, infringing upon defendants' rights to counsel, and telling offensive jokes to female lawyers. *Id.* at 531-45, 754 P.2d at 731-40, 247 Cal. Rptr. at 385-94.

64. *Id.* at 542, 754 P.2d at 738, 247 Cal. Rptr. at 392.

65. *Id.* at 543, 754 P.2d at 738, 247 Cal. Rptr. at 392-93.

66. *Id.* at 531-32, 754 P.2d at 731, 247 Cal. Rptr. at 385. Although Ryan was not in court at the time, the attorney allegedly made these comments before Ryan's clerk. *Id.*

loud, derogatory statements to [be] made in front of the whole courtroom as soon as the judge leaves.<sup>67</sup>

In a third case, Ryan imposed an improperly harsh sentence for driving-under-the-influence. After he refused to explain the sentence in court, Ryan told a local newspaper that the sentence was intended to discourage jury trials and "there had to be some incentive not to go to trial."<sup>68</sup> The California Supreme Court held that in each of the three pending cases, Ryan's comments violated Canon 3(A)(6) and constituted prejudicial conduct.<sup>69</sup>

The Maine Supreme Judicial Court addressed the appearance of prejudice caused by comments on pending cases in *Matter of Benoit*.<sup>70</sup> Judge John W. Benoit, Jr., in response to a higher court decision vacating sentences he imposed in nine criminal cases and remanding the cases for resentencing, wrote a letter to four Maine newspapers criticizing the higher court's decision.<sup>71</sup> Benoit's widely published letter defended the original sentences, discussed the factors that produced them, and stated "I have asked the Maine attorney general to seek a review" of the decision.<sup>72</sup> Maine's supreme court held that the letter violated Canon 3(A)(6), suspended Benoit for a week, fined him \$1,000 and ordered him to take an ethics course.<sup>73</sup> Canon 3(A)(6), the court observed, bars a judge from "publicly prejudging" or appearing to prejudge any aspect of a pending case.<sup>74</sup> The court stated it was "difficult to conceive of a more egregious violation" than Benoit's letter.<sup>75</sup> The letter clearly showed Benoit's bias, made the judicial system appear unfair, and subjected the defendants facing resentencing to a "pub-

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67. *Id.* at 543, 754 P.2d at 738, 247 Cal. Rptr. at 393.

68. *Id.* at 534, 754 P.2d at 732-33, 247 Cal. Rptr. at 386-87. Ryan also improperly defended the sentence in a letter to the local newspaper's editor. *Id.* at 544, 754 P.2d at 739, 247 Cal. Rptr. at 393.

69. *Id.* at 543-44, 754 P.2d at 738-39, 247 Cal. Rptr. at 393. With regard to pending cases, the California Commission on Judicial Performance stated that "it is entirely improper for a judge to use the media either as a platform or as a method of responding to criticism." Also, it found that some litigants were prejudiced and the press reacted unfavorably to some of Ryan's comments. *Id.* at 542, 754 P.2d at 738, 247 Cal. Rptr. at 392. The California Supreme Court largely adopted the Commission's findings without further comment. *Id.* at 542-44, 754 P.2d at 738-39, 247 Cal. Rptr. at 392-93.

70. 523 A.2d 1381 (Me. 1987).

71. *Id.* at 1382.

72. *Id.* at 1382, 1384. The attorney for the defendants facing resentencing notified the State Committee on Judicial Responsibility and Disability of the letter and sought Benoit's recusal, which Benoit granted. *Id.* at 1382.

73. *Id.* at 1384-85.

74. *Id.* at 1383.

75. *Id.*

lic prejudgment.”<sup>76</sup>

A similar concern about public confidence guided the Texas State Commission on Judicial Conduct in its November 1989 order censuring Judge Jack Hampton for publicly explaining a thirty-year prison sentence while a motion for a new trial was pending before him.<sup>77</sup> The judge imposed the sentence on an alleged double murderer who, accompanied by several friends, picked up a pair of gay men outside a bar and drove them to a park, where the gay men were killed with multiple gunshots.<sup>78</sup> In a December 1988 interview with a Dallas newspaper reporter, Judge Hampton gave the following explanations for the relatively light sentence:

These two gays that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys.

I don't much care for queers cruising the streets picking up teenage boys. I've got a teenage boy. . . .

Some murder victims are less innocent in their deaths than others. In those cases a defendant is unlikely to deserve a maximum sentence.

I put prostitutes and gays at about the same level. If these boys had picked up two prostitutes and taken them to the woods and killed them, I'd consider that a similar case.

And I'd be hard put to give somebody life for killing a prostitute.

Just spell my name right . . . [i]f it makes anyone mad they'll forget it by 1990.<sup>79</sup>

On the heels of the newspaper interview, Hampton made the following remarks in a telephone interview with an Associated Press reporter:

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. This 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've been prosecuting since 1955. Defending, I defended cases twenty

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76. *Id.*

77. Inquiry Concerning a Judge No. 52, Order of Public Censure of Morris Jackson Hampton, Judge, 238th Jud. Dist. Ct., Dallas, Texas, slip op. at 3-4 (Tex. State Comm'n on Judicial Conduct Nov. 27, 1989).

78. See Hahn, *Conduct Commission Must Not Condone Anti-Gay Statements*, Tex. Lawyer, Nov. 13, 1989, at 24, col. 1 (opinion column discussing facts of the murder case and urging the Commission on Judicial Conduct to reject a special master's finding that Judge Hampton would be impartial in any case involving homosexuals).

79. *Censure of Hampton*, slip op. at 1-2.

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.<sup>80</sup>

The Commission on Judicial Conduct found Judge Hampton's comments violated Canon 3(A)(8) of the Texas Code of Judicial Conduct.<sup>81</sup> Because the new trial motion was then pending and the judge's interview with the newspaper reporter lasted from thirty to forty-five minutes, it went well beyond an explanation of court procedures.<sup>82</sup> The Commission stated that to condone such a lengthy, off-the-bench discussion of a judge's findings and rationale would be to approve of "the use of off-record, extra-judicial considerations" in the judicial process and would diminish "[p]erceptions of fairness."<sup>83</sup> Regarding Canon 2(A), the Commission noted that the disciplinary case record contained substantial evidence that the public responded to the judge's comments with "disbelief, abhorrence and indignation."<sup>84</sup> Consequently, the Commission ruled that Judge Hampton violated Canon 2(A) because his comments damaged public confidence in judicial integrity and impartiality.<sup>85</sup>

Judges are permitted to provide background information on pending cases to news reporters.<sup>86</sup> Care must be taken to avoid discussing the merits, as illustrated by an Alabama Supreme Court decision, *Matter of Sheffield*.<sup>87</sup> The court suspended Judge Billy Joe Sheffield for two months, without pay, because he commented on the merits of a pending contempt case, and he failed to recuse himself from the matter.<sup>88</sup> The judge had initiated the contempt proceeding against a woman who wrote a letter to a small-town newspaper criticizing the judge, though not by name, for releasing a man from jail who failed to make child support and maintenance

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80. *Id.* at 2.

81. *Id.* at 4. Texas Canon 3(A)(8) is almost identical to Canon 3(A)(6) of the Illinois Code and the ABA Code, prohibiting out-of-court comments on pending cases. *See id.* at 3; ILL. S. CT. R. 63(A)(6), ILL. ANN. STAT. ch. 110A, para. 63(A)(6) (Canon 3(A)(6) and Committee Comments) (Smith-Hurd 1989).

82. *Censure of Hampton*, slip op. at 3.

83. *Id.* at 3.

84. *Id.* at 4.

85. *Id.* at 3. The special master who conducted a hearing on the matter found that Judge Hampton's comments did not violate Canon 2(A) because the judge would be impartial in cases with homosexuals or prostitutes as victims. *Id.* at 2. The Commission on Judicial Conduct emphatically disagreed. *Id.* at 3-4.

86. *See supra* notes 13, 18-26 and accompanying text (discussion of Canon 3(A)(6)).

87. 465 So. 2d 350 (Ala. 1984).

88. *Id.* at 355-56, 359. The judge was cleared of a related charge for making the improper contempt finding because there was no clear and convincing evidence that he made the finding in bad faith. *Id.* at 358-59.

payments.<sup>89</sup>

In a telephone interview with a newspaper editor the night before the contempt hearing, the judge said “[t]he contempt speaks for itself. . . . I think it’s pretty obvious who she is talking about. . . . Just because she doesn’t name any names doesn’t lessen what’s been done.”<sup>90</sup> The judge also said the letter had “false information in it” and suggested the editor “might want to look at the libel laws; call an attorney.”<sup>91</sup> The next day the judge found the letter writer in contempt but rescinded the contempt order a day later.<sup>92</sup>

The Alabama Supreme Court began its discussion by quoting from a National Conference of State Trial Judges report urging judges to provide the news media with background information on pending cases.<sup>93</sup> The court observed that judges are prohibited from commenting publicly on the merits but are encouraged to give abstract explanations of pending cases.<sup>94</sup> “Obviously, judges walk a fine line between the duties and prohibitions of Canon 3(A)(6).”<sup>95</sup> It added that “the risk of being misquoted” may stop many judges from talking to the press.<sup>96</sup> The court then rejected Judge Sheffield’s claim that he merely provided “abstract legal explanations.”<sup>97</sup> Instead, it concluded clear and convincing evidence supported a finding that the judge commented on the merits during

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89. *Id.* at 352. The letter stated in part that the unnamed judge:

feels justified in coming into office and changing another judge’s decision. He says that a man can sign all of his resources over to another person, let that person handle his finances, give him money as he needs or wants it and not be liable of [sic] supporting his family. . . . Every woman in Henry and Houston Counties had better sit up and take notice of this situation. The next time it could be one of you.

*Id.*

90. *Id.* at 353.

91. *Id.*

92. *Id.* The judge researched contempt law and the “clear and present danger” doctrine, realized the contempt order was erroneous, and rescinded the order on his own initiative. *Id.* Accounts and criticism of the contempt proceeding appeared in newspapers around the nation including The New York Times, The Bakersfield Californian and The Syracuse Post Standard. *Id.*

93. *Id.* at 355 (“Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media”) (quoting Nat’l Conference of State Trial Judges Comm. on News Reporting and Fair Trial, *Judicial Guidelines for Dealing with News Media Inquiries and Criticism* (5th Draft, June 5, 1984)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*



the telephone interview in violation of Canon 3(A)(6).<sup>98</sup>

*Miera*,<sup>99</sup> the *Kelly* dissent,<sup>100</sup> and *Wenger*<sup>101</sup> all support a judge's right to respond to public criticism. As *McCartney*<sup>102</sup> emphasizes, however, any responses must be calm and reasoned. Moreover, the merits of pending cases must be avoided, as *Ryan*,<sup>103</sup> *Benoit*,<sup>104</sup> *Hampton*,<sup>105</sup> and *Sheffield*<sup>106</sup> admonish. As Justice William O. Douglas observed, judges should be "men of fortitude, able to thrive in a hardy climate."<sup>107</sup> Thus, instead of responding personally to criticism, some judges might prefer to let a local bar association respond on their behalf.

#### IV. THE BAR ASSOCIATIONS

Sometimes, local bar associations will come to the aid of judges under public attack.<sup>108</sup> Bar intervention is sporadic, however, and may often be less effective than a judge's self-defense.<sup>109</sup> The ABA issued a pamphlet in 1986 that urged state and local bar groups to develop plans to respond to unfair or inaccurate criticism of judges or the courts.<sup>110</sup> The Illinois State Bar Association previously is-

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98. *Id.* Judges cannot avoid discipline by keeping their comments to a journalist "off the record" until after a trial is completed. See *In re Hayes*, 541 So. 2d 105 (Fla. 1989). In *Hayes*, a Florida judge stipulated that he violated Canons 1, 2, and 3(A)(6) when he made observations about a murder trial over which he was presiding to a journalist, whom the judge knew would later use the observations in a published account of the trial. The judge received a public reprimand. *Id.* at 105-06.

99. See *supra* notes 33-38 and accompanying text (*Miera* discussion).

100. See *supra* notes 39-46 and accompanying text (*Kelly* discussion).

101. See *supra* notes 54-61 and accompanying text (*Wenger* discussion).

102. See *supra* notes 47-53 and accompanying text (*McCartney* discussion).

103. See *supra* notes 62-69 and accompanying text (*Ryan* discussion).

104. See *supra* notes 70-76 and accompanying text (*Benoit* discussion).

105. See *supra* notes 77-85 and accompanying text (*Hampton* discussion).

106. See *supra* notes 87-98 and accompanying text (*Sheffield* discussion).

107. *Craig v. Harney*, 331 U.S. 367, 376 (1947).

108. See, e.g., *Council of Lawyers has Greylord Backlash Plan*, Chicago Daily Law Bulletin, June 15, 1984, at 1, col. 2 (the Chicago Council of Lawyers, expecting voters to retaliate generally against judges for the Operation Greylord court corruption scandal, announced a plan to distribute sample ballots with the group's judicial evaluations); *Bar Group Assails Daley's Complaint Against Judge*, Chicago Sun-Times, Feb. 6, 1985, at 24, col. 4 (the Cook County Bar Association accused Cook County State's Attorney Richard M. Daley of unethical conduct because he publicly denounced, and filed a judicial disciplinary complaint against, a criminal court judge, E.C. Johnson, who had just acquitted an attorney charged with bribery. The IJA also planned to denounce Daley's filing of the disciplinary complaint).

109. See Wapner, *How We Can Develop a Better Working Relationship with the Press*, 25 JUDGES' J. 6, at 47 (Winter 1986) ("the bar associations sometimes do, and sometimes don't" answer criticism on behalf of judges).

110. A.B.A. SUBCOMMITTEE ON UNJUST CRITICISM OF THE BENCH, COURTS AND COMMUNITY COMMITTEE, JUDICIAL ADMINISTRATION DIVISION LAWYERS CONFER-

sued a similar set of guidelines for local bar use in 1982<sup>111</sup> based on a policy statement issued by the IJA.<sup>112</sup> The ABA pamphlet explains that "inaccurate or unjust criticism of judges, courts, or our system of justice . . . erodes public confidence."<sup>113</sup> The ABA pamphlet urges lawyers and bar associations to respond to unjust criticism because judicial responses might seem undignified, self-serving or lacking in credibility. Furthermore, such responses might interfere with pending litigation.<sup>114</sup>

Essentially, the ABA and ISBA guidelines list the same factors for deciding when and how bar groups should become involved.<sup>115</sup> For example, under both guidelines involvement should be considered only if the criticism is serious, materially inaccurate, or reflects adversely on the judiciary as a whole.<sup>116</sup> The ABA and ISBA guidelines advise that generally bar responses are inappropriate when the criticism is fair comment, vague, based on innuendo, when a lengthy investigation is needed to explore the facts, or when a judicial discipline complaint is likely to be filed.<sup>117</sup> Both the ABA and ISBA guidelines recommend concise, informative, non-argumentative responses issued within forty-eight hours of the criticism if possible.<sup>118</sup>

The Illinois Judges Association has a policy similar to those urged by the ABA and ISBA, but with an added feature: the group tries to enlist the support of bar groups or law professors for any

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ENCE, *Unjust Criticism of Judges* (1986). The pamphlet also offers guidelines for implementing such plans.

111. ILL. ST. B.A., *Model Program Against Unwarranted Criticism of Judges* (1982). The CBA has no set policy but publicly defends or criticizes judicial rulings on a case-by-case basis. Telephone interview with Terrence Murphy, Executive Director, CBA (Oct. 23, 1989).

112. ILL. JUDGES A., *A Program of the Illinois Judges Association for Meeting Inaccurate and Unjust Criticism of Courts and Judges* (1981), excerpts reprinted in 69 ILL. B.J. 336 (1981) (based on policy statements by judges' groups in California and Washington state and on an ABA Committee's draft report).

113. *Unjust Criticism*, *supra* note 110, at 1.

114. *Id.*

115. *Id.* at 3-4; ISBA *Model Program*, *supra* note 111, app. at 1.

116. *Unjust Criticism*, *supra* note 110, at 3-4; ISBA *Model Program*, *supra* note 111, app. at 1.

117. *Unjust Criticism*, *supra* note 110, at 4; ISBA *Model Program*, *supra* note 111, app. at 1-2.

118. *Unjust Criticism*, *supra* note 110, at 5-6, ISBA *Model Program*, *supra* note 111, app. at 2-3. A pair of attorneys involved in bar responses warned that taking substantive positions will cost at least half the potential audience, and late responses may either be "no longer newsworthy or may rekindle the controversy by republishing the original charge." Schoenbaum and Goldspiel, *Answering Unjust Criticism—First Aid for Battered Courts*, 21 JUDGES J. 39, 40 (Fall 1982).

response.<sup>119</sup> Although members of the Judges Association may be able to respond faster by themselves, the group considered important the participation of other segments of the legal profession to give the public a more accurate view of the judicial function.<sup>120</sup>

Although bar associations play an important role in defending the courts' public image, several gaps in that role are probably unavoidable. The bar groups' reluctance to intervene in situations involving innuendo or potential disciplinary action is understandable. It is often difficult to find the source of innuendo and refute it effectively. Moreover, to the extent the innuendo involves a judge's personal life, the judge will be in a much better position to know the facts and to respond quickly. Potential disciplinary situations may require extensive investigations, and bar groups should not appear to be prejudging a disciplinary proceeding. Innuendo or the threat of a disciplinary action can cause great damage to a judge's reputation, however, particularly if no rebuttal is made quickly. Even in less delicate circumstances, however, the bar groups may simply decide the criticism is not serious, or bar groups may be among the critics.<sup>121</sup> Moreover, a bar group's aid may come too late, after the public focus has shifted elsewhere.

Given these gaps in bar groups assistance, judges may often find it desirable to assume primary responsibility for their own public defense and rely on the bar for occasional backup assistance. This approach is commendable because only the judge knows why he issued a particular ruling. His explanation may be the most credible and may draw the most attention. After all, it is often the judge who becomes the center of controversy. Once the case concludes, a judge can address the merits in ways that bar associations

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119. IJA Program, *supra* note 112, at 1.

120. *Id.*

121. See, e.g., *CBA Rejects Evaluation Appeal*, Chicago Daily Law Bulletin, Sept. 14, 1988, at 1, col. 2 (the CBA refused to reconsider its "not recommended" rating of Cook County Circuit Judge Jill K. McNulty, a criminal division supervising judge, during a period in which her immediate superior and several judges below her engaged in court corruption, resulting in federal Operation Greylord convictions. The CBA evaluation of McNulty said that although it knew of no evidence indicating she was corrupt, she "exercised poor judgment" by failing to aggressively investigate and take ameliorative steps); *Two Groups of Lawyers Lash Out at Retention of Five Judges*, Chicago Tribune, June 25, 1987, § 2, at 2, col. 2 (the CBA and Chicago Council of Lawyers criticized Cook County's 173 full circuit judges for re-electing five associate judges against the recommendations of both bar groups; four other associate judges whom the bar groups opposed were denied re-election); *Eight Judges Don't Rate with Bar Group*, Chicago Tribune, Oct. 8, 1986, § 2, at 1, col. 5 (the Council of Lawyers declared that eight Cook County circuit judges seeking retention were unqualified; one was said to have an "erratic, sometimes bullying demeanor," and another was viewed as "close-minded . . . indecisive and dilatory.")

are unable or unwilling to do. Consequently, in many situations, a judge can mount a more effective public defense than bar associations.

## V. ANALYSIS

Judges are often faced with the prospect of making a controversial ruling, such as acquitting a notorious criminal defendant, fining a municipality whose officials refuse to obey a court order, or striking down a popular law.<sup>122</sup> Then, when elected judges confront voters, they are highly motivated to explain and justify their rulings. The public also has an earnest interest in obtaining the information needed to evaluate a controversial ruling. Such information provides the basis for rational decisions regarding whether judges deserve to be retained. Fortunately, the Code of Judicial Conduct and case law provide considerable leeway for judges to respond to criticism and explain their rulings, either on, or off, the bench.

### A. *In-Court Explanations and Written Opinions*

In-court explanations and written opinions provide judges with the greatest freedom from the restraints of Canon 3(A)(6).<sup>123</sup> Both modes of expression permit a timely discussion of a ruling's merits. Providing thorough oral or written opinions may also help prevent inaccurate or incomplete news accounts, thereby reducing criticism based on misconceptions. Moreover, a judge can respond to criticism by supplying a copy of the ruling to the media<sup>124</sup> or by adres-

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122. See, e.g., *Second Federal Judge Rejects Law Against Burning the Flag*, N.Y. Times, March 6, 1990, at A20, col. 1 (a Washington, D.C. federal court judge held the Federal Flag Protection Act of 1989, which criminalized burning the U.S. flag, unconstitutional; the previous week, a federal judge in Seattle also voided the act on First Amendment grounds).

123. ILL. S. CT. R. 63(A)(6), ILL. REV. STAT. ch. 110A, para. 63(A)(6) (1987). See *supra* notes 13, 18-26 and accompanying text (Canon 3(A)(6) discussion).

124. Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit stood by his written opinion when an unsuccessful appellant's attorney, Northwestern University law professor Anthony D'Amato, made a speech claiming that Easterbrook altered or omitted important facts in the case. D'Amato represented John M. Branion Jr., a Chicago physician, in an effort to overturn Branion's conviction for the 1967 murder of his wife. The Seventh Circuit, in a unanimous July 1988 opinion written by Easterbrook, affirmed a lower court's denial of Branion's petition for a writ of habeas corpus. *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1645 (1989). During an October 1989 speech, D'Amato asserted that Easterbrook engaged in an "artful" distortion of the facts to justify ruling against the obviously innocent Branion. D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts* (paper delivered at the Cardozo Law School, Oct. 2, 1989) (scheduled for publication in the *Cardozo Law Review*). Asked for his reaction, Easterbrook declined comment, saying "[i]t would be a

sing it in his next ruling, if the case remains pending.

Judge Milton I. Shadur of the U.S. District Court in Chicago demonstrated the latter technique in September 1989. Shadur responded to politicians' and journalists' criticism of \$1,000 a day contempt fines he imposed against Cook County for overcrowding at the county jail.<sup>125</sup> In an opinion ordering the parties to submit

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mistake, and anything I said couldn't possibly come out right. I put a long time into writing that opinion. Whatever I have to say, right or wrong, is already in it." Margolick, *A Law Professor with a Beef Takes the Judge to Task and the Case to the Public*, N.Y. Times, Oct. 13, 1989, at B5, col. 1.

125. Shadur began imposing the fines in early 1989 for violations of a 1982 consent decree and a 1983 order setting a 4,500 inmate limit for the County jail. Pursuant to the consent decree, the County agreed not to overcrowd the county jail. *County Jail Fines May Get Personal*, Chicago Tribune, Sept. 16, 1989, § 1, at 5, col. 5; *Release of Inmates to Go on*, Chicago Tribune, March 20, 1984, § 2, at 1, col. 2.

County officials, in an effort to comply with the 4,500-inmate limit, sought bail reductions for 340 inmates in February 1983, but the wholesale approach was resisted by Cook County Circuit Court judges. *Judges Balk on Plan to Cut Crowding at Jail*, Chicago Tribune, Feb. 11, 1983, § 2, at 1, col. 2. Presiding Circuit Judge Gino DiVito of the County's preliminary hearing courts said "[i]f Judge Shadur truly believes these people should be dismissed from jail on a wholesale basis . . . he can exercise his discretion to do so." *Id.*

In March 1985, Cook County State's Attorney Richard M. Daley urged Shadur to modify the inmate limit because the resultant release of allegedly dangerous felons posed an immediate threat to public safety. *Keep Suspects Jailed, Daley Says*, Chicago Tribune, March 26, 1985, § 2, at 4, col. 4. Daley said the issue was "whether the temporary comfort of jail inmates takes priority over the safety of our community." *Id.* Shadur responded in court two days later, calling it "a mistaken viewpoint that to create constitutional living conditions is to be soft on criminals and soft on crime. That is dead wrong." *Judge Assails County Inaction on Jail Crowding*, Chicago Tribune, March 28, 1985, § 2, at 1, col. 2. Another two days later, Shadur denied the motion to raise the inmate limit. *Inmate Double-celling Rejected*, Chicago Tribune, March 30, 1985, § 1, at 5, col. 2.

By the Fall of 1988, over 100 jail inmates were sometimes forced to sleep on mattresses on the floor, a violation of Shadur's 1983 order requiring a bed for each inmate. Chicago Tribune, Sept. 12, 1988, § 2, at 3, col. 5. Mike Royko observed that Shadur's objection to mattresses on the floor would seem strange to the Japanese, who commonly sleep on futons on the floor. Royko, *Let Sleeping Dogs Lie—Even on Cots*, Chicago Tribune, Feb. 14, 1989, § 1, at 3, col. 1. Royko wrote that Shadur "probably hasn't been mugged lately or his car hasn't been stolen. However, the judge has made it more likely that you or I will be mugged or that our car will be stolen in the near future." *Id.* Royko's solution was to transfer the jail overcrowding case to a judge of Japanese ancestry, and appoint Shadur ambassador to Japan. *Id.*

Chicago Police Superintendent LeRoy Martin suggested that Shadur visit city neighborhoods with high crime rates to "see the conditions people live under," and said "overcrowding in the jail doesn't bother me . . . I say put the two bums in the same cell, put four of them in there. Sleep in shifts." *Martin: Let County Inmate 'Bums' Sleep in Shifts*, Chicago Tribune, April 21, 1989, § 2, at 1, col. 2.

Television commentator Walter Jacobson joined the chorus in May 1989, observing that "[t]hieves and thugs are getting arrested, and they check-in and check-out, because the judge (Milton Shadur) does not want them in there too uncomfortable. . . . Of course, [Shadur] lives in a suburb on the north shore." *Walter Jacobson Perspective* (WBBM-TV

memoranda on the future course of the fifteen-year-old litigation over jail conditions, Shadur explained the basis for the fines and analyzed the public relations situation.<sup>126</sup>

Initially, Shadur noted that, as a federal judge with lifetime tenure, he could "render justice without concern as to public perceptions (or more frequently misperceptions) of the decisions involved."<sup>127</sup> Nonetheless, he added, public perceptions are important, and the media has a "special responsibility" to provide accurate information.<sup>128</sup> Shadur continued, saying "[i]t is therefore especially regrettable when media representatives prefer to feed unreasoning prejudices rather than to deal with the real issues."<sup>129</sup> The misinformation served to focus attention on the judge rather than the County board, where responsibility for the jail problem lies.<sup>130</sup>

The freedom to make in-court explanations is limited, however. Such explanations, like those made out of court, are governed by Canon 2(A) and its requirement that judges maintain the appearance of impartiality, honesty and dignity.<sup>131</sup> In this regard, judges must refrain from attacks against specific critics because such attacks may appear to be the basis of a personal feud. For example, in *McCartney*,<sup>132</sup> the judge exacerbated his problem with the public defender's office by angrily attacking the office in court. The attack made it clear that, at least from that point on, the public defender's office would have problems with the judge and should avoid him.

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broadcast, May 23, 1989). Two months later, Jacobson urged Shadur to allow the jail to use the fine money to buy monitoring bracelets that would enable jail officials to keep track of inmates released because of the overcrowding. *Walter Jacobson Perspective* (WBBM-TV broadcast, August 21, 1989). Jacobson followed up the next month by suggesting that Fort Sheridan, a U.S. Army base slated to close in neighboring Lake County, could be used to temporarily hold some of the Cook County Jail's overflow prisoners. *Walter Jacobson Perspective* (WBBM-TV broadcast, Sept. 13, 1989). In court, Shadur described the suggestion as "thoughtless though perhaps well intended." *Duran v. O'Grady*, No. 74 C 2949, slip op. at 4-5 (N.D. Ill. Sept. 15, 1989). Jacobson then unsuccessfully sought an explanation from Shadur over the telephone and surmised that Shadur opposed Fort Sheridan as a temporary jail because the base was near Shadur's home. *Walter Jacobson Perspective* (WBBM-TV broadcast, Sept. 18, 1989).

126. *Duran v. O'Grady*, No. 74 C 2949 (N.D. Ill. Sept. 15, 1989) (1989 U.S. Dist. LEXIS 10989).

127. *Id.*, slip op. at 2.

128. *Id.*

129. *Id.*

130. *Id.* at 2-3.

131. ILL. S. CT. R. 62(A), ILL. REV. STAT. ch. 110A, para. 62(A) (1987). See *supra* notes 12, 16-17 and accompanying text (Canon 2(A) discussion).

132. 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974). See *supra* notes 47-53 and accompanying text (*McCartney* discussion).

The better approach would have been for the judge to note the existence of the public defender's policy of disqualifying the judge and to state that he found the policy difficult to understand. A quiet, behind-the-scenes approach to defending the judge's reputation within the legal community would have been preferable to an angry, in-court counterattack. The judge might have responded more effectively by meeting privately with the public defender. Moreover, a public response may have been unnecessary if the general public was unaware of the judge's dispute with the public defender.

Higher courts should never be directly attacked, as the *Wenger*<sup>133</sup> and *Benoit*<sup>134</sup> cases illustrate. If a case is reversed and remanded, the judge will have a chance to expound the merits and justify his reasoning in court when the case returns. Only then should the judge respond. If the case has concluded, the judge may be able to respond out of court. In either situation, any response should emphasize the facts that were initially before the judge. Clearly, it is unwise to create even the appearance of a feud by accusing the higher court of undermining a judge's authority, as occurred in *Wenger*,<sup>135</sup> or urging a litigant to seek review of a reversal, as occurred in *Benoit*.<sup>136</sup>

### B. Promoting Accurate News Coverage

Judges also can take an active role in promoting accurate news coverage. Joseph A. Wapner of the "People's Court," a former California trial court judge, has stated that because many reporters lack expertise about the court system, judges have a responsibility to provide background information and clear explanations of rulings.<sup>137</sup> When inaccurate or misleading reports appear, judges should write a letter to the editor or otherwise seek to straighten the record, Wapner advised.<sup>138</sup>

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133. 29 Cal. 3d 615, 630 P.2d 954, 175 Cal. Rptr. 420 (1981). See *supra* notes 54-61 and accompanying text (*Wenger* discussion).

134. 523 A.2d 1381 (Me. 1987). See *supra* notes 70-76 and accompanying text (*Benoit* discussion).

135. 29 Cal. 3d at 635, 630 P.2d at 964-65, 175 Cal. Rptr. at 430-31.

136. 523 A.2d at 1384.

137. Wapner, *supra* note 109, at 8. New York Supreme Court Judge Nat H. Hentel, noting that the National Judicial College has for several years urged judges to dine regularly with newsmen, said "[i]t's not a matter of kissing anybody's behind, but the judge takes the responsibility of educating the journalists as to what is going on and uses them as the surrogate to pass it on to the public, which misunderstands most judicial processes." Hentel, *supra* note 8, at 231.

138. Wapner, *supra* note 109, at 47-48.

Open lines of communication between judges and news reporters are beneficial to both groups,<sup>139</sup> however, they are not without pitfalls. Judges who give such interviews might be tempted to comment on the merits of pending cases<sup>140</sup> and could be misquoted. A discussion of the merits can be avoided by keeping to the facts and law and by omitting even the obvious inferences. A judge should simply let the media or attorneys make such inferences. The risk of being misquoted can be largely eliminated by answering questions in writing, perhaps by making available opinions or other documents containing the desired background information, or by having other court personnel, such as a bailiff or secretary, answer reporters' questions. Once a judge becomes accustomed to dealing with press inquiries, it should be easy to keep the proper bounds in mind.

Speaking off-the-record to reporters should be avoided because mistakes may result. A reporter's promise not to publish the judge's comments or not to attribute statements to the judge may entice him to discuss the merits. Canon 3(A)(6), however, certainly prohibits this approach.<sup>141</sup> Moreover, even the most trustworthy reporter might inadvertently mix off-the-record comments with other information and publish some off-the-record material. It is more prudent to give reporters only information that the ethics rules permit the judge to publish.

### C. *Off-the-bench Comments*

Occasionally, a judge may need to step out of his judicial role and defend himself. He may face pointed, well-publicized criticism and find it necessary to respond while the controversy remains in the public eye. As with in-court responses, a judge should emphasize the facts and avoid attacking specific critics. It is also important to avoid inflammatory rhetoric or disparaging comments

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139. See Drechsel, *Judicial Selection and Trial Judge-Journalist Interaction in Two States*, 10 JUST. SYS. J. 6 (1985). Judges in Minnesota, which elects its judges, were found to be more likely to cooperate with press inquiries than judges in a state with an appointive system. *Id.* at 11. A 1980 survey of Minnesota trial judges indicated that ninety-five percent of the judges would explain legal processes to journalists, ninety-four percent were willing to be interviewed for stories about the courts, and eighty-six percent would explain at least some aspects of their rulings to journalists. *Id.*

140. See, e.g., *Matter of Sheffield* 465 So. 2d 350 (Ala. 1984). See *supra* notes 87-98 and accompanying text (*Sheffield* discussion).

141. ILL. S. CT. R. 63(A)(6), ILL. REV. STAT. ch. 110A, para. 63(A)(6) (1987). See *supra* notes 13, 18-26 and accompanying text (Canon 3(A)(6) discussion); see also *supra* note 98 (discussion of a case on off-the-record comments).



about racial, religious, sexual or ethnic groups. In *In re Miera*,<sup>142</sup> for example, the judge whose colleagues had publicly called for his removal might have responded by describing them as insensitive instead of "blood thirsty hypocrites."<sup>143</sup> Or the judge might have simply told inquiring journalists that he has tried not to allow personal criticism to affect his judicial rulings and will continue to do his best in the future.

Out-of-court responses can take various forms such as sending out a written press release, holding a press conference, or telephoning individual reporters. A judge who wants his response to be heard should, nonetheless, refrain from appearing overly aggressive. Consequently, a press release may often be the most desirable response. It is much easier to appear calm in a written release than in a live session with reporters. If reporters call for a response, the judge or other court personnel can read the release over the phone. Whatever form a response takes, it should be carefully thought through in advance. A judge should be mindful of the facts that are in the public record and whether the case remains pending in any court. Based upon these considerations, the judge can determine and stay within the limits defined for extrajudicial communications.

## VI. CONCLUSION

Illinois' elected judges are particularly vulnerable to public criticism, but they need not stand mute in response. The Illinois Code of Judicial Conduct allows judges to respond in court or in written opinions as long as the responses are dignified. The Code also permits appropriate out-of-court responses as long as the merits of pending cases are avoided. A judge can often meet criticism effectively by showing factual errors or omissions in the criticism, without directly questioning the critic's character or motives. Written opinions, which can be used as a vehicle for responses in cases that remain pending before a judge, are especially useful because they allow judges to explain the rationale of controversial rulings in a calm, reasoned manner. Local bar associations will sometimes come to the aid of beleaguered judges, but judges cannot completely rely on the bar in this regard. Bar groups might decide not to defend a judge under attack, might take too long to respond, or might be among the judge's critics. Therefore, an effective public defense of a judge will often require the judge's active participa-

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142. See *supra* notes 33-40 and accompanying text (*Miera* discussion).

143. See *id.*

tion. A judge should consider using his freedom to respond to criticism when his reputation and judicial career are at stake.

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