

# Extrajudicial Speech: Judicial Ethics in the New Media Age

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If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

– Justice Louis Brandeis<sup>2</sup>

The public has a difficult time evaluating judges. Most people never enter a courtroom, they seldom hear the complete testimony of witnesses, nor do they have the legal training to evaluate a ruling in a complex matter. For these and other reasons, the judiciary is probably the least understood branch of government. Since a judge's role and rulings are sometimes difficult to comprehend, the public must take much of what a judge does on faith. If they lose that faith, the judicial system itself is threatened.

The most common way for the general public to become informed about judges and courts is through the news and entertainment media. In recent years, economic pressures and the 24-hour news cycle have caused a sea change in the manner by which news is gathered and presented. This has had consequences for most social and political entities, including the judiciary. The result of these changes has been simplified media coverage of courts, which has sensationalized legal proceedings and undermined the public's faith in the judiciary and the judicial process.

Extrajudicial silence – the judiciary's traditional response to misinformation, criticism or attack in the media – has proven ineffective in preventing a decline in the public trust and confidence in the justice system.<sup>3</sup>

Revisions to the latest version of the American Bar Association's Model Code of Judicial Conduct, published in 2007, include new ethics rules that were designed to allow extrajudicial speech.<sup>4</sup> Although limitations persist, the Model Code now encourages members of the judiciary to become full participants in the ongoing public discussion about the courts.

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1. I wish to thank Karen MacKenzie and Rosemary K. Wolock for their invaluable assistance in the writing of this article.

2. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The *Whitney* decision was overruled by *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

3. The phrases "extrajudicial silence" and "extrajudicial speech" are taken from Stephan J. Fortunato's article, *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 *Geo. J. Legal Ethics* 679, 682-83 (1999), and are used in this article to describe judicial interaction with the media.

4. These revisions will be discussed throughout the remainder of this article.

### Courts in the New Media Environment

For better or worse, the media certainly plays a role in the educating Americans about courts.<sup>5</sup> A 1999 study<sup>6</sup> by the National Center for State Courts found that “six of ten [respondents] ... say they get court information from electronic media and half regularly receive it from print media. About a fourth get it from dramas and comedies with a legal theme.”<sup>7</sup> In a similar 1998 survey, 41 percent of respondents cited television news as an important source of information about the courts, while 37 percent cited television “news magazine” programs.<sup>8</sup> Local daily newspapers were cited by 36 percent, national newspapers by 35 percent, and radio news by 31 percent.<sup>9</sup>

### Courts on Television

Television entertainment, with its emphasis on conflict and quick resolution, can cause major distortions in the public’s understanding of the court system.<sup>10</sup> In a so-called courtroom drama, a case typically proceeds from arrest to resolution within an hour.<sup>11</sup> While these shows are portrayed realistically with sets designed to look like courtrooms and law offices, the lifelike settings are merely the backdrop for a commercial drama.<sup>12</sup> Oversimplification for the sake of emotional tension usually dictates that defendants are guilty, with the real dramatic challenge being whether the judge or jury will reach the correct conclusion.<sup>13</sup> The inevitable legal inaccuracies are passed on to the viewer with the force of law.<sup>14</sup>

Such distortions reverberate in real courtrooms when the public expects courts to behave like their television counterparts. As the court said jurors in *Jackie Barron Wilson v. The State of Texas*: “They have all seen ‘CSI: Crime Scene Investigation’ or ‘NCIS’ and ‘know’ that DNA is infallible.”<sup>15</sup>

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5. Besides the studies cited *infra*, most literature on subject has asserted that the media have such an influence, without proof. “[T]hrough television representations of law have become ubiquitous, the extent of their impact, if any, has neither been defined nor measured with precision.” Kimberlianne Podlas, *As Seen On Tv: The Normative Influence Of Syndi-Court On Contemporary Litigiousness*, 11 VILLANOVA SPORTS & ENT. L. J. 1, 2 (footnotes omitted). In her article, Podlas presents the results of her survey of 225 prospective jurors on their perceptions of judges’ behavior, and whether those perceptions are shaped by viewing of syndicated court programs such as “Judge Judy.” *Id.* at 29-37. But her study does not address the role of the media generally in forming general perceptions of the court system.
  6. The author was unable to find any more recent quantitative research on the question of media influence on the perceptions of the general public of the courts.
  7. NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 4 (1999), available at [http://www.ncsconline.org/WC/Publications/Res\\_AmtPTC\\_PublicViewCrtsPub.pdf](http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf).
  8. AMERICAN BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 94 (1999) (survey conducted by M/A/R/C Research), [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1269460858\\_20\\_1\\_1\\_7\\_Upload\\_File.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1269460858_20_1_1_7_Upload_File.pdf). These were actually mentioned less frequently than other sources: personal experience was named by 63 percent of respondents; 59 percent cited school or college courses; 58 percent selected “books/library;” 57 percent cited jury duty; 43 percent cited lawyers; and materials available from the court were also cited by 43 percent. *Id.*
  9. *Id.*
  10. RAY C. SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES p. 45 (4th ed, 2007).
  11. Judge Dennis N. Sweeney, The “CSI Effect” A Judge’s Viewpoint: How Do Courtroom Dramas Affect the Work of the Courts? JUSTICE MATTERS, SPRING-SUMMER 2009 vol. 12, no. 4 <http://www.courts.state.md.us/publications/ejusticematters/2009/summer/csieffect.html>
  12. Kimberlianne Podlas, *Impact of Television on Cross-Examination and Juror “Truth”* 14 WIDENER L. REV. 479, 495 (2009).
  13. *Id.* at 490-491.
  14. *Id.* at 497.
  15. *Jackie Barron Wilson v. The State of Texas* 185 S.W. 3rd 481, 489. 2006 TEX. CRIM. APP. LEXIS 425 (2006).

For example, courtroom reality shows, also known as “syndi-courts,” fictitiously replicate a courtroom setting, presided over by a robed member of “the judiciary.” In fact, many of these “syndi-judges” have never made a judicial decision before their first television case.<sup>16</sup> Those who have been judges often do not behave as if they are subject to an ethical code of judicial conduct.<sup>17</sup>

By using the look and feel of a courtroom, these shows attempt to convince viewers that they are watching authentic trials involving actual litigants.<sup>18</sup> In reality, these cases are picked for their entertainment value.<sup>19</sup> Unlike an actual proceeding, trials can last no more a few minutes.<sup>20</sup> The rules of evidence or for that matter any law itself has little import to a syndi-judge in deciding the case.<sup>21</sup>

Regular viewers come to believe that judges are “vocal, active, and opinionated” on the bench, a view that is not shared by those who do not watch syndi-court shows.<sup>22</sup>

The participants in these syndi-courts are assigned roles in a morality play, where the only “judicial” determination is who is good and who is evil. The true judicial role of applying the law to factual circumstance is completely lost in what can be called “a ‘Trojan horse’ packed with an army of misperceptions.”<sup>23</sup>

Media distortions are not limited to entertainment programming. Television news, which averages 64 seconds on a news story during a thirty-minute news broadcast,<sup>24</sup> both simplifies and sensationalizes courtroom proceedings, adding significantly to public misperceptions of how courts operate.<sup>25</sup> Both radio and print organizations – which at one time provided detailed and accurate descriptions of courtroom proceedings – in response to the changing media environment no longer provide such coverage, focusing instead on the entrainment value of the courtroom proceeding.<sup>26</sup>

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16. The following shows had “syndi-judges” who had never served on the bench: *People’s Court* with attorney and former New York City mayor and Congressman Ed Koch (1997-99), *Eye for an Eye* with attorney and former prosecutor “Extreme Akim” Anastopoulos (2004-11), *Moral Court* starring “Judge Extreme Larry Elder,” an attorney and talk-show host (2000-01), *Texas Justice* with attorney Larry Joe Doherty (2001-05), and *La Corte de Familia* (Family Court) (2000-05) / *Cristina’s Court* with attorney Cristina Perez (2006-10). *Judge show*, Wikipedia, [http://en.wikipedia.org/wiki/Judge\\_show](http://en.wikipedia.org/wiki/Judge_show) (visited April 6, 2012).

17. See Erika Lane, *Current Development 2006-2007: The Reality of Courtroom Television Shows: Should the Model Code of Judicial Conduct Apply to T.V. Judges?* 20 GEO. J. LEGAL ETHICS 779 (Summer 2007).

18. *Id.* at 780.

19. *Id.* at 780.

20. *Id.*

21. *Id.* at 783.

22. Kimberlianne Podlas, *Blame Judge Judy: The Effects of Syndicated Television Courtrooms on Jurors*, 25 AMER. J. TRIAL ADVOCACY 557, 558 (2002).

23. Kimberlianne Podlas, *Please Adjust Your Signal: How Television’s Syndicated Courtrooms Bias Our Juror Citizenry*, p. 21 (2001).

24. Limor Peer, Ed Malthouse, Mary Nesbitt, Bobby Calder, *The local TV news experience: How to win viewers by focusing on engagement*, MEDIA MANAGEMENT CENTER NORTHWESTERN UNIVERSITY p. 46 (2007).

25. SURETTE, *supra* 45.

26. Richard L. Fox, Robert W. Van Sickle, and Thomas L. Steiger, *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* p. 6 (2d ed. 2007).

### The Changing Media

The forces driving the change are the subject of a 2011 report for the Federal Communication Commission. The FCC report found that the most critical factor shaping the media is a sharp decline in advertising revenues, which is transforming the way news is gathered and distributed.<sup>27</sup> The FCC analysis found that newspaper advertising revenue dropped by 47 percent in the four-year period ending in 2009.<sup>28</sup> In response, newspapers cut editorial spending by \$1.6 billion a year,<sup>29</sup> resulting in staff reductions at most daily newspapers in the range of 25 percent to 50 percent.<sup>30</sup> These staffing cuts reduced the number of print journalists to levels last seen in the early to mid-1970s.<sup>31</sup> Similar cuts in television news reduced staff levels by half industry-wide.<sup>32</sup>

The impact of these cuts and their effect on coverage of the courts is detailed in a section of the FCC report entitled “crime and criminal justice”:

Given that local TV news tends to focus on the latest murder or fire, it is tempting to think that we will never have a shortage of crime coverage. But cutbacks at newspapers have meant that coverage of underlying issues – how well the criminal or civil justice systems work – has suffered. In most cases, newspapers have not entirely eliminated their coverage of courts, but instead send so few reporters to do so much that reporting has become more reactive and shallow, and less enterprising.<sup>33</sup>

While praising the work ethic of individual editors and reporters, the FCC report determined that local news outlets no longer have the staff to conduct meaningful in-depth feature stories. Moreover, the cuts have rendered the traditional beat reporter almost extinct.<sup>34</sup> Remaining journalists have by necessity become generalists, who lack the time to do more than skim the surface of the stories they are reporting.<sup>35</sup> These new generalists might, on any given day, be assigned to cover city employee contract negotiations, a fire, then a local children’s fundraiser, and finally a high visibility courtroom case. Many will do all of this, in the case of print reporters, without leaving their desk, which might now be located in their home.<sup>36</sup> Local television and radio reporters are also becoming “one-man bands,” who must record and then edit their own material to get it on the air.<sup>37</sup>

The FCC report suggests that this trend is irreversible, returning journalism to the age of the wire service reporter. These journalists, like hamsters, are running ever faster in place in an effort to complete their daily quota of “superficial stories.”<sup>38</sup>

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27. See Steven Waldman et al. (*Federal Communication Commission Working Group on the Information Needs of Communities*), THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE, 46 (July 2011), <http://www.fcc.gov/info-needs-communities#read>.

28. *Id.* at 10 (citing Newspaper Assoc. of Am., Advertising Expenditures (last updated Mar. 2010), current version available at <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx>).

29. *Id.* at 12 (citing Rick Edmonds, *Shrinking Newspapers Have Created \$1.6 Billion News Deficit*, POYNTER, Oct. 10, 2009, <http://www.poynter.org/latest-news/business-news/the-biz-blog/98784/shrinking-newspapers-have-created-1-6-billion-news-deficit/>).

30. *Id.* at 10.

31. *Id.* at 10.

32. *Id.* at 10.

33. *Id.* at 47

34. *Id.* at 11.

35. Dean Starkman, *The Hamster Wheel*, COLOMBIA JOUR. REV. (Sept./Oct. 2010) [http://www.cjr.org/cover\\_story/the\\_hamster\\_wheel.php?page=all](http://www.cjr.org/cover_story/the_hamster_wheel.php?page=all).

36. WALDMAN, ET AL. *supra* note 27, at 45.

37. *Id.* at 13.

38. *Id.* at 13.

In an article in the *Columbia Journalism Review*, Dean Starkman describes this approach of constantly doing more with less as the “hamster wheel.”<sup>39</sup> He explains that the emphasis on “volume without thought” engenders a level of deep passivity in media organizations.<sup>40</sup> This passivity, according to a Pew study, creates a dependence on governmental sources that goes beyond simply relying on official version of events.<sup>41</sup> The 2010 study found that in fact 63 percent of all news in the city of Baltimore was initiated by government officials, with the vast majority of crime stories coming from police sources.<sup>42</sup>

External control of the information process is sometimes so complete that releases from government officials often appear verbatim in press accounts.<sup>43</sup>

Bill Girdner, owner and editor of Courthouse News Service, decried the increasing media dependence on other sources for stories involving the courts: “When journalists don’t have presence (in the courthouse), others control the information process.”<sup>44</sup>

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### ***How the New Media Environment Affects the Courts***

Girdner’s concern about who controls the information process is one that judges should share. Sixty-one percent of all lead stories on local news are about crime, disasters or accidents.<sup>45</sup> These crime stories generally originate from the police. Media reporting therefore focuses on the brutal facts of the crime in conjunction with the defendant’s arrest or arraignment and rarely is a story about how well courts do their job.<sup>46</sup>

Lawyers and judges are taught in law school that the origins of the American common law lie in the Magna Carta, the Constitution and the Bill of Rights, and that these great documents form the basis of our system of justice. Lawyers study case law as part of an intellectual effort to learn the development of our laws in the context of common law courts. Little, if any, thought is given to public opinion as the originator of our legal system.

Professor Lawrence M. Friedman asserts that this common legal understanding is wrong and that the public’s attitude toward the courts shapes the justice system through an interaction of three different cultural paradigms.<sup>47</sup>

The first of these he defines as the popular culture, or the “norms and values held by ordinary people.”<sup>48</sup> Friedman claims popular culture is related to – but distinct from – the popular legal culture. He defines this second culture, much of which is derived from the media,

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39. Starkman, *supra* note 35.

40. *Id.*

41. *How News Happens: A Study of the News Ecosystem of One American City*, PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM, Jan. 11, 2010, [http://www.journalism.org/analysis\\_report/how\\_news\\_happens](http://www.journalism.org/analysis_report/how_news_happens).

42. *Id.*

43. *Id.*

44. WALDMAN, ET AL. *supra* note 27, at 48.

45. *Id.* at 88, citing Prepared Testimony of Tom Rosenstiel, Dir., Pew Research Ctr. Proj. for Excellence in Journalism, FCC Workshop on the Future of Media and the Information Needs of Communities: Serving the Public Interest in the Digital Era (Mar. 4, 2010), available at <http://reboot.fcc.gov/future-of-media/serving-the-publicinterest-in-the-digital-era>.

46. *Id.* at 47.

47. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579 (1989).

48. *Id.* at 1579.

as the “ideas and attitudes about law which ordinary people or more generally lay people hold. What the average plumber, secretary or, for that matter, the average investment banker, thinks about courts and lawyers ...”<sup>49</sup> Finally, he argues that the last of these paradigms is the legal culture, made up of the “ideas, attitudes, values and opinions about law held by people in a society,” including concepts “which are specifically legal in content – ideas about courts, justice, the police, the Supreme Court, lawyers.”<sup>50</sup>

When a shift in the perception of courts occurs in the popular legal culture, Friedman argues, it will ultimately become embedded in the popular culture.<sup>51</sup> In this sense, popular legal culture shapes the popular culture’s attitude about the make-up of the law.<sup>52</sup>

A change in attitudes about law in the popular culture influences the legal culture. Accordingly, “clues to the legitimacy of courts, and other agencies of law ... are not to be found in the structure of doctrine, or in the formal texts of jurists, but in the broad messages traveling back and forth between the public and the organs of popular culture . . .”<sup>53</sup> This means that the legal culture is merely “an intervening variable between social innovation and legal change.”<sup>54</sup> Contrary to law school teachings, in a democracy, the legal system will always be a manifestation of the public culture.<sup>55</sup> Therefore, what the public thinks about courts and the law ultimately plays a fundamental role in how courts function.

Studies suggest that wide segments of the popular legal culture are persuaded that judges are not concerned about either high crime levels or crime victims.<sup>56</sup> The reality that

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crime is in decline<sup>57</sup> has had almost no impact upon these perceptions. The disconnect that exists between the courtroom and cultural perception feeds widespread popular support for restricting the judiciary.<sup>58</sup>

That discontent is also beginning to affect the legal culture. According to the National Center for State Courts, “2011 saw more efforts to impeach or

otherwise legislatively remove state judges from office than at any point in recent history, indeed perhaps in all of U.S. history.”<sup>59</sup> In Iowa, members of the state House of Representatives filed bills of impeachment against four Supreme Court justices because the representatives disagreed with the court’s decision that the state’s constitution created the right

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49. *Id.* at 1580.

50. *Id.*

51. *Id.* at 1592.

52. *Id.* at 1593.

53. *Id.* at 1605.

54. *Id.* at 1584.

55. *Id.* at 1597.

56. David B. Rottman, *On Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?* CT. REV., WINTER 1998, 14, 17, [aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Rottman.pdf](http://aja.ncsc.dni.us/courtrv/cr35-4/CR35-4Rottman.pdf).

57. See Federal Bureau of Investigation, *Crime Rates In U.S. Decline* (press release) (Sept. 19, 2011), [http://www.fbi.gov/news/stories/2011/september/crime\\_091911/crime\\_091911](http://www.fbi.gov/news/stories/2011/september/crime_091911/crime_091911).

58. See AM. BAR ASS’N, OFFICE OF JUSTICE INITIATIVES, *BAR PUBLIC OPINION SURVEYS CONCERNING LAWYERS AND THE JUSTICE SYSTEM*. (1998).

59. Bill Raftery, *2011 Year in Review: Record number of impeachment attempts against judges for their decisions*, GAVEL TO GAVEL (NAT’L CTR. FOR STATE CTS.), Dec. 27, 2011, <http://gaveltogavel.us/site/2011/12/27/2011-year-in-review-record-number-of-impeachment-attempts-against-judges-for-their-decisions/>.

to marry for same sex couples.<sup>60</sup> The New Hampshire legislature used a bill of impeachment issued against a family law master as a “blank check” to investigate the entire judiciary.<sup>61</sup> And there was an effort to impeach a judge in Oklahoma who did nothing more than accept a plea agreement that had been approved by the prosecutor, the victim’s parents and the defense attorney in a sex abuse case because members of the legislature disagreed with the deal.<sup>62</sup>

These political expressions of discontent were not limited to impeachment efforts. A bill passed by the Tennessee legislature would replace the current judicial discipline authority known as the Court of the Judiciary with a new, smaller body and give the speakers of the House and Senate the power to appoint most of the members.<sup>63</sup> In October 2011, New Jersey Gov. Chris Christie attacked what he claimed were “elitist judges” while campaigning to win Republican control of the legislature.<sup>64</sup> Protesters outside of the Indiana Supreme Court in 2012 carried signs claiming the court’s justices were “enemies of the constitution,” as state senators submitted a bill to end merit selection of judges.<sup>65</sup>

Across the nation, candidates for elective office routinely attack judges and call for radical changes in the judicial system as part of their campaign rhetoric.<sup>66</sup> One presidential candidate went so far as to advocate the arrest of so-called “activist judges.”<sup>67</sup>

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60. *Id.* See H.R. 47, H.R. 48, H.R. 49 and H.R. 50 (IOWA LEGIS. 2011).

61. *Id.* See H.R. 7 (N.H. LEGIS. 2011).

62. *Id.* See H.R. 1001 (OK. LEGIS. 2011).

63. See *Judicial reforms head to governor*, THE TENNESSEAN, Apr. 10, 2012, <http://www.tennessean.com/article/20120410/NEWS0201/304090065/Judicial-reforms-head-governor>; and Samuel M. Simpson, *Compromise on TN Court of the Judiciary Picks Up Steam*, THE TENNESSEAN, Feb. 22, 2012.

64. Matt Friedman, *Gov. Chris Christie: Elitist Judges Must Be Stopped*, NJ.com, Oct. 26, 2011, [http://www.nj.com/news/index.ssf/2011/10/gov\\_chris\\_christie\\_elitist\\_jud.html](http://www.nj.com/news/index.ssf/2011/10/gov_chris_christie_elitist_jud.html). Christie was reacting to a decision by State Superior Court Assignment Judge Linda Feinberg “that increases in the cost of pensions and health care benefits for judges and justices were, in effect, pay cuts that are forbidden by the state Constitution.” *Id.*

65. Sharon Rondeau, *Citizens Protest Indiana Supreme Court Ruling Quashing Fourth Amendment Rights*, THE POST AND MAIL, May 26, 2011, <http://www.thepostemail.com/2011/05/26/citizens-protest-indiana-supreme-court-ruling-quashing-fourth-amendment-rights/>. See also Bill Raftery, *Indiana Senators, Angry Over State Supreme Court Decision, Look to Take Up Efforts to Alter or End Merit Selection, judicial disciplinary commission*, GAVEL TO GAVEL (NAT’L CTR. FOR STATE CTS) (Jan. 6, 2012), <http://gaveltogavel.us/site/2012/01/06/indiana-senators-angry-over-state-supreme-court-decision-look-to-take-up-efforts-to-alter-or-end-merit-selection-judicial-disciplinary-commission/>. The protests and legislation were in reaction to the court’s decision in *Barnes v. State*, 946 N.E.2d 572 (Ind. May 12, 2011), *adhered to on reh’g*, 953 N.E.2d 473 (Ind. Sept. 20, 2011) (holding that defendant in a misdemeanor prosecution for assaulting a police officer was not entitled to a jury instruction on the common law “castle doctrine” right to defend one’s home against invasion).

66. Peter Hardin, *Bachman Rips Judges in Iowa – Again*, GavelGrab.com (JUSTICE AT STAKE), Apr. 12, 2011, <http://www.gavelgrab.org/?p=19738>; Peter Hardin, “*Stop Bullying Judges*,” *Legal Analyst Warns*, GavelGrab.com (JUSTICE AT STAKE), Oct. 17, 2011 (removed from site), Peter Hardin, *Controversy Still Sizzles Over Candidates Attacks*, GavelGrab.com (JUSTICE AT STAKE), Nov. 3, 2011 (removed from site).

67. See, e.g., Amy Gardner & Matt DeLong, *Newt Gingrich’s Assault on ‘Activist Judges’ Draws Criticism, Even From Right*, WASH. POST, Dec. 17, 2001, [http://www.washingtonpost.com/politics/newt-gingrichs-assault-on-activist-judges-draws-criticism-even-from-right/2011/12/17/gIQAoYa8oO\\_story.html](http://www.washingtonpost.com/politics/newt-gingrichs-assault-on-activist-judges-draws-criticism-even-from-right/2011/12/17/gIQAoYa8oO_story.html).

Yet the judges who are at the center of these controversies, in virtually all cases, remain silent. Their silence is due, in part, to a perception that the media cannot be trusted to fairly present what happens in a courtroom.<sup>68</sup> Many judges treat reporters as adversaries, whose only interest in the justice system is to convert it into a commodity.<sup>69</sup> Even some of the most elevated members of the judiciary think nothing good can come of a camera in the courthouse.<sup>70</sup>

Distrust of the media, however is not the only or even the major reason for extrajudicial silence. Rather, it is an ingrained belief that it is unethical to interact with the press.<sup>71</sup>

## THE ETHICS OF EXTRAJUDICIAL SPEECH

### *The Beginning of a Debate*

The ethical theory of extrajudicial silence was initially limited to the proposition that a judge should never speak to a journalist about a case that was pending.<sup>72</sup> The theory rested upon an assertion that extrajudicial silence was the best way to convey to the public a judge's commitment to the rule of law.<sup>73</sup> Advocates asserted that extrajudicial speech had to be discouraged, as it might "lower public perceptions as to the dignity of the court."<sup>74</sup>

As Professor William G. Ross, a noted advocate of this theory, wrote:

Judges ordinarily should refrain from explaining or defending their decisions even if their critics have ignited a firestorm of hostility ... comments about individual decisions are far more likely to subtly erode public respect.<sup>75</sup>

In other words, a judge should speak for purposes of the record. The only time a judge was encouraged to acknowledge a journalist's presence was through an order issued to control their conduct in court.<sup>76</sup> This idea naturally limited reporters to information contained in

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68. N.Y.S. COMM. TO REVIEW AUDIOVISUAL COVERAGE OF COURT PROCEEDINGS, AN OPEN COURTROOM: CAMERAS IN NEW YORK COURTS AT 46 (1997).

69. Eighty-seven percent of judges in a New York survey agreed that television coverage transforms sensational, criminal trials into mass-marketed commercial products. *Id.* at 46.

70. For instance, in 1996 Justice David Souter testified before a House Appropriations subcommittee, "I think the case is so strong that I can tell you the day you *See* a camera come into our courtroom, it's going to roll over my dead body." He explained that camera coverage had restricted his questions from the bench in New Hampshire because he worried about being taken out of context with a sound bite on the evening news. Jennifer J. Miller, *Cameras in Courtrooms: The Lens of the Public Eye on Our System of Justice*, 13 S. CAROLINA LAWYER 24 (Mar./Apr. 2002).

71. Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 711 (1997).

72. Stephan J. Fortunato, Jr., *On a Judge's Duty to Speak Extrajudicially: Rethinking the Strategy of Silence*, 12 GEO. J. LEGAL ETHICS 679, 708 (1999).

73. ABA MODEL CODE OF JUDICIAL CONDUCT 2007 (as amended Aug. 2010), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2010\\_mjcc\\_final\\_for\\_website.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mjcc_final_for_website.authcheckdam.pdf) [hereinafter ABA 2007 CODE], R. 2.4(A), External Influences on Judicial Conduct ("A judge shall not be swayed by public clamor or fear of criticism."), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html).

74. Response to Criticism of Judges, A.B.A. Jud. Div. Lawyers Conf., (July 1997), available at [http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/response\\_to\\_criticism.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/jd/lawyersconf/pdf/response_to_criticism.authcheckdam.pdf).

75. William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589, 606 (1989).

76. See Judge Sharen Wilson & Judge Cynthia Stevens Kent, *Handling Capital Cases Dealing With the Media*, 16 TEX. WESLEYAN L. REV. 159, 180 (2010).

the official court record, while letting pass any opportunity to clarify the court's operations or opinions for the press.

In time, this theory of silence expanded supporting restrictions on extrajudicial speech for all judges on all pending matters, regardless of whether a judge was involved in the matter.<sup>77</sup> This then evolved so that judges were urged not to discuss cases, even after matters were decided.<sup>78</sup> The evolution of this precept continued so that eventually a state Supreme Court advised that a judge should refrain from speaking to a reporter simply to avoid being misquoted.<sup>79</sup> Ultimately, certain advocates began to argue that a judge should be admonished not to engage in any form of public speech, stopping just short of restricting a judge's ability to teach in a classroom.<sup>80</sup>

As public attacks on judges increased, proponents of extrajudicial silence began to advocate the creation of state or local bar association committees whose purpose was to defend of the judiciary.<sup>81</sup> This move to create judicial defenders acknowledged an essential problem: Silence was not preventing a decline of public trust and confidence in the courts.<sup>82</sup> Instead of protecting the judiciary, silence instead left the courts defenseless in a sea of public distortions and political attacks that even the newly constituted bar association committees were incapable of tempering.<sup>83</sup>

Judge Stephen Fortunato Jr. expressed his consternation with the theory of extrajudicial silence when he remarked that the theory could be condensed to the words: "judges can't fight back."<sup>84</sup>

Judge Fortunato elaborated:

The conventional wisdom of the legal profession is that the approximately 12,000 men and women who sit on our nation's principal state and federal trial and appellate courts are to sit silently on the sidelines even in the face of false and vitriolic attacks directed at their integrity and impartiality... (S)ilence in these circumstances is bad politics for those who are committed to an independent judiciary and an appropriate separation of powers, but also that the tradition of *judicial non-response to criticism is inapposite, if not foolhardy, in the face of the changed nature of the media and public discourse, and that such sparse doctrinal support as there is for imposing silence on judges regarding extrajudicial responses to improper criticism is undeveloped and flawed.*<sup>85</sup>

77. William G. Ross, *Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls*, 38 CT. REV. 36, 36 (Summer 2001).

78. *Id.* at 37.

79. See *Matter of Sheffield*, 465 So. 2d 350, 355 (Ala. 1984) (affirming the Court of the Judiciary's finding that the judge had violated Canon 3A(6)). The court noted that "the risk of being misquoted, albeit honestly, may enter into the consideration and tilt the balance in favor of 'no comment.'"

80. See, e.g., Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 870 (1989) ("The failure of the Advisory Committee to repeat the Canon's caveat in its most recent opinion may be due to a fear that an *expansive reading of the prohibition would make it difficult for judges to engage in law school teaching, ...* But one quality teaching may have is that it is exploratory, tentative, informal, and impermanent. *Such teaching is different from the typical public speech or article. ...* If I had to engage in prudential line drawing, *I would interpret the Canon as permitting the former, but not the latter...* While that may be "too nice a distinction, the language of Canon 4 seems to contemplate just that kind of fine line drawing.") (emphasis added).

81. Abraham G. Gerges, *Should the Rules be Changed to Allow Judges to Respond to Criticism?*, 69 N.Y. ST. B.J. 38 (Apr. 1997).

82. Fortunato Jr., *supra* note 74, at 681- 82.

83. Gerges, *supra* note 83, at 38.

84. Fortunato, Jr., *supra* note 74, at 683.

85. *Id.* at 681 (emphasis added).

## THE 1990 MODEL CODE

Judge Fortunato was associated with a group of scholars and judges who responded to the publication of the American Bar Association's Model Code of Judicial Conduct in 1990 by collectively arguing that the extrajudicial silence as a theory was fatally flawed. They claimed that the new code, at least by implication, actually supported extrajudicial speech.<sup>86</sup>

Scholars such as J. Clark Kelso and Erwin Chemerinsky took this argument further, asserting that the new media environment necessitated that judges speak extrajudicially in order to maintain judicial independence.<sup>87</sup>

Professor Chemerinsky argued that both the 1990 Model Code and the First Amendment supported extrajudicial speech:

Whatever the reason why a judge speaks during a pending case, the speech is allowed so long as it does not seriously risk undermining the fairness of the proceedings. Under both the Model Code of Judicial Conduct and the First Amendment, judges can speak unless there is a real threat that the comments will materially prejudice the case. Hopefully speech by judges will enlighten and educate the public or, at the very least, allow the public to see judges in a more human light.<sup>88</sup>

J. Clark Kelso summed up the new viewpoint succinctly: "The simplest rule, a flat ban on public, extrajudicial speech by judges on legal topics, makes no sense."<sup>89</sup> He, however, qualified his assertion by pointing out: "An equally simple rule, permitting all public, extrajudicial speech, is, in my view, equally problematic."<sup>90</sup>

In other words, even those who believed that the Model Code allowed extrajudicial speech, accepted that there were circumstances where silence was appropriate. Silence about pending matters should not restrict the most qualified tutors from explaining the fundamentals of our justice system.

As public dissatisfaction with courts gathered momentum, arguments in support of extrajudicial speech found an audience.<sup>91</sup> This audience included several members of the ABA joint commission, which was formed in 2003 to revise the 1990 Model Code.<sup>92</sup> The revisions that emerged became the 2007 Model Code and included a new approach, which allowed judges to fight back.

## EXTRAJUDICIAL SPEECH UNDER THE 2007 MODEL CODE

There are, in the United States, 50 different ethical codes that regulate state judges and one that regulates federal judges. While these 51 codes vary, the ethical argument that emerged in the decade of the 1990s was singular and national in scope and focused on the ABA's Model Code.

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86. *Id.* at 5. See also *infra*, note 89.

87. See Erwin Chemerinsky, *Is it the Siren's Call: Judges and Free Speech While Cases are Pending*, 28 LOYOLA L. REV. 831, 849 (1995); and J. Clark Kelso, *Time, Place, and Manner Restrictions on Extrajudicial Speech by Judges*, 28 LOYOLA L. REV. 851, 853 (1995).

88. Chemerinsky, *Id.*, at 850.

89. Kelso, *supra* note 89, at 854.

90. *Id.*

91. See, e.g., Fortunato, Jr., *supra* note 74.

92. In September 2003, the American Bar Association announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct with a mandate to review the 1990 Model Code and to recommend revisions for possible adoption. See AMER. BAR ASS'N, JUDICIAL CODE REVISION PROJECT, [http://www.americanbar.org/groups/professional\\_responsibility/policy/judicial\\_code\\_revision\\_project.html](http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project.html).

The Model Code, as its name implies, is an archetypical judicial code of conduct designed to reflect the best current thinking about judicial ethics.<sup>93</sup> While the Model Code does not have the force of law, variations of it have been incorporated by all but one of the states in their codes of judicial conduct.<sup>94</sup> It – and the Canons the preceded it – has, from its inception, been the starting point for any national conversation about judicial ethics.<sup>95</sup>

The theory of extrajudicial silence was initially drawn from interpretations of earlier versions of the Model Canon and Model Code,<sup>96</sup> with subsequent refinements pointing to a major shift in favor of extrajudicial speech.<sup>97</sup> The refinements contained in the 2007 Model Code, largely the result of the changes in the media infrastructure, vindicated those who supported extrajudicial speech.

### **The Preamble**

The preamble to the 2007 Model Code in Section 1 is identical to its predecessor when it affirms that a judge should “strive to maintain and enhance confidence in the legal system.”<sup>98</sup> It then enlarges on this responsibility, placing a new burden on the judiciary to preserve “the rule of law.”<sup>99</sup>

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93. The American Bar Association’s Model Code of Judicial Conduct (Model Code) has its origins in 1924, when the ABA created the first model Canons of Judicial Ethics, which was to be a “guide and reminder to the judiciary,” nothing more, [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation.html). In 1972, a Code of Judicial Conduct was drafted to be something more: in effect, a roadmap to the states in order to police judicial conduct. Within 20 years, however, the 1972 code was seen to be insufficient with regard to the modern judicial environment. Therefore, in 1990, the ABA adopted a new Model Code, designed as a template, which allowed for quick modification in a changing judicial climate. It has been revised three times since. The last revision occurred in 2007, with the ABA expressing the hope “that the Revised [Model] Code will promote national uniformity and be adopted by the highest Court in each state.” Amer. Bar Ass’n, Statement of Commission Chair Mark I. Harrison (2007), [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/Chair\\_Message.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/Chair_Message.pdf).

94. Cynthia Gray, *The 2007 ABA Model Code: Taking Judicial Ethics Standards to the Next Level*, 90 JUDICATURE 284, 292 (May-June 2007). At the time, Montana was using the ABA’s 1924 Model Canons. *Id.* The state later adopted a code based on the 2007 ABA Model Code. *See* In the Matter of the 2008 Montana Code Of Judicial Conduct, No. AF 08-0203 (Mont. Dec. 12, 2008), available at <http://supremecourtdocket.mt.gov/view/AF%2008-0203%20Other%20--%20Order?id={7F2426C5-4E87-4C48-AE15-3E8E997CF8FC}>.

95. In spite of the linkage provided by the Model Code, each state’s code of judicial ethics is so different so that it is important to look at the ethical code for the state in which a judge serves before he or she contacts the media.

96. Fortunato, Jr., *supra* note 74, at 682-83.

97. These revisions can be found in the Canons and Rules themselves, as well as in supporting commentary and reporter’s explanation of changes, The reporter’s explanation of changes is a document which was drafted based upon the proceedings and record of the commission charged with drafting each version of Model Code, to explain to the ABA House of Delegates the basis for the changes.

98. ABA 2007 CODE, *supra* note 75, Preamble [1]: “An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”

99. *Id.*

The addition of Section 2 to the Preamble strengthens the obligation placed upon judges to inspire public confidence, by repeating and expanding on the wording of section 1.<sup>100</sup> This is a theme that will be repeated throughout the Model Code.<sup>101</sup>

**Canon 1**

Canon 1 combines Canons 1 and 2 from the 1990 Code. It opens with the words, “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary.”<sup>102</sup> The reporter’s explanation interprets these words as a reaffirmation of the preamble’s emphasis on the need to build public trust and confidence in the courts.<sup>103</sup>

The Commentary to Canon 1 explains that a judge should both anticipate public scrutiny and seek to advance the public’s understanding of our system of justice.<sup>104</sup> This is a marked change from the 1990 commentary, which found that “restrictions on extrajudicial speech ... are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.”<sup>105</sup>

The reporter’s explanation of the changes explained the shift: “As an overarching objective, the Commission deemed it desirable to speak of an *ethical duty to promote* as well as uphold judicial independence, integrity and impartiality.”<sup>106</sup>

Rule 1.2 reinforces the theme of a judicial burden to raise public confidence.<sup>107</sup> In discussing this new language, Comment [6] even supports extrajudicial outreach as a means of meeting this burden: “A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.”<sup>108</sup>

The reporter’s explanation calls attention to the addition of Comment [6] stating that it is “new, and is designed to encourage judges to participate in community outreach activity. Existing ABA policy encourages judges to engage in such activity as a means to promote public confidence in the courts.”<sup>109</sup>

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100. ABA 2007 CODE, Preamble [2]: “Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.”

101. See Reporter’s Explanation of Changes, ABA 2007 CODE, available at [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc_2007.authcheckdam.pdf), at 2.

102. ABA 2007 CODE, Canon 1.

103. Reporter’s Explanation of Changes, ABA 2007 CODE, at 6. “Canon 1 combines most of the subject matter of Canons 1 and 2 in the 1990 Code, addressing both the obligation of judges to uphold the independence, integrity, and impartiality of the judiciary and the obligation to avoid impropriety and its appearance. The admonishment that judges avoid not only impropriety but also its appearance is in the text of Canon 1 and in Rule 1.2.”

104. ABA 2007 CODE, 1.2, comment [2]: “A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code. [6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.”

105. ABA 1990 MODEL CODE OF JUDICIAL CONDUCT (as amended Aug. 1997, Aug. 1999 and Aug. 2003), available at [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004\\_Code-of-Judicial\\_Conduct.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/2004_Code-of-Judicial_Conduct.authcheckdam.pdf) [hereinafter ABA 1990 CODE], Canon 2, Commentary.

106. Reporter’s Explanation of Changes, ABA 2007 CODE, at 6 (emphasis added).

107. ABA 2007 CODE, Rule 1.2, Promoting Confidence in the Judiciary: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

108. ABA 2007 CODE, Rule 1.2, Comment (6).

109. Reporter’s Explanation of Changes, ABA 2007 CODE, at 9 (emphasis added). <http://www.american->

**Canon 2**

The language of Canon 2 is derived from Canon 3 of the 1990 Code.<sup>110</sup> Both stress that a judge must always be and appear to be impartial.<sup>111</sup> Rule 2.1 is similar to its predecessor in tone, however, the commentary's interpretation of this language is quite different.<sup>112</sup> The 1990 commentary stated,

Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.<sup>113</sup>

In contrast, the reporter's explanation of Rule 2.1 in the 2007 version emphasizes the necessity to support judicial involvement in the community:

*This comment has been added ... to underscore the value of judicial outreach.* Although undertaking activities that encourage public understanding of and confidence in the justice system is not a duty of judicial office per se, such activities promote public confidence in the courts and to that extent facilitate the courts' mission.<sup>114</sup>

Rule 2.10 and its subsections are heavily focused on the issues surrounding extrajudicial silence and speech. The reordering of this rule reflects real changes in support of extrajudicial speech.

Initially Rule 2.10(A) directly addresses the specific circumstance necessitating extrajudicial silence:

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.<sup>115</sup>

This language is almost identical to the first sentence of Canon 3B(9) from the 1990 Code.<sup>116</sup> The commentary explaining subsection (A) also states that this restriction is essential "to the maintenance of the independence, integrity, and impartiality of the judiciary."<sup>117</sup>

Rule 2.10(D) is a positive restatement of a sentence from its precursor, Canon 3B(9).<sup>118</sup> While Canon 3B(9) did not forbid making public statements, Rule 2.10(D) specifically allows judges to "make public statements in the course of official duties."<sup>119</sup> The shift in emphasis is important, as the Code moves from grudging acceptance to encouragement of extrajudicial statements by judges.

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bar.org/groups/professional\_responsibility/publications/model\_code\_of\_judicial\_conduct.html

110. *Id.* at 12: "Canon 2 addresses solely the judge's professional duties as a judge, which constitute part of Canon 3 in the 1990 Code."

111. ABA 2007 CODE, Canon 2, A Judge Shall Perform the Duties of Judicial Office Impartially, Competently, and Diligently.

112. ABA 2007 CODE, Rule 2.1, Giving Precedence to the Duties of Judicial Office: "The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities."

113. ABA 1990 CODE, Canon 3, Commentary.

114. Reporter's Explanation of Changes, ABA 2007 CODE, *supra* note 104, at 13.

115. ABA 2007 CODE, Rule 2.10, Judicial Statements on Pending and Impending Cases.

116. Reporter's Explanation of Changes, ABA 2007 CODE, at 24.

117. ABA 2007 CODE, Rule 2.10, Comment (1).

118. Reporter's Explanation of Changes, ABA 2007 CODE, at 24.

119. ABA 2007 CODE, Rule 2.10(D).

The addition of Rule 2.10(E) underscores this significant shift away from the theory of extrajudicial silence.

Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.<sup>120</sup>

The comment explaining this new addition signals that members of the committee were ambivalent about the new rule.<sup>121</sup> As the reporter's explanation for this rule observed,

It may be appropriate in some instances for statements that explain or defend the role or action of a judge in a particular matter to be made by a third person, rather than by the judge. This suggestion reflects a preference for keeping to a minimum the extent to which judges discuss cases directly with the media.<sup>122</sup>

The explanation stressed, however, that this new rule does in fact allow a judge to speak extrajudicially:

Judges are justifiably reluctant to speak about pending cases. However, the Commission wanted to make clear that when a judge's conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding.<sup>123</sup>

### **Canon 3**

Canon 3 begins in substantially the same manner as its antecedent, Canon 4 of the 1990 Code.<sup>124</sup> Both require a judge to avoid extrajudicial activities that increase the risk of conflict with the obligations of judicial office.<sup>125</sup> But while Canon 4(A) provided that "[a] judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties."<sup>126</sup> Rule 3.1 of the 2007 Model Code specifically encourages community activities, stating that "a judge may engage in extrajudicial activities, except as prohibited by law or this Code."<sup>127</sup>

A comparison of the commentaries accentuates this change in direction. The commentary to the Canon 4(A) explained that "[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives,"<sup>128</sup> while the commentary to the Rule 3.1 suggests that the new rule encourages "[p]articipation in both law-related and other extrajudicial activities," which the commentary says, "helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system."<sup>129</sup>

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120. ABA 2007 CODE, Rule 2.10(E), Judicial Statements on Pending and Impending Cases.

121. ABA 2007 CODE 2007, Comment [3]: "Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter."

122. Reporter's Explanation of Changes, ABA 2007 CODE, *supra* note 104, at 25.

123. *Id.*

124. Reporter's Explanation of Changes, ABA 2007 CODE, at 32: "This renumbered Canon 3 is drawn almost exclusively from Canon 4 of the 1990 Code."

125. ABA 2007 CODE, Canon 3, A Judge Shall Conduct the Judges's Personal and Extrajudicial Activities to Minimize the Risk of Conflict with the Obligations of Judicial Office.

126. ABA 1990 CODE, Canon 4(A).

127. ABA 2007 CODE, Rule 3.1, Extrajudicial Activities in General.

128. ABA 1990 CODE, Canon 4(A), Commentary.

129. ABA 2007 CODE, Rule 3.1, Extrajudicial Activities in General.

The change in the commentary to Rule 3.1 is significant because it “is restructured to permit extrajudicial activities generally.”<sup>130</sup> The statement is explicit:

[1] This Comment was reworded to confirm the special role that judges can play in engaging in extrajudicial activities ...In both instances, the sense of the Comment is to be somewhat more encouraging than was the 1990 Code, so that judges will reach out to the communities of which they are a part, and avoid isolating themselves.

Specific examples in the 1990 Code, both in black letter (avocational activities such as speaking and writing) and in the Commentary (improving criminal and juvenile justice and *expressing opposition to the persecution of lawyers and judges in other countries*), were removed as unnecessarily restrictive or of insufficiently general application.

[2] This Comment focuses on the *positive value of judges being integrated into the activity of the community*. The first paragraph of Comment to Canon 4A had addressed that notion implicitly, but spoke in terms of judges not becoming isolated from the communities in which they live.<sup>131</sup>

The shift in the language of Canon 3, like the shift in Rule 2.10(D),<sup>132</sup> actually encourages extrajudicial activities.

Canon 3 does, however, contain another, strict prohibition on extrajudicial speech. Rule 3.5 states that “[a] judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.”<sup>133</sup> This provision contains two slight modifications from the 1990 Canon 3B (12), from which it was derived.<sup>134</sup> It adds the word “intentionally,” which would suggest that a judge must purposely disclose the information. The second modification gives a judge the right to disclose “to protect the health or safety of the judge or a member of a judge’s family, court personnel, or other judicial officers ...”<sup>135</sup>

#### **Canon 4**

Canon 4 of the 2007 Code supersedes Canon 5 of the 1990 Code, defining the ethical limits of a judge’s political activities.<sup>136</sup> The current Rule 4.1 lists the activities a judge is forbidden to do, while Rule 4.2 is concerned with those political activities that a judge may ethically do.<sup>137</sup> Among the latter, Rule 4.2(b)(2) specially allows a judge to “speak on behalf of his or her candidacy through any medium ...,”<sup>138</sup> language that seems to have been changed in recognition of the Supreme Court’s decision that a provision of Minnesota’s Code of Judicial Conduct which prohibited a candidate for judicial office from giving views on disputed legal or political issues while running for judicial office was a violation of the First Amendment.<sup>139</sup>

130. Reporter’s Explanation of Changes, ABA 2007 CODE, *supra* note 104, at 33.

131. *Id.* at 34 (emphasis added).

132. *See supra* pages 198-199.

133. ABA 2007 CODE, Rule 3.5.

134. *See* ABA 1990 CODE, Canon 3B(12).

135. ABA 2007 CODE, Rule 3.5, Comment [2].

136. ABA 2007 CODE, Canon 4, A Judge or Candidate for Judicial Office Shall Not Engage in Political or Campaign Activity that is Inconsistent with the Independence, Integrity, or Impartiality of the Judiciary.

137. ABA 2007 CODE, Rule 4.1, Political and Campaign Activities of Judges and Judicial Candidates in General and Rule 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections.

138. ABA 2007 CODE, Rule 4.2(B)(2).

139. *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002).

**Implications of the Changes in the 2007 Model Code**

In aggregate, the alterations to the 2007 Model Code clearly support extrajudicial speech. The drafters of the Code, in the face of serious opposition,<sup>140</sup> reached the conclusion that the judiciary had an obligation to build public trust and to protect the American system of laws. They concluded that in the current media environment, this means that judges can and should speak to the media.

The Preamble repeatedly states that judges must strengthen public trust and confidence in the courts, and ties this imperative to the equally important burden to preserve the rule of law. The drafters of the new code saw a connection between the preservation of our laws and public trust and confidence, and concluded that judges bear a substantial role in making this connection. The canons and rules that follow are a roadmap to assist judges in undertaking this new role.

The revisions to Rules 1.2, 2.1, and 3.1 removed the negative language from the 1990 Code to actively promote extrajudicial outreach. A judge now has an affirmative duty – although not a legal obligation, the Code points out – to promote public understanding of the

justice system.<sup>141</sup> The reporter’s explanation repeatedly signals that there is a new strategy for strengthening public trust through extrajudicial conduct, which must include speech.<sup>142</sup> And, as the drafters understood, opening the courthouse to the community opens it to the media.

More than opening the courthouse, these rule changes suggest that judges should also affirmatively work to educate the community

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*While Canon 3B(9) did not forbid making public statements, Rule 2.10(D) specifically allows judges to “make public statements in the course of official duties.”*

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about the courts. Such education may take many forms, including talking to local reporters, who in turn tell the court’s story to the community. Extrajudicial outreach should not be confined to the press, however. Each public service club presentation or court session conducted in the local high school provides an opportunity to attract press coverage and to convey the court’s concern for the public at large.

The alterations in the 2007 Code swept away the prior language contained in Canon 3(B)(9), with its implication that while extrajudicial outreach was not prohibited, there was something suspect about it.

Rule 2.10(A) still limits extrajudicial speech when a matter is pending, but with the adoption of Rule 2.10(E), judges are no longer prevented from fighting back in the face of unfair criticism. The addition of this new rule makes “explicit what was only implicit:

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140. By way of example the American Judicature Society objected to a new exception that allows a judge to “respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter” subject to other restrictions. See Cynthia Gray, The 2007 ABA model code: Taking judicial ethics to the next level, *Judicature* Volume 90 Number 6 May-June p. 286 (2007).

141. ABA 2007 CODE, Rule 2.1, Comment [2]: “Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.” See also ABA 1990 CODE Canon 3B(9): “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.”

142. A good example of this is: “Rule 3.1, lead-in is restructured to permit extrajudicial activities generally...” Reporter’s Explanation of Changes, ABA 2007 CODE, 33.

non-prejudicial responses to criticism are not banned.”<sup>143</sup> Extrajudicial speech is now explicitly permitted in the Model Code’s most restrictive ethical context.

Rule 4.2 explicitly allows extrajudicial speech for judges running for election. The modifications to this rule and to Canon 4 more generally were a result of the Supreme Court’s decision in *Republican Party of Minnesota v. White*, striking down restrictions on judicial candidates’ speech.<sup>144</sup> However, while the decision in *White* is limited to judicial elections, it seems unlikely that extrajudicial speech that the Model Code permits would be allowed in only that context, while continuing to be restricted in others.

## BACKLASH: ANOTHER PROPOSAL

The changes in the media environment and in the Model Code have reshaped the ethical discussion of commentary by judges. Even the advocates of extrajudicial silence recognize the scope of the transformation:

....[E]ducating “the public” is a daunting task. *We recognize that the public is generally undereducated about the role of the judiciary and the implications, ethical and otherwise, of extrajudicial comment.* ...We have cause to be realistic, then, in dealing with the public about the ethical implications of extrajudicial comment. ...<sup>145</sup>

But, while claiming to accept the reality of the changed media environment, the proponents of extrajudicial silence then turn and argue for a rejection of the revisions contained in the Model Code. Instead, they argue for a balancing test that would require judges to refrain from speaking to the media unless there is a greater likelihood of preserving judicial integrity than diminishing it.<sup>146</sup> They claim to:

.... choose the principled approach premised on our conclusions that silence will, on balance, more faithfully enhance and preserve the integrity and impartiality of the judiciary, and, *therefore, silence (with limited exceptions) should be the general rule.* ...

Our conclusion that *silence is preferable* to unfettered extrajudicial comment is reinforced by our belief that the public will, with the assistance of the profession, eventually recognize and appreciate the essential relationship between the limitations on extrajudicial comment and an impartial judiciary.<sup>147</sup>

The argument for this balancing test is an effort to reformulate the ethical debate. But even this attempt at reformulation, contains the admission that the Model Code no longer supports severe limits on extrajudicial speech.

The 2007 Model Code now encourages extrajudicial activities including extrajudicial speech. While this new role might disconcert some judges, they will find that it will improve public trust and confidence and make it easier to comply with many of the provisions of the 2007 Model Code.<sup>148</sup>

143. Mark Harrison & Keith Swisher, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?: Symposium: When Should Judges Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct*, 64 N.Y.U. ANN. SURV. AM. L. 559, 578 (2009).

144. The reporter’s explanation links the changes in Canon 4 to the court’s opinion. Reporter’s Explanation of Changes, ABA 2007 CODE, *supra* note 104, at 56. See also *Republican Party of Minnesota v. White*, *supra* note 145.

145. Harrison & Swisher, at 610, 611. (Emphasis added)

146. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, *supra* note 77, at 606.

147. *Id.* at 611 (emphasis added).

148. For instance, an open courthouse conveys the impression that the judges are not subject to external influences. ABA 2007 CODE, Rule 2.4, External Influences on Judicial Conduct.

## GUIDELINES FOR JUDGES SPEAKING TO THE MEDIA

Are there ways for judges to ethically work with the media? If so, what are they? What follows is an attempt to answer these questions using the relevant provisions of the 2007 Model Code.

As with any constructive partnership, professional or otherwise, one must work toward an understanding of the parameters that form the basis of the association. In the case of judges and journalists, it is important to accept the possibility that the press is not the enemy of the judiciary. Treating a journalist like an adversary is likely to elicit suspicion and hostility, compromising any relationship potential.

If journalists are approached as professionals who perform a job that is both complex and difficult, they will be more inclined to perceive an offer of mutual respect, and potential antagonisms will be reduced. Civil exchanges that include some degree of transparency can generate unforeseen opportunities for constructive exchanges that benefit both the courts and the press.

### ***Learn About Who Covers Your Court***

To successfully work with the media it is helpful to understand the distinctions among types of reporters and recognize some of the fundamental elements of their job.

As with judges, there is not one type of news journalist. Broadcast and print reporters are distinct from each other, and newspaper editors are different from television and radio assignment desk editors. All of them need to be understood in terms of their decision-making role before assessing their skills and personality.

Each news organization has a chain of command, and it is useful to understand the different individual roles. For example, depending on the type, size, and organization of a particular news outlet, stories may be assigned by an editor, news director or producer.

News organizations also vary on how material is posted on their websites, blogs, Facebook pages, Twitter feeds and other new media venues. Some organizations allow individual reporters and contributors to post their own material, while others require approval of an editor before posting.

All journalists operate under some form of deadline, and ones with web operations may post stories and updates continuously. Although a judge should not manage a case to meet a press deadline, there is no harm in accommodating a reporter's need to file a report on time. Providing this type of assistance is consistent with the judge's duty to promote public confidence under Rule 1.2, and to perform administrative duties competently under Rule 2.5(A). It will also affect how the story is covered. The journalist struggling with multiple stories and deadline demands will appreciate any small measure of assistance from the court.

There are also cycles and rhythms to the demands on journalists. There are recurring annual events, such as major holidays, major community events or even Law Day, that are usually part of every news organization's assignment board. Offering them a story that relates to this topic increases the chance it will be covered.<sup>149</sup> Providing such stories is entirely consistent with Rule 2.10 (D), allowing judges to explain court operations and procedures.<sup>150</sup>

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149. There are other examples. A veteran's treatment court graduation is more likely to be covered near Veterans Day. A special program designed to test drunk drivers is a good fit for a holiday, particularly New Year's. And a special adoption program will likely garner more attention near Mother's Day or Father's Day.

150. ABA 2007 CODE Rule 2.10(D), *supra* note 104.

There are also rhythms to emergent news. For example, after a major tragedy journalists will look for a related positive story. A program or a sentencing approach might be the basis for such a positive story. Rule 2.10(D) now encourages this form of extrajudicial outreach, as long as it does not involve a pending case.<sup>151</sup>

### ***Building a Relationship***

A judge should make a point of being known in the journalistic community, in order to become a guide who can accurately explain what happens in a courthouse as allowed by Rule 2.10(D).<sup>152</sup> In media terms, the judge then becomes a source, which will create a more positive working relationship.

Rule 1.2 strongly suggests that a judge reach out to members of the community, including members of the media.<sup>153</sup> A judge should meet reporters, editors, and assignment desk editors in the local community. Before establishing regular lines of communication, a judge should accept the premise that, as in every profession, some journalists are going to be good at what they do and some are less so. Judges should take the time to learn which reporters can be trusted and then work with them.

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*Rule changes suggest that judges should also affirmatively work to educate the community about the courts.*

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Such contacts can include regular lunch meetings. Although these lunches need not have an agenda, the embedded goal is to develop a relationship that allows for better communication. Building this type of relationship lays the foundation for the judge to become a guide to the justice system, consistent with Rule 2.10 (D).

Being a successful guide requires real, if sometimes inconvenient, communication. When a reporter contacts a judge's chambers, someone should take the call. If the judge is busy, the call should be returned. Communicating in this manner corresponds with the requirements of Rule 1.2 that a judge should expect, if not welcome, public scrutiny.<sup>154</sup>

When the calls concern a pending matter, someone should explain to the caller that the Code of Judicial Ethics Rule 2.10(A), or the operative equivalent in the court's jurisdiction, prevents any comment.<sup>155</sup> If the questions are of a more general nature, the judge can address them as allowed under Rule 2.10(D).<sup>156</sup>

### ***Media Management System***

Judges create management systems designed to accommodate people that are routinely in the courthouse, such as attorneys and police officers. In fact, such systems usually exist for any group of individuals who are regularly in court, except for journalists. Judges have been unwilling to create one for the media, in part because of ethical concerns. With the advent of the new Model Code it is time for this reluctance to end, as all courts should have a media management system.<sup>157</sup>

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151. *Id.*

152. *Id.*

153. ABA 2007 CODE, Rule 1.2.

154. ABA 2007 CODE Rule 1.2, comment (2).

155. ABA 2007 CODE Rule 2.10 (A).

156. ABA 2007 CODE Rule 2.10 (D).

157. For a guide that might help in creating such a system, See NAT'L JUDICIAL COLLEGE & REYNOLDS NAT'L CTR. FOR CTS. & MEDIA, INITIATING AND MAINTAINING A CONSTRUCTIVE DIALOGUE: A WORKBOOK FOR

A media management system begins with a designated liaison, such as a judge or court administrator, who has the task of speaking for the court.<sup>158</sup> Members of the media should be provided with that individual's contact information. All inquiries by a journalist should be referred to that person, to ensure there is no violation of Rule 2.10(C) prohibiting staff from making statements about pending matters.<sup>159</sup> At the same time, all ancillary staff should be instructed to be polite and helpful in directing the reporter to the spokesperson, in line with the duties imposed under Rule 2.8(B).<sup>160</sup>

Often reporters will be seeking basic information about a case. In keeping with the general requirements of Canon 2, public facts should be made available to all journalists upon request.<sup>161</sup> If the state's code of judicial ethics allows "off the record" discussions with reporters, a judge should personally provide the public facts. Reporters will appreciate this act of courtesy, which judges should provide in accordance with Rule 2.8(B). This should also ensure that the reporter has access to the most accurate information.<sup>162</sup>

The ethical mandate to be courteous is even more important in the courtroom.<sup>163</sup> When reporters are in attendance, treating them with courtesy and respect will create a sense of civility and decorum. Over time, journalists will come to appreciate this consideration to the court's benefit.

A judge also has an ethical duty to maintain order in the courtroom under Rules 2.2 and 2.8.<sup>164</sup> In furtherance of that duty, a set of rules for the media that are simple, clear and fair should be created, enabling every journalist to comprehend and comply with them. A judge must enforce these rules impartially as directed by Rule 2.2.<sup>165</sup>

If permitted by the judge's jurisdiction, designating a press area in the courtroom where cameras, both still and video, can be positioned maintains a sense of order in the courtroom.

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JUDGES & JOURNALISTS (2008), available at [http://www.sji.gov/PDF/Courts\\_and\\_the\\_Media\\_NJC\\_Document.pdf](http://www.sji.gov/PDF/Courts_and_the_Media_NJC_Document.pdf).

158. Many courts designate this individual as the court's "public information officer." See Conference of Court Public Information Officers, *About Us*, CCPIO.org, <http://www.ccpio.org/aboutus.htm>.

159. ABA 2007 CODE, *supra* note 104, Rule 2.10(C).

160. ABA 2007 CODE, Rule 2.8 (B): "... shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

161. ABA 2007 CODE, Canon 2.

162. ABA 2007 CODE, Rule 2.8 (B): "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

163. ABA 2007 CODE, Rule 2.8 Decorum, Demeanor, and Communication with Jurors (A) A judge shall require order and decorum in proceedings before the court. (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control. (C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding. Comment [1] The duty to hear all proceedings with patience and *courtesy* is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate." (Emphasis added.)

164. ABA 2007 CODE, Rule 2.2, Impartiality and Fairness ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially,") and Rule 2.8, Decorum, Demeanor, and Communication with Jurors ("(A) A judge shall require order and decorum in proceedings before the court. (B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.")

165. ABA 2007 CODE, Rule 2.2, Impartiality and Fairness: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

Camera operators should be assured that there will be time for them to take down their equipment at the end of the proceeding. If necessary, a single pool video camera should be arranged to prevent commotion in a high-profile case. Still photographers should be advised to turn the automatic feature off and to be artistic in their shots. All reporters should be informed that interviews are not allowed in the courtroom, and that the jury is completely off limits for interviews and photography. These procedural orders are compatible with the ethical responsibility imposed by Rule 2.8, which specifies that a judge maintain order and decorum in a courtroom.<sup>166</sup>

If space is available in the courthouse, there should be a separate workspace for the media, which includes coffee and electrical outlets. The press should be encouraged to use that area by guaranteeing that every reporter will be notified when the case is proceeding in the courtroom.

Judges and court officials must also ensure that all the news organizations are given equal access to public proceedings involving the case, as mandated by Rule 1.2.<sup>167</sup> Each morning, before the day's proceedings begin, reporters should be provided with any new public information in the case(s) they are covering, pursuant to Rule 2.10(D), along with a brief reminder of the decorum rules in the courtroom.<sup>168</sup>

This management system will establish control of the courtroom and comply with the mandate of Rule 2.5 to curb any possible interference with the prompt resolution of the case, due, in this circumstance, to the media's presence.<sup>169</sup>

### **Cautions**

A judge should strive to build credibility with the media by being honest when talking to a reporter, in keeping with Rule 2.1.<sup>170</sup> There are certain types of questions that cannot be answered, even off the record, but judges should not become enmeshed in legal detail in explaining that they cannot answer. Simply note that the ethical code prevents a judge from answering. But judges should not use ethical limitations as an excuse to equivocate or to avoid answering a tough question.

There are two areas in the Model Code where extrajudicial speech is strictly limited. Rule 3.5 prevents a judge from disclosing non-public information.<sup>171</sup> A judge also cannot benefit, nor help another benefit, from non-public information they acquire in course of their duty.<sup>172</sup> In addition, Rule 2.10(A) limits extrajudicial speech when a matter is pending or impending.<sup>173</sup> Although it is clear that a judge may not discuss any pending case with the media, knowing when a case is impending poses a certain difficulty.

166. ABA 2007 CODE, Rule 2.8: "(A) A judge shall require order and decorum in proceedings before the court."

167. ABA 2007 CODE, Rule 1.2, Comment [4]: "Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and *promote access to justice for all.*" (Emphasis added.)

168. ABA 2007 CODE Rule 2.10 (D): "Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity."

169. ABA 2007 CODE Rule 2.5, comment (4): "... A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs."

170. ABA 2007 CODE Rule 2.1, Comment [5]: "Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on *the judge's honesty*, impartiality, temperament, or fitness to serve as a judge." (Emphasis added.)

171. ABA 2007 CODE Rule 3.5.

172. *Id.*

173. ABA 2007 CODE, Rule 2.10(A).

The Model Code says an impending matter is one “that is imminent or expected to occur in the near future.”<sup>174</sup> Fortunately the media itself will often warn a judge if a matter is impending, through its coverage. Once the coverage starts, judges should not agree to an interview, even if the case has not yet been filed in the courthouse.

In addition, lunch and other social interactions between a judge and a reporter should be avoided during the adjudication of a high visibility case.

***Offering Your Opinion in the High Visibility Case***

A judge needs to be articulate when adjudicating a high visibility case, as the press and the public are listening. Given the limitations imposed by Rule 2.10(A), how might a judge convey to the media the reasons for a decision? The answer is in the court’s opinions.

Judges should use clear language in their rulings to facilitate press and public understanding of the decisions. If the decision is straightforward and can be given orally, as in a bench trial verdict, or a decision in a preliminary proceeding, judges should keep it simple.

That not only helps the media, but also the people who are parties or witnesses. It also complies with the requirement of Rule 2.5 not to unnecessarily delay the resolution of a matter.<sup>175</sup>

When a matter is complex, it is often helpful to write an opinion but do so quickly. Leaving a high visibility case to linger is a mistake and, if left too long, a violation of Rule 2.5.<sup>176</sup> The media can, and

perhaps will, question a delay, as will the community, which will lessen respect for the ultimate judgment.

Whether the opinion is written or oral, clear sentences at the beginning should explain the decision in language that is easily understood by a lay audience. After the opinion is delivered, copies should be distributed to every journalist present. Those sentences will probably be repeated the next day by media outlets, serving as precise judicial description of the case to the community. As an aside, those clear sentences will also provide the parties to the litigation a better understanding of the ruling.

***Responding to Unfair Criticism***

A judge may be subjected to unjust criticism but a response, if necessary, must be done with care. It is critical to first determine if the applicable code of judicial conduct allows for an extrajudicial rebuttal, as Rule 2.10 (E) is new<sup>177</sup> and many jurisdictions have yet to adopt some variation of it.<sup>178</sup> If allowed, a response should be crafted without discussing

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*Treating a journalist like an adversary is likely to elicit suspicion and compromise any relationship potential.*

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174. ABA 2007 CODE, Preamble, Terminology, Impending Matter.  
175. ABA 2007 CODE, Rule 2.5, Comment [4]: “In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.”  
176. *Id.*  
177. ABA 2007 CODE, Rule 2.10(E): “Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge’s conduct in a matter.”  
178. According to the A.B.A., as of March 5, 2012, 26 states (Arizona; Arkansas; Colorado; Connecticut; Delaware; District Of Columbia; Hawaii; Indiana; Iowa; Kansas; Maryland; Minnesota; Missouri;

the merits of the pending case.<sup>179</sup>

There is also a danger of being seen as self-centered when responding to criticism.<sup>180</sup> Therefore any response must be limited, direct and in writing, not framed as an opinion or order, but rather as a letter directed to the media outlet that was the source of the criticism.

Letters of this nature should not be crafted haphazardly, nor delivered in anger. The thematic emphasis must focus on a defense of the justice system and not any personal grievance. If there is a state bar or ethics board which can quickly respond to ethical questions, request a review of the letter before sending it. A critique of the letter by trusted colleagues is another option. After the letter is completed, it should be held overnight and reread the next day.

Once the letter has been sent, the matter is over. No interview requests should be considered, nor replies to any subsequent commentary. The idea here is to correct the error, nothing more. What happens in a courtroom is not about the judge, nor should the response be about the judge. Rather it should be about protecting and promoting the public's understanding of the justice system.

### **Telling the Court's Story**

Contact with the media should not be limited to high visibility cases. To promote public understanding, there are times when a judge should reach out to the media, as suggested in Rule 1.2.<sup>181</sup>

A good framework for reaching out to the media begins with the court's docket. Providing the local paper with access to the docket suggests to the media – and perhaps to the community at large – that the judge is not vulnerable to external influence in accordance with Rule 2.4 (C).<sup>182</sup> The press receives easy access to the docket, while the court retains control over the materials provided. It also reduces the likelihood that a reporter will be sent to get the docket, and start looking around the courthouse for a story that has not been vetted by a judge or other court officials.

If the court has the capability, dockets should be posted online.<sup>183</sup> If not, the court should set up an email or fax arrangement with the leading news organizations in its community.

There may be times when a court creates a program that the community should be informed about. A standard press release is unlikely to attract as much media attention as once was the case. Today unaccompanied press releases, whether faxed, mailed or emailed, often go directly into the trash. A better approach is based upon relationship with the media;

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Montana; Nebraska; Nevada; New Hampshire; New Mexico; North Dakota; Ohio; Oklahoma; South Dakota; Tennessee; Utah; Washington; and Wyoming) had adopted new judicial codes based on the 2007 ABA Code, two states (Maine and Mississippi) had proposed but not yet adopted permanent revisions, one state (California) had proposed interim revisions, and 14 states had established committees to review their judicial conduct codes. A.B.A., STATE ADOPTION OF REVISED MODEL CODE OF JUDICIAL CONDUCT (rev. Mar. 5, 2012), [http://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map.html](http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html).

179. See ABA 2007 CODE, Rule 2.10(A).

180. Mark I. Harrison and Keith H. Swisher, *supra* p. 580.

181. ABA 2007 CODE, Rule 1.2, Comment [6]: "A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code."

182. ABA 2007 CODE, Rule 2.4 (C): "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

183. Many courts now post this material online. A commercial website, [www.legaldockets.com](http://www.legaldockets.com), has a lengthy list of links to individual court's docket websites, organized by jurisdiction.

one that has already been created. Personal relationships make it easier to penetrate the tangle of coverage requests that reporters get daily. After preparing a short description of the program, the release should be sent to a journalist or editor who has a relationship with the court. Court officials may decide to offer the release exclusively to one particular news outlet. The best way to ensure that they receive the release is to call first and tell them it is coming. If possible, the press release should be emailed or faxed to the editor or reporter while the court official is talking to them on the phone.

Television and print journalists approach stories differently. Television reporters will want video images: Something more than a judge speaking into a camera. Print reporters may be less interested in visual images but will likely want information in greater depth. Both will want to know why this is an important story. The short release is the place to explain the importance of the court's new program to the press and the public.

The beginning of a program is one the best times to get coverage. A program that is new in the country, state or local area will interest a reporter.<sup>184</sup>

It is important to emphasize the human interest portion of the story. Court officials should ask the individuals or organizations who are working with the court on the program if they would be willing to support it by agreeing to be interviewed. An employee in the courthouse should assist in setting up these interviews.

This approach allows the community to speak on behalf of the court's program and is consistent with Rule 3.1 and its insistence that judges work with other entities in the community.<sup>185</sup> In the event that there are other governmental agencies involved, their participation also conforms to Rule 3.2, which allows judges to share their knowledge and expertise in the administration of justice with other governmental agencies.<sup>186</sup>

Once the program is up and running, it is important to keep – and publicize – statistics, such as how many children were adopted in the child adoption program or how many defendants were re-arrested after entering the drug court. These numbers support the program by showing it is working, while providing an opportunity for media graphics. This approach also creates goodwill with reporters, while telling the story in a favorable light.

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184. Here are some examples: Angie Holdsworth, *Valley Veterans Get Help From New Court Program*, KNXV-TV (PHOENIX, ARIZ.), ABC15.com, Jan. 20, 2011, [http://www.abc15.com/dpp/news/region\\_phoenix\\_metro/central\\_phoenix/valley-veterans-get-help-from-new-court-program](http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/valley-veterans-get-help-from-new-court-program); Crystal Kobza, *DWI Court Takes Field Trip to High School Auditorium*, YOUTUBE (POSTED BY KOB-TV, FARMINGTON, N.M.), Jan. 20, 2011, <http://www.youtube.com/watch?v=eCwjhgFMGb4>; Kathleen Gray, *Dogs Help Provide Support in Courtrooms*, USA TODAY, Feb. 23, 2010, [http://www.usatoday.com/news/nation/2010-02-22-court-dogs\\_N.htm](http://www.usatoday.com/news/nation/2010-02-22-court-dogs_N.htm); John Schwartz, *Defendants Fresh From War Find Service Counts in Court*, N.Y. TIMES, Mar. 15, 2010, <http://www.nytimes.com/2010/03/16/us/16soldiers.html>; Leah Beno, *Drunken Driver Reform Program Seeks to Expand*, FoxTwinCities.com (KMSP-TV / MY FOX 9), Mar. 24, 2011, <http://www.myfoxtwincities.com/dpp/news/minnesota/drunken-driver-reform-program-seeks-to-expand-mar-24-2011>; and Michael Williams, *Adoption Day at Salem County Courthouse Marks Creation of New Families*, Nj.com, Nov. 19, 2011, [http://www.nj.com/salem/index.ssf/2011/11/adoption\\_day\\_at\\_salem\\_county\\_c.html](http://www.nj.com/salem/index.ssf/2011/11/adoption_day_at_salem_county_c.html).

185. ABA 2007 CODE, Rule 3.1, comment [2]: "Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system." [www.americanbar.org/groups/professional\\_responsibility/publications/model\\_code\\_of\\_judicial\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct.html).

186. ABA 2007 CODE, Rule 3.2, comment [1]: "Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials."

A relationship built on honesty and trust with the journalistic community will pay dividends. Reporters covering a controversial decision will be more likely to treat the court decisions and rulings with understanding and respect. Stories about court programs will appear more often. And judges will find that it is easier to comply with the ethical obligation imposed by Rule 2.4—not to be swayed by public clamor or a fear of media – when the journalist covering the story knows and respects the judge.<sup>187</sup>

## CONCLUSION

With the advent of the 24/7 news coverage and the decline in the number of journalists, news organizations are undergoing enormous change. Partially as a result of this new, emerging media environment, the public culture has become increasingly cynical about the courts. Judicial decisions are being politicized, thus threatening to undermine the American system of justice. If these distortions continue unchallenged by those in the judiciary, the attacks will change the legal culture and, consequently, our laws.

To meet these attacks, judges must provide the public with an accurate description of how justice is administered. Courts have adapted to the 21st century with e-filing and video conferencing. Judges employ technology to supervise defendants on probation and are experimenting with evidence-based sentencing. In short, the justice system is adjusting to a changing world. The judiciary must also adjust to the changing media environment. Judges can no longer rely on extrajudicial silence as a viable option to maintain public trust and confidence.

The 2007 Model Code has changed as a result of this new environment and the need for judges to ethically respond to unjust attacks and distortions. The ability to speak extrajudicially, which was once only implied, is clearly expressed in the new Code.

The judiciary must speak in defense of the American system of justice. No one else is doing that now, and no one else can do it better. To paraphrase Justice Brandeis, there are many falsehoods and fallacies about the justice system in the public culture and if the judiciary is silent, no one else will avert the evil through a process of education.<sup>188</sup>

The remedy for the judiciary is not silence, but extrajudicial speech.

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187. ABA 2007 CODE, Rule 2.4 (A), Comment [1]: “An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.”

188. See *Whitney v. California*, *supra* note 2, and accompanying text.

