

Reprinted from *Uncertain Justice: Politics in America's Courts* with permission from The Century Foundation, Inc. Copyright © 2000, New York

DEFENDING JUSTICE

THE COURTS, CRITICISM, AND INTIMIDATION

THE REPORT OF THE CITIZENS FOR INDEPENDENT COURTS
TASK FORCE ON THE DISTINCTION BETWEEN INTIMIDATION
AND LEGITIMATE CRITICISM OF JUDGES

| | |
|---|-----|
| Members of the Task Force | 123 |
| Task Force Recommendations | 127 |
| Report of the Task Force on Criticism of Judges | 129 |
| Appendix A: Memorandum on Ethical Restrictions on Lawyers Who Criticize Judges | 165 |
| Appendix B: Memorandum on Ethical Constraints Limiting a Judge's First Amendment Freedom of Speech | 173 |
| Appendix C: Response to Criticism of Judges | 191 |

MEMBERS OF THE TASK FORCE*

REPORTER

Charles Gardner Geyh, Professor of Law, Indiana University School of Law-Bloomington; Director, Center for Judicial Independence, American Judicature Society; Visiting Associate Professor of Law, Cleveland State University (1998–1999)**

MEMBERS

Robert M. Ackerman, Professor of Law, Pennsylvania State University, Dickinson School of Law; former Dean, Willamette University College of Law

Luke Bierman, Esq., Ph.D., Adjunct Faculty, Northwestern University School of Law; Presidential Assistant, American Bar Association; former Director, Judicial Division, American Bar Association

George M. Dennison, President, The University of Montana

John DiBiaggio, President, Tufts University

* Affiliations of members listed for purposes of identification only. The views expressed in this report do not necessarily reflect the views of the institutions with which the members are affiliated.

** Christopher R. George, Cleveland State University, served as assistant to the reporter.

The Reverend Dr. James M. Dunn, Executive Director, Baptist Joint Committee

John R. Dunne, Assistant Attorney General, Bush administration; former State Senator, Sixth District of New York

Eileen Gallagher, Esq., Project Manager, Standing Committee on Judicial Independence, American Bar Association

Harlan D. Hockenberg, Esq., Member, Board of Directors, National Jewish Coalition; Co-Chair, Senator Charles E. Grassley Re-election Committee

Mark Frederick Kozlowski, Esq., Staff Attorney, Brennan Center for Justice

Edward W. Madeira, Jr., Esq., Partner, Pepper Hamilton, L.L.P.; Chair, Commission on Separation of Powers and Judicial Independence, American Bar Association; Member, Standing Committee on Judicial Independence, American Bar Association; Permanent Member, Third Circuit Judicial Conference; Fellow, American College of Trial Lawyers

Paul Marcus, Haynes Professor of Law, College of William and Mary, Marshall-Wythe School of Law

Burke Marshall, Professor Emeritus of Law, Yale Law School

John J. McMackin, Jr., Esq., Williams & Jensen, P.C.

The Honorable William A. Norris, former Judge, U.S. Court of Appeals for the Ninth Circuit

LeRoy Pernell, Dean, Northern Illinois University College of Law

Burnele V. Powell, Dean, University of Missouri-Kansas City School of Law

Richard L. Rubenstein, President, University of Bridgeport

Patricia C. Shakow, Esq., former Member, Editorial Board, *The Washington Post*

Thomas H. Sponsler, Dean, Albany Law School

Paul B. Terpak, Esq., Blankingship & Keith

Daniel E. Troy, Esq., Partner, Wiley, Rein & Fielding; Associate Scholar, American Enterprise Institute

TASK FORCE RECOMMENDATIONS

1. The Task Force recommends against the adoption of any proposal that seeks to censor or sanction excessive but otherwise lawful criticism of judges.
2. Because bar-generated responses to attacks on judges may be perceived as self-serving, the Task Force recommends that legal educators, civic organizations, community leaders, and other concerned citizens be involved in response efforts.
3. The Task Force recommends that national, state, and local bar organizations develop plans for responding to unjust criticism of judges, such as those developed by the American Bar Association. Such plans should provide for a prompt response to misleading or potentially intimidating criticism, without seeking to defend judges for the sake of defending them when they are subjected to nonintimidating, nonmisleading criticism, and should involve nonlawyers as participants whenever possible.
4. The Task Force recommends the development and continuation of programs designed to better inform school children and adults on the importance of courts in protecting legal rights and responsibilities, so as to ensure public receptivity to an impartial, independent judiciary.

REPORT OF THE TASK FORCE ON THE CRITICISM OF JUDGES

I. INTRODUCTION

Our task force was assigned to address this issue: when does legitimate criticism of judges deteriorate into illegitimate, independence-threatening intimidation?

The issue of judicial criticism has received considerable attention in the past five years. It has been discussed at length in books, law review symposia, commission reports, and newspaper and magazine articles. It has been the subject of conferences hosted by the bench, the bar, and academic institutions; and it has been of central concern to Citizens for Independent Courts, which commissioned this report.

With so much having already been said and written, the question naturally arises as to what this report can hope to accomplish. The contribution of this report is ultimately twofold. First, the report reflects a consensus reached among the members of an avowedly bipartisan task force. The report thus underscores the extent to which an independent judiciary—one that is insulated from political intimidation—is valued across the political spectrum. Second, while many (though not all) members of the Task Force have law degrees, this report is written not by and for lawyers and judges, but by and for citizens who are concerned about their government and the role of courts in American society. The report thus looks beyond the bench,

the bar, and the academy that have more or less monopolized the judicial independence discussion to date, in an effort to reach a broader audience.

Given its purposes and target audience, this report does not address its subject in the exhaustive detail or with the subtlety of nuance that some might say it deserves. Concededly, generalizing about judicial independence and intimidation can be perilous business. After all, mechanisms for judicial selection, tenure, and removal—to say nothing of legal culture—differ dramatically between state and federal judiciaries; among the various state judiciaries; and among trial, appellate, and supreme court judges within any given state. The kinds of criticism that could well intimidate a state trial judge who is in the midst of a bruising reelection campaign may have no impact on a justice of the United States Supreme Court, who enjoys life tenure and receives a salary that may not be diminished. In the end, the Task Force has attempted to strike a balance with a concise report that speaks in general terms accessible to all citizens, without overgeneralizing to the point of being simplistic or inaccurate.

II. THE CRITICISM OF JUDGES IN HISTORICAL CONTEXT

Judicial criticism and intimidation are not recent phenomena. In England, the 1700 Act of Settlement, which rendered English courts independent of the Crown, was a response to repeated overreaching and intimidation by the monarch.¹ Although the Act of Settlement served to protect the English courts, it did not apply in the American colonies, where the colonial courts were dependent on the King for their tenure and compensation.² Repeated confrontations between the colonists and the Crown over the latter's attempts to manipulate colonial judges ultimately led to a grievance in the Declaration of Independence, that King George III had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and payment of their Salaries."³

As the new states began to frame their constitutions in the wake of independence, the generally accepted antidote to judicial dependence on the monarch or executive branch was not judicial

independence, but judicial dependence on the legislative branch or the people.⁴ Although the state judiciaries were appointed, judges were subject to reappointment in some jurisdictions; in other jurisdictions that provided for tenure during good behavior, they were subject to removal upon impeachment for “maladministration,” or a simple address from the legislature—a process by which the Governor is authorized to remove a judge upon the request of a bare majority of the general assembly.⁵ Over the course of the succeeding decade, legislatures in several states threatened judges with removal in response to courts exercising the power of judicial review to strike down legislation.⁶ These and like episodes gave rise to fear of legislative tyranny, and generated significant support for judicial independence that may have reached its high point on the eve of the federal constitutional convention.

Although the phrase “judicial independence” appears nowhere in the United States Constitution, it is implicit in three provisions of Article III: the “judicial power” clause, which delegates to the judicial branch alone the judicial power to decide individual cases (and which, by implication, guarantees the judiciary sufficient independence from the political branches to protect the “judicial power” against usurpation); the “good behaviour” clause, which guarantees federal judges tenure during good behavior—which is to say for life, subject only to removal following impeachment for “treason, bribery, and other high crimes and misdemeanors”; and the “compensation” clause, which guarantees federal judges a compensation that may not be diminished during their tenure in office. It is clear from James Madison’s notes of the constitutional convention, and Alexander Hamilton’s defense of Article III in *The Federalist*, that these provisions were designed to provide for an independent judicial branch comprised of independent judges.⁷

As vital as the founders thought judicial independence was to the success of the fledgling government, at no time did they or their successors equate independence with immunity from harsh criticism. To the contrary, state and federal judges have weathered cycles of intense criticism that have peaked and troughed throughout our nation’s history.⁸ There is a tendency in the historical literature (and in the brief synopsis of that literature, which follows) to define these periods of judicial criticism with reference to attacks upon the Supreme Court of the United States. It is important to understand, however, that each state judiciary has a unique history, with periods

of criticism unique to itself, that limitations of space and time prevent the Task Force from exploring in this report.

THE JEFFERSONIAN REPUBLICANS' CONFRONTATION WITH THE FEDERAL COURTS

The election of Thomas Jefferson ushered in the first sustained wave of national anger directed at federal judges. Although reform of the judicial system had been sought for several years, it was lame duck President John Adams, with the aid of a lame duck Federalist Congress, who established new courts and packed them with Federalist partisans. That, in turn, catalyzed a drive by the incoming Jeffersonian Republicans to disestablish the courts the Federalists had created, and impeach the Federalist judges whose offices had not been abolished. "[T]he only check upon the Judiciary system as it is now organized and filled," wrote Republican Congressman William Giles to Thomas Jefferson, "is the removal of all its executive officers indiscriminately."⁹

The Jeffersonian Republicans succeeded in repealing the judge-ships the outgoing federalists had created, but with the exception of the inebriated and insane Judge Thomas Pickering, failed in their efforts to remove federalist judges by means of the impeachment process. The Republicans' inability to secure the conviction of Justice Samuel Chase in his 1805 impeachment trial effectively ended this initial assault on the federal courts.

JACKSONIAN DEMOCRATS' ATTACKS ON STATE AND FEDERAL COURTS

With the ascendancy of Jacksonian Democracy at the close of the 1820s came a new wave of antagonism directed at the state and federal courts. President Andrew Jackson's unique brand of majoritarian democracy was very much in tension with an appointed judiciary (on the federal or state level) that imposed limits on the will of the majority. Legislation was introduced in Congress to strip the United States Supreme Court of jurisdiction to hear appeals from the decisions of state courts; the president himself openly confronted the authority of the Supreme Court;¹⁰ and several states did the same.¹¹ A

groundswell of support for elective judiciaries directly challenged the notion of an independent judiciary. Jacksonian Democrat Frederick Robinson made the point bluntly:

[J]udges should be made responsible to the people by periodical elections. The boast of an independent judiciary is always made to deceive you. We want no part of our government independent of the people.¹²

John Marshall's death in 1835 and the end of Jackson's presidency in 1837 effectively ended, for the time being, the confrontation between the White House and the Supreme Court. In the states, Jackson's continued influence is credited with the rise of elected judiciaries. Beginning with Mississippi in 1832 and resuming in earnest after 1845, every new state entering the Union provided for elected judiciaries. The persistence of the movement toward elected state judiciaries, however, is attributable less to a Jacksonian-era suspicion of judicial independence than to the increasingly prevalent view that elected judges approved by the people were stronger and more independent than were judges beholden to the governors or legislatures who appointed them.¹³

THE *DRED SCOTT* DECISION AND ITS AFTERMATH

The issue of slavery became increasingly heated in the decades preceding the Supreme Court's 1857 decision in *Dred Scott v. Sanford*. The Missouri Compromise of 1820, the Compromise of 1850, and the Kansas-Nebraska Act of 1854 were all testament to the contentiousness of the sectional divide over the direction of the nation on the slavery issue.¹⁴

In *Dred Scott*, the Supreme Court held, first, that freed black slaves could not invoke the jurisdiction of the federal courts because they were not citizens of the United States, and second, that because the Constitution acknowledged and protected the right to own slaves as property, Congress lacked the power to prohibit slavery in the territories.¹⁵ In so holding, the Court simultaneously appeared to manifest a proslavery bias and crippled congressional moderates in their efforts to preserve any semblance of detente between pro- and anti-slavery forces.

Reaction to *Dred Scott* was swift and severe. The “five slaveholders and two or three doughfaces on the bench” who decided the case were accused of “rush[ing] into politics voluntarily and without other purpose other than to subserve the cause of slavery.”¹⁶ It was a decision “entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room,”¹⁷ wrote one critic. “If epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again.”¹⁸

The *Dred Scott* decision is widely identified as a contributing cause of the Civil War. It was not until after the end of the war, adoption of the Thirteenth through Fifteenth Amendments to the United States Constitution, and the painful period of Reconstruction (which included its own round of attacks on the federal courts) that some semblance of equilibrium was restored.

PROGRESSIVE-POPULIST AND NEW DEAL CRITICISM OF THE LOCHNER ERA COURT

The Populist period at the end of the nineteenth century, and the progressive era in the early twentieth century, ushered in another wave of resentment directed at the courts. As progressive reformers sought to address social ills through legislation, they came into conflict with state courts and a national Supreme Court that read the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution as imposing distinct limits on the power of state and federal legislatures to regulate business and industry. Senator George Norris declared that federal judges on the trial and appellate levels were “not responsive to the pulsations of humanity [because] the security of a life position and a life salary makes them forget too often the toiling masses who are struggling for an existence.”¹⁹ Accordingly, as one scholar observed:

[T]he Populist-Progressives during the early decades of the century sought to infuse federal judicial institutions with elements of popular democracy, to alter the substance of judicial decisions, to change the selection of federal judges, and to circumscribe their power and the jurisdiction of their courts.²⁰

On the state level, progressive reformers grew disenchanted with the partisan nature of judicial elections. Earlier in the nineteenth century, appointed judges had been perceived as weak-kneed shills for the governor or the general assembly. This perception helped give rise to elective judiciaries. Now, however, judges selected in partisan elections were increasingly criticized as too beholden to the political parties. To address the problem, some states adopted nonpartisan judicial election systems. In 1913, the American Judicature Society was formed, and soon thereafter began to advocate “merit-selection” systems. Several states adopted these systems, in which judges would be appointed with the assistance of a merit-selection commission, and later stand for “retention elections.” In such elections, the judges would run unopposed and remain in office if a majority of the electorate voted to retain them.

On the federal level, Chief Justice William Howard Taft and the United States Congress responded to widespread criticisms with groundbreaking reforms in federal judicial administration, which served to allay some of the public criticism targeting defective administration of justice.²¹ Attacks on the Supreme Court (sometimes called the “Lochner Court” because of its interpretation of the due process clause exemplified by its decision in the case of *Lochner v. New York*) accelerated, however, after Franklin Roosevelt took office, when the Court continued to strike down New Deal legislation. Roosevelt brought the issue to a head with his so-called Court-packing plan, which would have increased the size of the Supreme Court, under the guise of lessening the workload of the aging Supreme Court justices. His avowed purpose was to add enough New Deal justices to tip the balance of power on the Court in Roosevelt’s favor. The confrontation was finally defused when a member of the Supreme Court, who had previously ruled against New Deal legislation, changed his voting behavior before Congress had acted on the Court-packing proposal—the so-called “switch in time that saved nine.”

ATTACKS ON THE WARREN COURT

Under Chief Justice Earl Warren’s leadership in the 1950s and 1960s, the Supreme Court of the United States interpreted the Constitution to protect a greatly expanded array of civil and criminal rights. Supreme Court decisions invalidating racial segregation of public institutions, disallowing prayer in public schools, and

affording criminal defendants a range of previously unrecognized procedural protections provoked sharp criticism in some quarters.

The John Birch Society accused Warren of voting “92 percent in favor of Communists,” and “sanction[ing] treason.”²² Congress received a torrent of letters calling for Warren’s impeachment, a sentiment echoed on billboards across the country.²³ Warren was not the only target. Then-congressman Gerald Ford called for the impeachment of Justice William O. Douglas, because of Douglas’s allegedly leftward leanings.

Although the calls for impeachment were never acted upon, the perceived excesses of the Warren Court were among the campaign issues that helped win the presidency for Richard Nixon in 1968.²⁴ The retirement of Earl Warren in 1969, and the resignation of Justice Abe Fortas that same year, enabled President Nixon to appoint Chief Justice Warren Burger and Justice Harry Blackmun, thereby closing the book on the Warren Court and the attendant period of criticism.

Opinions have differed as to who is to “blame” for these periods of criticism—the judges, for inviting attacks when they allegedly exceeded their proper roles; or overly vituperative critics, for seeming to lack the necessary appreciation for an independent judiciary. As a consequence, periods of intense criticism have often been greeted by a counterresponse from those who charge the critics with threatening to compromise judicial independence.²⁵

One consequence of these recurrent altercations between critics and defenders of the courts may have been to preserve a semblance of interbranch equilibrium over time:

- ♦ The Jeffersonian Republicans may have succeeded in their efforts to disestablish federal courts, but their critics succeeded in convincing future Congresses that such a tack was inappropriate and not to be repeated.²⁶
- ♦ The Jeffersonian Republicans, in turn, by failing in their effort to remove Justice Chase, thus set a precedent against Congress’s impeaching a judge on account of his or her judicial decisions. At the same time, however, others have noted that for its part, the judiciary ceased to provide so many targets as obvious as Justice Chase.²⁷
- ♦ Progressive-era defenders of the courts staved off extreme assaults on judicial independence, such as proposals to end good behavior

tenure for federal judges, but the widespread dissatisfaction with the courts, as highlighted by court critics, led to major structural reforms in the state and federal courts systems.

- ♦ During the New Deal, President Roosevelt's Court-packing plan was never adopted, which set a precedent against such transparent efforts to manipulate Court decision-making in the future. At the same time, Roosevelt's threat to implement the plan may have led to a one-vote shift on the Supreme Court that tipped the balance of power in favor of upholding the constitutionality of New Deal programs.
- ♦ While calls to impeach Chief Justice Earl Warren and Justice William Douglas were successfully resisted, critics of the Warren Court ultimately had their concerns addressed with the election of Richard Nixon and his appointment of more conservative justices to replace the outgoing members of the Warren Court.

As the Task Force and others seek to address the current period of judicial criticism, described below, it is important to understand it in a broader historical context—to keep in mind the push and pull of court critics and defenders, and the interplay of confrontation and compromise, that have typified such periods in the past and helped bring debates over the courts to peaceful resolution.

III. RECENT DEVELOPMENTS CONCERNING CRITICISM OF JUDGES

A new wave of criticism directed at the courts is now upon us. Unlike many of the previous waves, the focus today is not so much on the Supreme Court as on state and lower federal court judges. Opinions differ as to whether such criticism represents an unprecedented assault on judicial independence, an inevitable response to unprecedented usurpations of power by the courts, or simply another high tide in the ebb and flow of judicial criticism described in the preceding section. There is, however, general agreement that judicial criticism has intensified, relative to recent years past.

For purposes of this report, we have isolated six basic categories of criticism that some have identified as troubling: (A) threats to life and safety; (B) threats of impeachment or related forms of removal from office; (C) threats amid pending cases; (D) misleading criticism; (E) judicial discipline as a form of criticism; and (F) threats of electoral defeat. What follows is a brief description of these categories of criticism, and the explanations offered for why they do or do not threaten judicial independence.

ISSUE A: THREATS TO LIFE AND SAFETY

Threats to the life or safety of judges and their families are periodically reported. They are unlawful, and subject to criminal prosecution. Moreover, there is no serious disagreement that such threats are inimical to judicial independence. Judges cannot be expected to render impartial justice in the teeth of threats to kill or injure them or their loved ones unless they decide cases in a particular way.

Judges have been occasionally attacked or killed on account of their decisions. District judge John H. Wood, Jr., was murdered in 1979; district judge Richard Daronco was shot and killed in 1988; and circuit court judge Robert Vance was killed by a bomb blast in 1989.²⁸ In 1996, a militia group in central Texas reportedly plotted to kidnap a federal judge,²⁹ and the Associated Press recently reported on a plan devised by three prison inmates to murder three federal judges.

The so-called Nuremberg Files web page has given rise to a more controversial issue concerning implied death threats directed at judges, among others. The antiabortion Internet web site solicited and published the names of abortion providers, and it differentiated between those who were “working,” “wounded,” or a “fatality.” Physicians shot and killed were moved from the “working” category to the “fatality” category within hours of the incident. Following the list of abortion providers was a list of judges, identified as the “shysters” of the abortion providers.³⁰ A civil jury recently found in favor of several abortion providers who sued the authors of the website on the grounds that listing their names in this manner constituted a threat to their lives. Others have expressed the concern that holding the authors of the site liable for their speech violates their First Amendment freedom of speech.

ISSUE B: THREATS OF IMPEACHMENT OR REMOVAL

Over the course of the past three years, Speaker of the House Newt Gingrich, Senate Majority Leader Robert Dole, and House Majority Whip Tom DeLay have each threatened to bring impeachment proceedings against one or more federal judges on the basis of rulings those judges issued in specific cases.³¹ And President Clinton, through his press secretary, at one point threatened to request a judge to resign if he did not reverse a ruling. Six judges who have been specifically targeted include:

- ♦ United States district judge Harold Baer, who was threatened with impeachment proceedings by several members of Congress, and with President Clinton's resignation request, after he issued a pretrial ruling excluding evidence in a drug case.³²
- ♦ United States district judge Fred Biery, who was targeted for removal by impeachment after he preliminarily enjoined the seating of two Texas county office holders who had recently won election, pending resolution by the state courts of whether voters who cast 800 absentee ballots met state residency requirements.³³
- ♦ United States district judge Thelton Henderson, who was identified as an impeachment target after he issued a preliminary injunction against the implementation of California Proposition 209, on the grounds that the proposition was likely to be ruled unconstitutional.³⁴
- ♦ United States district judge John T. Nixon, whose investigation and possible impeachment was urged by the Tennessee state senate and the state house judiciary committee after he overturned five death penalty convictions.³⁵
- ♦ United States district judge Ira DeMent, who issued several rulings prohibiting school-sponsored prayer in public schools in Alabama, which resulted in his being targeted for impeachment by religious groups.³⁶
- ♦ United States district judge Stewart Dalzell, whose impeachment was sought by the family and supporters of a slain woman after

he overturned the conviction of Lisa Michelle Lambert, convicted of the woman's murder, and barred the state from retrying Lambert.³⁷

Some have characterized these threats of impeachment as a form of independence-compromising intimidation. In response to the threats directed at Judge Baer, three present and former chief judges of the United States Court of Appeals for the Second Circuit issued a joint statement, which declared in part that:

The framers of our Constitution gave federal judges life tenure, after nomination by the President and confirmation by the Senate. They did not provide for resignation or impeachment whenever a judge makes a decision with which elected officials disagree. . . .

When a judge is threatened with a call for resignation or impeachment because of disagreement with a ruling, the entire process of orderly resolution of legal disputes is undermined.

We have no quarrel with criticism of any decision rendered by a judge. . . .

But there is an important line between legitimate criticism of a decision and illegitimate attack upon a judge. . . . Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.³⁸

Others have been less sympathetic, arguing either that Congress is within its rights to define impeachable high crimes and misdemeanors to include what they regard as activist decision-making,³⁹ or that judges with life tenure and a guaranteed salary have all the insulation they need to endure essentially idle threats of removal.⁴⁰ Senator Robert Dole responded to the above-quoted joint statement of the Second Circuit judges calling him to task for his attacks on Judge Baer, with a letter of his own:

Although I share your concerns about maintaining the independence of the federal judiciary, I believe you were wrong to suggest that I overstepped my bounds in criticizing Judge Baer's ruling in the *Bayless* case. Simply put, judges are not the only ones in our constitutional system who have "important

responsibilities” relating to the proper administration of justice in the federal courts. The Legislative Branch, along with the President, has a significant role to play in ensuring that judges, no less than other officers of the United States, faithfully perform their duties under the Constitution. That is why . . . Congress is given the solemn power under the Constitution, where warranted, to remove from office judges and other officers of the United States.⁴¹

Other actions short of threats to impeach may also have an impact on public confidence in the courts, if not the independence of the judge in question. President Clinton’s suggestion, through his press secretary, that he might ask for Judge Baer’s resignation if the judge did not reverse the unpopular ruling described above, is an example.⁴² Shortly thereafter, a circuit court judge announced that he was resigning in protest of widespread attacks on federal judges, including those on himself.⁴³

Although threats to remove a judge by means other than electoral defeat have been directed primarily at federal judges, state judges have occasionally been targeted as well. Members of the New Hampshire legislature recently responded to a state Supreme Court decision invalidating the use of local property taxes to fund public schools with an effort to remove Chief Justice David Brock by means of legislative address.⁴⁴

ISSUE C: THREATS AMID PENDING CASES

One of the previously mentioned episodes—that concerning Judge Baer—occurred in the context of a pending case.⁴⁵ The judge subsequently reversed his ruling, and said that he did so on the basis of new information introduced at a second hearing. Some, however, assumed that he responded to political pressure and criticized the president and members of Congress who, in their view, intimidated him. Others complained that even if the reversal was solely merits-based, those who threatened the judge made it *appear* as though they had bullied him into changing his decision.⁴⁶ In either case, the fact that the threats were issued at a time when they could have influenced the decision-making process made such threats especially problematic in the minds of some.⁴⁷ Others, in contrast, thought it was all for the best

that the judge responded to political pressure,⁴⁸ or blamed the judge for creating his own problems by reversing himself instead of standing firm and allowing the appellate process to run its course.

ISSUE D: MISLEADING CRITICISM

Judges have been targeted with arguably misleading criticism in a variety of contexts. In some cases, judges have been criticized by lawyers in their capacity as election opponents or as attorneys who have appeared before the judge in question, or who otherwise have an interest in the court system. Lawyers who criticize judges in unfair or misleading ways may be subject to discipline under applicable codes of professional responsibility, as discussed in Appendix A (see pages 165–71). In other cases, judges have been criticized by nonlawyers who are members of special interest groups, representatives of the media, or disgruntled litigants.

The following examples are illustrative:

- ♦ Georgia justice Leah Sears' election opponent accused her of writing a dissenting opinion in which she "referred to traditional moral standards as pathetic and disgraceful," when in fact she had referred to the analysis of the majority opinion as "pathetic and disgraceful."⁴⁹
- ♦ United States district judge Norma Shapiro is reported to have "placed a population cap on [Philadelphia's] crowded jail system, causing people arrested on felony charges to be released."⁵⁰ As a consequence, she has been accused by *Wall Street Journal* Editorial Features writer Max Boot of being "responsible for as much crime in Philadelphia as any street gang,"⁵¹ and more specifically, by National Rifle Association president Charlton Heston, of releasing prisoners who subsequently "committed seventy-nine murders, ninety rapes, seven hundred and one burglaries, nine hundred and fifty nine robberies, one thousand one hundred and thirteen assaults," among other offenses.⁵² Heston apparently obtained these statistics from the Philadelphia district attorney's office.⁵³ In fact, Judge Shapiro had originally dismissed the case on the grounds that it was inappropriate for the federal courts to decide a matter that was the subject of ongoing

state court proceedings. Her decision to abstain, however, was reversed by the Third Circuit Court of Appeals, which ordered her to decide the case.⁵⁴ She did not then impose a prison population cap on her own initiative; rather, she approved a consent decree agreed to by all parties—including the city of Philadelphia—which called for such a cap.⁵⁵ Finally, she took pains to ensure that no prisoner released under the consent decree had been arrested for violent crimes.⁵⁶

- ◆ Opponents in Tennessee justice Penny White’s retention election focused their attention on a single capital case, in which they asserted that “Penny White felt the crime wasn’t heinous enough for the death penalty—so she struck it down.”⁵⁷ In fact, Justice White wrote no opinion in that case, but merely joined in the opinion of the court which did not disallow imposition of the death penalty, but instead remanded the case for resentencing.⁵⁸
- ◆ Ad hominem attacks may represent a special subset of misleading criticism. Shrill and unfounded attacks on a judge’s character, motives, competence, or allegiance arguably misinform listeners or readers as to the basis for the decisions in question. Examples include a recent series of articles in the *New York Post*, published under headlines such as “Three Stooges Are Court Clowns”;⁵⁹ a Philadelphia journalist’s reference to a judge as the “Queen of Murder Lite”;⁶⁰ and Alabama governor Fob James, who accused a trial judge of lacking the “personal integrity and fortitude to obey his oath of office” because, in the governor’s view, the judge followed the decisions of the Supreme Court at the expense of the Constitution.⁶¹

Some have singled out misleading criticism of judges as especially troublesome.⁶² Most public officials, they argue, are in a position to address misleading criticism by defending their decisions publicly and thereby setting the record straight. Judges, in contrast, are restricted in their authority to do so by the canons of judicial ethics.⁶³ Even when ethics rules are not technically violated, judges have been chastised for making extrajudicial comments about judicial decisions. Thus, for example, when the present and former chief judges of the United States Court of Appeals for the Second Circuit issued the joint statement defending Judge Baer, described above,

Senator Dole's initial response was to question the propriety of the judges speaking out on the issue:

It has come to my attention that you have issued a joint statement criticizing me for expressing my belief that U.S. District Judge Harold Baer's decision in *United States v. Bayless* . . . has no basis in law. I must say I was surprised to learn that you had commented publicly on a case that may well appear before you on appeal. Judges, unlike elected officials such as Senators, perform what your statement calls their "important responsibilities in a constitutional democracy" in the courtroom, not in the court of public opinion.⁶⁴

Others, less sympathetic to the view that publication of misleading criticism poses a particular problem, point out that counterspeech remains alive and well, as reflected in each of the illustrations recounted above, in which misleading accusations against the judges in question were ultimately exposed in counterreports.⁶⁵

ISSUE E: THREATS OF DISCIPLINE

Judicial discipline (short of removal) was unheard of prior to the 1960s. In the last thirty years, however, judicial conduct organizations have been established in all fifty states, and Congress has created a disciplinary mechanism for the federal courts. These disciplinary bodies serve a vital role, by providing a means to detect and remedy a wide range of judicial misbehavior, such as drunkenness, abusiveness, gender and racial bias, and chronic decision-making delay.

In several states, judges have recently been subjected to disciplinary proceedings on the basis of their rulings.⁶⁶

- ♦ In California, state court of appeals justice Anthony Kline issued a dissenting opinion in which he indicated that he would "refuse to acquiesce" in a 1992 decision of the California Supreme Court, which had authorized parties to settle their disputes post-trial by stipulating to reversal of the trial court judgment.⁶⁷ Justice Kline's stated rationale was "based on [his] deeply felt opinion that the doctrine of stipulated reversal announced in [the 1992 decision]—a doctrine employed in no other jurisdiction in this

nation and unanimously repudiated by the Supreme Court of the United States—is destructive of judicial institutions.”⁶⁸ The California Commission on Judicial Ethics subsequently initiated an inquiry into Justice Kline on the grounds that his “refusal to follow the law” violated the Code of Judicial Ethics.⁶⁹ The press has subsequently reported that Justice Kline “is only the latest in a series of similar investigations by the Commission on Judicial Performance.”⁷⁰

- ♦ In New York, the New York Court of Appeals approved the removal of Brooklyn Criminal Court judge Lorin M. Duckman from office, in light of what the court characterized as “[t]he substantial record of petitioner’s intentional disregard of the requirements of the law in order to achieve a personal sense of justice in particular cases before him.”⁷¹ In particular, the court concluded that Duckman had “willfully disregard[ed] the law” by dismissing sixteen misdemeanor cases after prosecutors declined to reduce the charges or offer more lenient plea arrangements.⁷² The Duckman case is complicated by the fact that the judge’s alleged misconduct also included a “substantial record of improper courtroom conduct and unresponsiveness to concerns flagged for him,” over and above the charges that he disregarded the law in the decisions he made.⁷³
- ♦ A different but related problem has arisen in the federal court system. There, the Fifth Circuit Judicial Council has sanctioned Texas U.S. district judge John McBryde for, among other things, abusive and inappropriate courtroom demeanor. Judge McBryde has challenged the sanction—which banned him from hearing new cases for one year—on the grounds that it effectively removed him from office in violation of the United States Constitution.⁷⁴

Some have argued that the targeted judges’ independence is threatened when judicial conduct organizations pursue disciplinary actions against judges on account of their decisions. Professor Stephen Barnett, of the University of California Boalt Hall School of Law, accused the California Commission on Judicial Performance of “trying to set itself up as a Super Court to punish judges who don’t decide cases the way the commission thinks they should.”⁷⁵ Two judges who

dissented from the majority's decision to remove Judge Duckman argued that "the majority has sent a message that the State's judicial disciplinary procedures are susceptible to manipulation by public officials and that judges whose rulings displease those public officials may find themselves singled out for exceptional, and possibly ruinous, scrutiny."⁷⁶

Others have argued, however, that a judge's refusal to follow the law is a form of misconduct that is subject to discipline. In response to the Kline episode, the director of New York's judicial discipline commission argued that the California commission's decision to bring charges against Judge Kline "was a very courageous thing to do," because "[i]f a judge disregards the law, statutory law or case law, it is judicial misconduct."⁷⁷ The point was echoed by the legal affairs correspondent to the *California Political Review*, who argued that "intermediate appellate court judges . . . are sworn to uphold the law. When they refuse to follow the law, they violate their oath." He characterized Kline's actions as a form of "judicial nullification," and "a lot more serious offense than drinking at lunch or being rude to jurors."⁷⁸

ISSUE F: THREATS OF ELECTORAL DEFEAT

In several states, grassroots organizations have launched sometimes successful campaigns against the reelection or retention of particular judges, on the basis of the judge's decision in an isolated case or on an isolated issue. Certainly the most highly publicized recent example is Tennessee justice Penny White, who lost her retention election following a campaign to unseat her on account of her joining a majority opinion reversing the imposition of the death penalty in a murder case, and remanding the case for resentencing.⁷⁹ Mississippi justice James Robertson likewise lost his reelection bid following an effort to unseat him on account of his decision to invalidate the death penalty in a rape case.⁸⁰

Although comparatively few judges have been turned out of office because of unpopular decisions rendered in isolated cases, many more have survived close calls—stiff challenges to reelection posed by groups or opponents upset by a single decision or set of decisions. Examples include:

- ♦ Tennessee justice Adolpho Birch, who authored the opinion that Justice Penny White joined,⁸¹

- ♦ California chief justice Ronald George and California justice Ming Chin, who were opposed on account of their abortion rulings;⁸²
- ♦ Illinois judge Dan Locallo, whose retention was opposed on account of a sentence he imposed in a single case.⁸³
- ♦ Ohio justice Paul Pfeifer, whose reelection was opposed on the basis of his decision in a school funding case.⁸⁴

Some assert that judicial independence is threatened when judges are voted out of office, not on the basis of their records as a whole, but in light of how they ruled in particular cases. As Florida justice Ben Overton put it: “It was never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.”⁸⁵

Others argue that voters are merely exercising their franchise, and holding judges accountable for their record. In the wake of Penny White’s defeat, Tennessee governor Don Sundquist observed: “Should a judge look over his shoulder [when making decisions] about whether they’re going to be thrown out of office? I hope so.”⁸⁶ A letter to the editor of a Tennessee newspaper added: “[I]t is disturbing to hear the public being chastised for threatening judicial independence. This kind of rhetoric threatens voter independence.”⁸⁷

V. TASK FORCE ANALYSIS

The Task Force believes that judges must be permitted to decide cases according to the law as they conceive it to be written, without fear of reprisal. This is not because judicial independence is an end in and of itself. Rather, it is because judicial independence is a critically important means to the larger end of enabling judges to render impartial justice and to enforce our individual and collective rights. Our cherished constitutional rights would not long endure if the judges sworn to uphold them could be intimidated by public officials or a fleeting majority of the electorate into disregarding or minimizing those rights in order to achieve “popular” results.

To say that judges must be independent enough to render impartial justice and resist intimidation is not to say that they must be so independent as to be unaccountable. Judges, of course, must ultimately be accountable to the people. Accountability, in turn, often begins with criticism. Judges will be criticized whenever they decide controversial cases. Moreover, criticism is inevitable when they make mistakes, and when they press the limits of their constitutional power. Such criticism provides judges with an opportunity to rethink their views and to correct their errors.

It must be remembered, moreover, that criticizing public officials, including judges, is not only instrumental to good government—it is every citizen’s constitutional right. On those occasions in which legitimate criticism degenerates unjustifiably into intimidation that may threaten judicial independence, we must nevertheless err on the side of tolerating dissent by making no recommendation that could be construed as threatening court critics with punishment, censorship, or reprisal for lawful criticism.

To say that criticism must be tolerated and encouraged is not to deny that certain forms of criticism may undermine judicial independence, or at least the appearance of judicial independence in the public’s mind.

In this report, the Task Force has identified and analyzed a number of significant problems that have arisen in isolated areas where the line separating criticism from intimidation has been crossed, and which together constitute a serious concern that needs to be addressed.

ANALYSIS OF ISSUE A: THREATS TO LIFE OR SAFETY

Threats to the life or safety of judges, their families, or their friends represent an obvious and extreme form of judicial intimidation. Explicit threats are subject to criminal prosecution. Implied threats, varying in their subtlety, can present difficult questions as to when concern for a judge’s physical safety ends and critics’ First Amendment rights begin. Regardless, however, of where that line is drawn for purposes of criminal prosecution or civil liability, court critics should be taken to task for any criticism that could be construed as threatening to a judge’s life or safety.⁸⁸

Direct threats to a judge’s life or safety pose more than a theoretical problem, as evidenced by the judges discussed in Section IV

of this report who have been assaulted or killed. Although such threats represent the most extreme form of judicial intimidation imaginable, the Task Force has no evidence to suggest that ongoing law enforcement efforts to protect judges are inadequate or in need of reform.

ANALYSIS OF ISSUE B: THREATS OF IMPEACHMENT

The Task Force is troubled by recent threats to impeach and remove judges for making unpopular decisions in isolated cases. The problem is twofold: first, the specter of calls for their impeachment may cause some judges to think twice about interpreting the law as they conceive it to be written, on those occasions in which the law dictates an unpopular result. Second, even if impeachment threats do not in fact compromise a judge's capacity for independent judgment, the public perception may be to the contrary, thereby undermining public confidence in the courts and the appearance of a fair and impartial justice system.

The appropriate remedy for correcting erroneous judicial decisions is not impeachment, but appeal. The point was made powerfully by Representative Robert Kastenmeier in 1986, when he explained the House Judiciary Committee's decision not to initiate impeachment proceedings against three judges who had voted to reverse a death penalty conviction:

A judicial decision (right or wrong), standing alone, cannot rise to the level of a "high crime or misdemeanor." If this were otherwise, the impeachment remedy would become merely another avenue for judicial review: a sort of legislative referendum on the quality of judicial decision-making. To the contrary, impeachment is a constitutional last step and an extraordinary response at that.⁸⁹

The threat posed by essentially idle calls for impeachment should not be overstated. No federal judge has ever been removed from office for rendering an unpopular decision. Federal judges thus appear to remain sufficiently insulated from such threats to ignore them—as they should. At the same time, recently renewed interest in the impeachment process in Congress in light of the Clinton impeachment

counsels against dismissing impeachment threats as empty. Moreover, public confidence in an impartial judiciary can only be undermined by threats to remove judges who make unpopular rulings—regardless of whether those threats are viable, or whether the judges in question are in fact intimidated.

In the past several years, threats of judicial removal (other than by election) have targeted federal judges, for which reason our discussion here has thus far been confined to the impeachment process in the federal system. The recent efforts by members of the New Hampshire Assembly to remove a justice of the New Hampshire Supreme Court by means of legislative address—in large part because of a widely criticized ruling in a particular case—demonstrate that removal threats are no longer an issue limited to the federal system. Moreover, some state removal mechanisms, such as the legislative address, are less cumbersome to employ than impeachment⁹⁰ and so have the potential to be more viable tools for judicial intimidation. Accordingly, the Task Force is especially concerned by the possibility that efforts to remove state judges on account of their rulings could become more commonplace.

ANALYSIS OF ISSUE C: THREATS IN PENDING CASES

Threats to remove a judge or to exact retribution of other kinds are especially troublesome in the context of a pending case, when the judge is put on notice that if he or she decides the case a particular way, negative consequences may follow. Unlike the previously discussed threats to remove a judge for a decision already made—a decision that the judge is no longer in a position to reverse—threats issued while a decision is still within the judge's control can be uniquely intimidating. Even if the judge is able to remain uninfluenced by such threats, the appearance will be to the contrary whenever the judge's decision coincides with the views of those issuing the threats.

ANALYSIS OF ISSUE D: MISLEADING CRITICISM

Misleading criticism poses a problem of a different nature. Previously discussed forms of criticism raise the specter of intimidation—the possibility that judges will be deterred by threats to their lives, safety, or

tenure in office, from deciding cases according to the law as they conceive it to be written. Misleading criticism, in contrast, may not be any more intimidating than accurate criticism.

This is not to say, however, that misleading criticism has no impact on judicial independence. When a judge's decisions are criticized in materially misleading ways, public confidence in the judge and the justice system are unjustifiably undermined. It is only when public confidence in the courts is at low ebb that proposals to curb or undermine the judiciary's independence gain significant public support.

Ordinarily, when a public official is criticized in unfair or misleading ways, there is an obvious and effective remedy: the official can set the record straight in a press release, at town meetings, in television or newspaper interviews, and so on. Unlike other public officials, however, judges are generally foreclosed by ethics restrictions from publicly explaining and defending their decisions. (A memorandum describing these ethics restrictions is attached as Appendix B.) As a consequence, their ability to set the record straight is compromised, and the possibility that misleading criticism will go unanswered becomes correspondingly greater. If misleading speech is to be corrected, the task must fall to concerned citizens other than the targeted judge.

ANALYSIS OF ISSUE E: JUDICIAL DISCIPLINE

Although the Task Force believes that judicial discipline should be used sparingly, if at all, to address the content of a judge's judicial opinions, the Task Force is convinced that judicial discipline, properly administered, is critically important to preserving an independent judiciary. By providing a meaningful remedy for judicial misbehavior when it arises, disciplinary mechanisms preserve public confidence in the integrity of the judicial system. Obviously enough, however, judicial discipline can serve that vital role only if the public is aware of its existence. In the *Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility*, published in 1989, that Task Force came to the following conclusion with respect to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which established a disciplinary structure in the federal system:

[F]or the 1980 act to be truly effective, all of those

involved—the bench, the bar, and the public—must be aware of its existence and must have access to it. We do not believe that public awareness of the act is widespread. *The Task Force therefore endorses measures to educate the public about the 1980 Act.*⁹¹

Ten years later, our Task Force continues to believe that public awareness of disciplinary mechanisms in the state and federal judicial systems is insufficient, and needs to be more adequately publicized.

Subjecting judges to disciplinary action on account of their rulings in specific cases presents a complicated issue. The problem is not an issue in the federal system, where the disciplinary statute directs chief circuit judges to dismiss disciplinary complaints related to the merits of a case. Not all state judicial conduct organizations, however, are similarly restricted.

Ordinarily, appellate review is the appropriate remedy for errant judicial decisions. Alternatively, errors can sometimes be corrected by remedial legislation or constitutional amendment, or circumvented by changes in executive branch enforcement. In contrast, resort to judicial discipline as a vehicle for discouraging or correcting judicial error can be problematic. Judges' independence could be compromised if they must decide cases in the shadow of a judicial conduct organization poised to take action against them, should it deem one of their decisions sufficiently erroneous or unjustified.

At the same time, judges take an oath to uphold the law. In rare and extreme cases, deliberate disregard of that oath, as manifested in a judicial opinion, may constitute a form of misconduct. The propriety of disciplinary action in these rare instances must necessarily turn on the unique circumstances of the situation at hand.

ANALYSIS OF ISSUE F: JUDICIAL ELECTIONS

Nowhere is the tension between judicial independence and accountability more obvious than in the context of judicial elections. If judges believe that they may be voted out of office if they make unpopular decisions in highly publicized cases shortly before they stand for reelection, the possibility exists that they will decide such cases differently than if the law is their only guide.

On the other hand, the point of having judges stand for reelection

is to hold them accountable to the electorate. If the electorate believes that a judge ought to be removed because of a decision rendered in an isolated case, that is its right.

Striking an appropriate balance between independence and accountability may depend on efforts to persuade voters that if a judge's reelection is made to turn on how he or she ruled in an isolated case, it can undermine judicial independence. If voters want judges to be impartial and to uphold their constitutional rights, they must be convinced to cast their ballots in light of the judge's record as a whole.

Alternatively, voters may be persuaded to reconsider the methods by which state judges are selected. Jurisdictions with highly partisan or politicized elections may wish to consider adopting the so-called Missouri plan, long supported by the American Judicature Society and the American Bar Association, among other organizations. In Missouri-plan states, judges are initially chosen by judicial selection commissions, rather than by election. At the conclusion of their terms, they stand for retention election, in which they do not run against other candidates, but against their own record, and must receive majority voter support to remain in office.

VI. TASK FORCE RECOMMENDATIONS

The preceding section details the variety of circumstances in which legitimate judicial criticism can degenerate into a form of intimidation threatening not just to judicial independence, but also to our individual rights and freedoms that only independent judges can protect. The question then becomes what to do about it.

ANALYSIS AND RECOMMENDATION 1

Although some forms of judicial intimidation—death threats, for example—are unlawful, the vast proportion of independence-threatening speech at issue in this report is protected by the First Amendment, and for good reason. We depend upon the largely unfettered expression of views to expose problems in government and to find solutions. Occasionally, such expression takes the form of unfair or intimidating

criticism. Were we, however, to punish or censor such excesses, we would risk chilling the dissemination of reasoned criticism by speakers fearful that their speech might be subject to sanction. Therefore, despite the adverse impact on judicial independence, legislators cannot and should not be prevented from threatening judges with impeachment; interest groups cannot and should not be barred from campaigning against judges' reelection on account of their decisions in isolated cases; and neither press nor public can or should be silenced on the grounds that their criticism is misleading.

Recommendation: The Task Force recommends against the adoption of any proposal that seeks to censor or sanction excessive but otherwise lawful criticism of judges.

ANALYSIS AND RECOMMENDATION 2

In a constitutional democracy that depends for its success upon the freedom of speech to provide the people with the information they need to govern themselves intelligently, there is only one appropriate response to unfair, excessive, and even intimidating speech, and that is counterspeech.

Without denigrating the importance of a response from the organized bar to excessive judicial criticism, there are inherent limits on what lawyers can accomplish in their responses to unjust judicial criticism. A skeptical public may remain unpersuaded by arguments that a judge has been attacked unfairly if the only people making those arguments are lawyers who may have clients with cases to be decided by that judge. Further, responses that come primarily from lawyers may create the perception that the judicial system is protecting its own.

To the extent possible, responses to unjust criticism should not come only from practicing lawyers. Law professors, for example, are well situated to serve as a credible source of information. Concerned citizens who are not necessarily lawyers, such as those who are members of Citizens for Independent Courts and the League of Women Voters, likewise have an important role to play. Participation by such citizens can help the public to think of the judicial system as one that serves all citizens and is worth defending against attacks.

Nonlawyers may be most effective in their responses if they work with local bar associations and bear in mind the guidelines provided

for responses from bar associations as outlined in Analysis and Recommendation 3.

Recommendation: Because bar-generated responses to attacks on judges may be perceived as self-serving, the Task Force recommends that legal educators, civic organizations, community leaders, and other concerned citizens be involved in response efforts.

ANALYSIS AND RECOMMENDATION 3

Given ethics restrictions on counterspeech by targeted judges, primary responsibility for the task of defending judges against unjust criticism frequently falls to officers of the court—the practicing bar. The bar is uniquely well-positioned to be aware of intimidating or otherwise unjust judicial criticism when it arises, and to respond accordingly.

The American Bar Association has developed a model plan for responding to unjust criticism, which is attached as Appendix C to this report. In the Task Force’s view, the key to the success of this or any counterspeech initiative is at least fourfold.

First, the response to unjust criticism must be prompt. A delay of only a few days allows the criticism to have more impact and the response to be overlooked or ignored.

Second, those responding to criticism must be mindful not only of when a response to criticism is appropriate and necessary, but also when it is not. In Section V above, the Task Force identified the limited circumstances in which independence-threatening criticism occurs, which is where remedial counterspeech would be in order. That leaves all manner of legitimate criticism—however harsh—with respect to which a response from the bar is neither necessary nor appropriate. It is incumbent on the bar to familiarize itself sufficiently with the facts of those cases in which judges are severely criticized to enable it to make an intelligent assessment of when intervention is warranted, and when it is not.

The third point follows from the second. An effective plan for responding to unjust criticism of judges must recognize that the goal is not to protect judges, but to protect the rights of the people. If judges are intimidated, they may seek to appease their intimidators at the expense of disfavored litigants and their constitutional rights. For that reason,

neutralizing judicial intimidation with counterspeech is enormously valuable. At the same time, when judges make erroneous decisions at the expense of our constitutional rights and responsibilities, they deserve criticism. To attempt to protect judges from legitimate criticism also disserves the individual rights that we seek to protect and preserve.

Fourth, if the bar is to play a credible role in responding to unjust criticism, it must not be perceived as a “shill” for the judges it defends. When the bar decides to respond in a given case, it should be because the bar has made an independent assessment that a response is necessary and appropriate—and not simply because a judge has requested that the bar intercede on his or her behalf.

Recommendation: The Task Force recommends that national, state, and local bar organizations develop plans for responding to unjust criticism of judges, such as those developed by the American Bar Association. Such plans should provide for a prompt response to misleading or potentially intimidating criticism, without seeking to defend judges for the sake of defending them when they are subjected to nonintimidating, nonmisleading criticism, and should involve nonlawyers as participants whenever possible.

ANALYSIS AND RECOMMENDATION 4

A reasoned response to intimidating criticism can have the desired effect only if it persuades the target audience. Unless the public understands and supports judicial independence in principle, it is unlikely to be troubled by judicial intimidation when called to its attention. Indeed, the public may even support efforts to intimidate judges into deciding cases as the majority would have them decided, as a means to preserve judicial accountability. The effectiveness of any short-term plans to respond to unjust criticism when it arises must therefore be coupled with a long-term plan to educate the public on the role of courts and judicial independence and accountability in American government. Such plans might also logically include efforts to better publicize existing mechanisms for judicial discipline, as discussed earlier in this report.

Citizens for Independent Courts, along with the American Judicature Society and the American Bar Association, among other organizations, have initiated a range of programs designed to reach

school children and adults with general information on the role of courts and the importance of judicial independence. The Task Force supports such efforts.

Recommendation: The Task Force recommends the development and continuation of programs designed to better inform school children and adults on the importance of courts in protecting legal rights and responsibilities, so as to ensure public receptivity to an impartial, independent judiciary.

VII. CONCLUSION

In this report, the Task Force has identified and analyzed a number of significant problems that have arisen in isolated areas, where the line separating criticism from intimidation has been crossed, and which together constitute a serious concern that needs to be addressed. Specifically, the Task Force has identified problems in the following areas: (A) threats to judges' lives or safety; (B) threats of removal; (C) threats in pending cases; (D) misleading criticism; (E) judicial discipline; and (F) judicial elections. To address these problems, the Task Force recommends a counterspeech campaign that responds to unjust or intimidating criticism when it occurs, and that seeks to educate the public on the role of courts and the importance of judicial independence in American government.

NOTES

1. Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. Pa. L. Rev. 209, 216 (1993).
2. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. Pa. L. Rev. 1104, 1112–13 (1976).
3. Declaration of Independence, para. 11 (U.S. 1776).
4. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), p. 161.

5. *Ibid.*

6. Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, vol. 1 (New York: Macmillan, 1971), pp. 133–41.

7. Alexander Hamilton, *The Federalist* Nos. 78, 79.

8. For an excellent historical treatment of the early periods of counter-majoritarian criticism, see Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998). The discussion that follows draws to a significant extent on Professor Friedman's work.

9. William Giles to Thomas Jefferson, March 16, 1801, reprinted in Dice Robins Anderson, *William Baruch Giles: A Biography* (Menasha, Wisc.: George Banta Pub. Co., 1915), p. 77.

10. The most notable example is President Jackson's alleged statement that "John Marshall has made his decision, now let him enforce it." Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little, Brown and Co., 1926), p. 759.

11. *Ibid.*, p. 773.

12. Quoted in Mary L. Volcansek and Jacqueline Lucienne Lafon, *Judicial Selection: The Cross-Evolution of French and American Practices* (New York: Greenwood Press, 1988), p. 90.

13. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 Am. B. Found. Res. J. 345, 346–48. Although, with few exceptions, the independence of state judges is no longer preserved by life tenure, various other mechanisms have, over the course of time, been included in state constitutions to preserve some measure of state judicial independence. Illustrative mechanisms include: lengthy terms of office; merit selection systems in which judges stand for retention elections only after they are initially appointed on the basis of merit; oaths of office obligating judges to uphold the law; specific constitutional guarantees of a separate, unified, or independent judicial branch; and tri-branch governmental structures in which the judiciary keeps the political branches in check through the exercise of judicial review, which by implication requires that the judiciary remain independent of those branches.

14. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 Hamline L. Rev. 1 (1996).

15. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

16. *New York Daily Tribune*, March 10, 1857, p. 5.

17. *New York Daily Tribune*, March 17, 1857, p. 4.

18. *New York Daily Tribune*, March 7, 1857, p. 5.

19. Quoted in Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton: Princeton University Press, 1973), p. 18 (alteration in original).

20. *Ibid.* (citations omitted).

21. *Ibid.*, p. 19. The establishment of the Conference of Senior Circuit Judges (later renamed the Judicial Conference of the United States), and later the circuit judicial councils and the Administrative Office of the U.S. Courts, were among the improvements.

22. Quoted in Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* (New York: New York University Press, 1983), p. 280.

23. *Ibid.*, p. 281.

24. Jack Harrison Pollack, *Earl Warren: The Judge Who Changed America* (Englewood Cliffs, N.J.: Prentice Hall, 1979), p. 289 (discussing “Nixon’s campaign fulminations over the need to replace ‘Warrenite’ justices with ‘law and order’ appointees”).

25. Thus, for example, when the Jeffersonian Republicans disestablished the federal courts created by the Judiciary Act of 1801—which had the effect of putting the Federalist judges occupying those courts out of their jobs—the Federalists protested vociferously that the repeal undermined judicial independence as embodied in the good behavior clause. The Federalists objected again in 1805, this time to greater effect, that the Jeffersonian-Republican-led effort to impeach Justice Samuel Chase because of his inflammatory rulings and statements from the bench, was an inappropriate attempt to muzzle the courts and compromise their independence. A century later, when the courts were under sustained attack by progressive reformers, the president of the American Bar Association came to the courts’ defense: “Judicial judgments are not accorded the same reception as formerly,” he said, noting that “the courts . . . are frequently and fiercely attacked,” which, in his view, threatened to “destroy confidence in the courts and . . . make a subservient judiciary.” American Bar Association, Address of the President, 33 Report of the Thirty-First Annual Meeting of the American Bar Association 341, 359 (1908). President Franklin Roosevelt’s Court-packing plan likewise prompted strenuous objections from opponents who argued that it would render the Supreme Court subservient to the president. *Reorganization of the Fed. Judiciary: Hearings on S.1392 Before the Senate Comm. on the Judiciary, 75th Cong.*, pt. 3, p. 546 (1937) (statement of Raymond Moley) (characterizing the Court-packing plan as a “deliberate attempt by one branch of the Government to weaken another branch,” which has “very few parallels in our history,”

“none of [which] is creditable”).

26. Thus, for example, in 1913, when Congress abolished the Article III Commerce Court it had created three years earlier, it took special care to relocate the judges whose offices were being abolished. See Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665 (1969).

27. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315, 321–22 (1999) (“Notwithstanding the well-known frustration of President Jefferson in response to this failure, however, it did have effect, if only in curbing partisan behavior on the bench.”) (footnotes omitted).

28. Deborah Tedford, “Federal Judges Warned of Abduction Plot,” *Houston Chronicle*, February 21, 1996, p. 17.

29. *Ibid.*

30. David E. Rovella, *Judges Target of Abortion Foe Web Site*, Nat’l L.J., November 23, 1998, p. A6.

31. The judges at issue included Harold Baer, Fred Biery, and Thelton Henderson. See Ralph Z. Hallow, “Republicans Out to Impeach ‘Activist’ Jurists,” *Washington Times*, March 12, 1997, p. A1 (reporting on the majority whip’s efforts to initiate impeachment proceedings against Baer, Biery and Henderson); Don Van Natta, Jr., “Judges Defend a Colleague from Attacks,” *New York Times*, March 29, 1996, p. B1 (discussing the Baer episode).

32. Van Natta, Jr., “Judges Defend a Colleague from Attacks,” p. B1.

33. Ross E. Milloy, “Suit Fights Absentee Vote By Soldiers at Texas Base,” *New York Times*, March 2, 1997, p. A22; Hallow, “Republicans Out to Impeach ‘Activist’ Jurists.”

34. Hallow, “Republicans Out to Impeach ‘Activist’ Jurists.”

35. Michael Finn, “Tenn. Senate Asks Congress to Impeach U.S. Judge Nixon,” *Chattanooga Free Press*, May 20, 1997, p. B3; Karin Miller, “House Panel OKs Weakened Judge Impeachment Resolution,” *Chattanooga Free Press*, May 28, 1997, p. B3.

36. Associated Press, “Effort to Impeach Federal Judge Stalls,” February 9, 1999.

37. Joseph Slobodzian, *Did this Judge Free a Killer?* Nat’l L. J., November 3, 1997, p. A6.

38. Jon O. Newman, *The Judge Baer Controversy*, 80 *Judicature* 156, 158 (1997).

39. David Barton, *Impeachment! Restraining an Overactive Judiciary* (Aledo, Tex.: Wallbuilder Press, 1996), p. 49 (“Judges who ignore jury decisions, or who pander to criminals while ignoring the obvious harm to soci-

ety, clearly fulfill the standards for impeachment . . .”).

40. *Hearing of the ABA Commission on Separation of Powers and Judicial Independence*, pp. 203–04, (February 21, 1997) (testimony of John Choon Yoo) (observing that “of all the elected or appointed officials in our government, either national or state, federal judges are the only ones who are institutionally independent and institutionally immune from political pressure,” and that Judge Baer was too “sensitive to political criticism,” because “[t]here was no real threat he was going to be impeached”).

41. Letter from Robert Dole to Jon O. Newman, et al., April 9, 1996, *reprinted in* Newman, 80 *Judicature* at 161, *supra* note 38.

42. See Martin Kasindorf, “Judgments Raise Some Objections/Clinton Denies Pressuring Baer,” *Newsday*, April 3, 1996, p. A19.

43. See Neil MacFarquhar, “Federal Judge to Resign, Citing Political Attacks,” *New York Times*, June 5, 1996, p. B4 (discussing resignation of circuit judge Lee Sarokin). Many greeted Judge Sarokin’s explanation for his resignation with skepticism. See, e.g., *Hearing of the ABA Commission on Separation of Powers and Judicial Independence*, pp. 195–96 (October 11, 1996) (testimony of Fred Graham) (“I do not believe [Sarokin] really makes a case or attempts to make a case that he or any other federal judge—that their independence was, in fact infringed upon, by . . . the kind of criticism that he cited”).

44. Associated Press, “Committees Starting From Scratch Handling Unusual Bill,” March 8, 1999.

45. The episode, involving United States district judge Harold Baer, is reported in Van Natta, Jr., “Judges Defend a Colleague from Attacks.”

46. Stephen B. Bright, *Political Attacks on the Judiciary*, 80 *Judicature* 165, 172 (1997) (“Regardless of why Judge Baer eventually changed his ruling . . . there will always be the appearance that he backed down due to the barrage of criticism he received”).

47. *Hearing of the ABA Commission on Separation of Powers and Judicial Independence*, pp. 139–40 (October 11, 1996) (testimony of Andrew Coats) (“[T]he pending case aspect of [the Baer incident] seems . . . to make it somewhat more difficult” because “interference in the process seems . . . to be more of a danger than just the criticism after the fact”).

48. William Schneider, “Getting Out Front on the Crime Issue,” *National Journal*, April 11, 1996 (“Did a federal judge respond to political pressure . . . ? Of course he did. And by doing so, he saved Clinton, the federal judiciary and himself a whole lot of grief”).

49. Bill Rankin, “Campaign Flier Targeting Judge Criticized by Legal Ethics Experts,” *Atlanta Constitution*, June 19, 1998, p. 6F.

50. Brad Stetson, “Author Scathingly Indicts Judiciary,” *Orange County*

Register, August 16, 1998, p. F37.

51. *Ibid.*

52. NBC-TV, *Today*, transcript, June 8, 1998.

53. Although Heston did not indicate his source in the interview, he was apparently relying on data generated by the Philadelphia District Attorney's office. Transcript of speech by Judge Norma Shapiro before the American Judicature Society Task Force on Judicial Independence, October 28, 1998 ("I have tried in the last few years to verify those statistics. I can find no basis for it whatsoever. The figures are totally and exclusively in the control of the district attorney").

54. *Hearing of the ABA Commission on Separation of Powers and Judicial Independence*, pp. 191, 198 (December 13, 1996).

55. *Ibid.*, p. 199.

56. Transcript of speech by Judge Norma Shapiro ("I didn't release people fast enough to suit the class or the city so there was a new consent decree in which a special prison master would do it. However, in each one of those 7,000 decrees I personally reviewed what he did to be sure he complied with one thing: it couldn't be anyone accused of a violent offense such as rape, homicide and no one who had been accused of doing anything with a gun. And to my knowledge, those rules were never violated").

57. Quoted in Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 314 (1997).

58. *Ibid.*

59. Jack Newfield and Maggie Haberman, "Three Stooges Are Court Clowns," *New York Post*, September 29, 1998, p. 12.

60. Don Russell, "Temin's Gig Is Up," *Philadelphia Daily News*, December 3, 1998, p. 3.

61. Press Release, State of Alabama, Governor's Office, November 4, 1997.

62. Bright, *supra* note 46, at 167-70 (detailing the misleading criticism aimed at former Tennessee justice Penny White and Mississippi justice James Robertson during their reelection campaigns).

63. *Ibid.* at 172. For example, Canon 3B(9) of the ABA Model Code of Judicial Conduct provides that "a judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." The accompanying commentary adds that "the requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition."

64. *Reprinted in Newman, supra* note 38, at 161.

65. In his testimony before the ABA Commission, Court Television anchor Fred Graham was unapologetic about the role of the media in its reporting of judicial criticism, noting that after Senator Dole attacked several Democratic appointees, the press responded by putting Dole's arguably misleading accusations in context, for example, by reporting that Dole had voted to confirm the appointees he criticized President Clinton for nominating. *Hearing of the ABA Commission on Separation of Powers and Judicial Independence*, p. 194 (October 11, 1996).

66. *See, e.g.*, Harriet Chiang, "Judicial Watchdog's Probes Assailed," *San Francisco Chronicle*, July 24, 1998, p. A1 (discussing disciplinary proceedings filed by the state Commission on Judicial Performance against Justice J. Anthony Kline and other California judges, on the basis of statements made in judicial opinions); Gary Spencer, *Court of Appeals Removes Duckman; Dissents Stress Threats to Independence*, N.Y. L. J., July 8, 1998, p. 1 (reporting on removal of Judge Lorin Duckman, in part because of his rulings in misdemeanor cases).

67. *Morrow v. Hood Communications, Inc.*, 59 Cal. App. 4th 924, 927 (1997) (Kline, J., dissenting).

68. *Ibid.* (citation omitted).

69. Notice of Formal Proceedings in *Inquiry Concerning J. Anthony Kline, No. 151*, Before the State of California Commission on Judicial Performance 2 (filed June 30, 1998).

70. Chiang, *supra* note 66.

71. Spencer, *supra* note 66.

72. *Ibid.*

73. *Ibid.*

74. Laura Vozella, "Judicial Panel Affirms Rebuke of McBryde," *Fort Worth Star-Telegram*, September 20, 1998, p. 1.

75. *Quoted in* Chiang, *supra* note 66.

76. *See, e.g.*, Spencer, *supra* note 66.

77. *Quoted in* Chiang, *supra* note 66.

78. Jean Guccione, "Discipline Board: Charges Resulted From Kline's Vote," *Los Angeles Daily Journal*, July 13, 1998.

79. *See, e.g.*, Kirk Loggins, "Activists Target Tennessee Judge," *Tennessean*, July 8, 1998, p. 1A (discussing election defeat of Tennessee justice Penny White, and ongoing effort to defeat Tennessee justice Adolpho Birch, because of rulings in criminal cases).

80. "Judicial Independence Crucial, Justice Warns," *Chicago Tribune*, December 6, 1998, p. C13.

81. *Ibid.*

82. Jenifer Warren, "State's Chief Justice Says He Will Fight Back," *Los Angeles Times*, March 6, 1998, p. A3; Pete Wilson and Dianne Feinstein, "Don't Let Factions Oust Judges Over Single Decision," *Los Angeles Daily News*, October 29, 1998, p. N19.

83. R. Bruce Dold, "Judges Up For Election Walking a Delicate Tightrope," *Chicago Tribune*, October 23, 1998, p. N27.

84. Thomas Suddes, "Editorials and Forum," *Plain Dealer*, May 6, 1998, p. 11B (discussing opposition to Pfeifer's reelection based on the school funding cases and concluding: "So, by this November, Republican Justice Pfeifer just may have a race—and, possibly, some additional insights into the school-funding case").

85. *Quoted in* Stephen B. Bright, *Political Attacks on the Judiciary*, 80 *Judicature* 165, 166 (1997).

86. *Ibid.* (alteration in original) (footnote omitted).

87. Letters to the Editor, *Tennessean*, August 3, 1998, p.14A.

88. For a discussion of *how* such critics might be taken to task, please see the Recommendations section of this report.

89. *Quoted in An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence*, p. 48 (1997).

90. The legislative address, for example, typically enables the general assembly to petition the governor for removal of a judge upon a simple majority vote of both houses of the legislature.

91. Thomas E. Baker, *The Good Judge: Report of the Twentieth Century Fund Task Force on Federal Judicial Responsibility* (New York: Priority Press Publications, 1989), p. 10.

APPENDIX A:

MEMORANDUM ON ETHICAL RESTRICTIONS ON LAWYERS WHO CRITICIZE JUDGES

To: Charles Geyh, Reporter to Citizens for Independent Courts
Task Force on the Distinction between Intimidation and
Legitimate Criticism of Judges
From: Lisa Dewey, Associate, Piper & Marbury, L.L.P., Amy
Potter, Law Clerk, Piper & Marbury, L.L.P.
Date: May 28, 1999
Subject: Ethical Restrictions on Lawyers Who Criticize Judges

INTRODUCTION AND SUMMARY

Lawyers may criticize judges as long as the statements made are true and do not disrupt the functioning of the judicial system.¹ Lawyers have the same First Amendment right as non-lawyers to criticize judges, but lawyers must also abide by the ethical rules of their states. State ethical rules are based largely on the ABA Model Rules of Professional Conduct and the Model Code of Professional Responsibility.² These ethical rules impose sanctions on lawyers who make false statements about judges or whose criticism interferes with the fairness of judicial proceedings.³ Lawyers are

uniquely well-situated to inform the public of possible problems with the judicial system but, at the same time, must ensure that their comments do not interfere with the administration of justice.⁴

Lawyers rarely face sanctions for criticism unless they knew or should have known that the criticism was false.⁵ When imposing sanctions under ethical provisions, courts must take into account the guarantee of freedom of speech found in the First Amendment. Courts will also consider when the comment took place and what effect, if any, it had on an impending trial. A lawyer retains his or her First Amendment rights to free speech, and sanctions cannot be imposed unless the statements of facts are false or the statements impede the ability of the judiciary to function.

ABA MODEL RULES AND MODEL CODE OF PROFESSIONAL CONDUCT

The ABA's ethical codes governing lawyers are useful in determining what limitations exist on lawyers' criticism of the judiciary. The Model Rules of Professional Conduct and the Model Code of Professional Responsibility⁶ serve as a basis for many state codes of ethics for lawyers. The Model Rules are the most current standard adopted by the ABA, replacing the Model Code in 1983.⁷ Nearly two-thirds of the states have modeled their ethical standards on the Model Rules.⁸ Model Rule 8.2, "Judicial and Legal Officials," states:

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.⁹

MR 8.2 differs slightly from the provisions in the Model Code, which refers only to "knowingly mak[ing] false statements."¹⁰ Under MR 8.2,

it is possible for a lawyer to be sanctioned for statements he or she did not know were false, but could have reasonably discovered were false. The general standard for determining if a statement can be proscribed is that (1) the statement must be false and (2) the lawyer must have known it to be false or have had reckless disregard for the truth of the statement.

The limits on speech imposed by MR 8.2(a) are consistent with the U.S. Constitution's guarantee of freedom of speech.¹¹ The comments to the rules recognize that honest and candid opinions by lawyers can improve the administration of justice, whereas false statements by lawyers can unfairly undermine public confidence in the administration of justice.¹² In addition, lawyers are encouraged to defend judges who are unjustly criticized by others.¹³

A LAWYER'S DUTY TO THE PUBLIC AND TO THE COURTS

Some courts have held that, because they are officers of the court and members of a profession that has developed ethical guidelines, lawyers do not have the same right as non-lawyers to criticize the judiciary.¹⁴ Lawyers have a duty to avoid undermining public opinion of the judiciary by exhibiting disrespect for the courts.¹⁵ Rather, lawyers are encouraged to help promote public confidence in the judicial system. Unfair or inaccurate criticism will not help to improve the judiciary.¹⁶

FIRST AMENDMENT ISSUES ARISING FROM LAWYERS' CRITICISM OF JUDGES

There is a tension between the ethical rules governing a lawyer's conduct when criticizing a judge and that lawyer's First Amendment guarantee of freedom of speech. Ethical rules that limit what a lawyer can or cannot say regarding a judge restrict his or her freedom of speech. Yet such restraints have been upheld in some situations because certain conduct by lawyers may undermine the ability of the

judicial system to function.¹⁷ The Supreme Court of the United States has generally held that conduct protected by the First Amendment cannot be restricted by ethical codes unless the conduct “obstruct[s] the administration of justice.”¹⁸ Thus, criticism by lawyers is protected as long as it does not interfere with judicial functioning. This standard is especially applicable during a trial, but can be used to restrict criticism made at other times.

Courts apply the standards used in libel and defamation cases to situations in which lawyers criticize the judiciary. Public figures, including judges, do not receive as much protection as ordinary citizens. Nevertheless, a defendant will be held liable for statements about public figures that are false and said with “actual malice.”¹⁹ This standard has been applied to lawyers who criticize judges and it is consistent with the standards developed in MR 8.2.

Distinctions are drawn between comments made during or prior to a trial, comments made after the litigation has been resolved, and comments made during an election campaign. These three situations carry with them different levels of obligations concerning what types of speech are allowed and protected by the First Amendment.

A. Comments Made during a Trial. Generally, criticisms made by lawyers involved in a pending or recently concluded trial are more suspect than statements made by lawyers not involved in the proceedings.²⁰ This is because of the fear that publicity may interfere with the parties’ ability to get a fair proceeding. In addition to MR 8.2, lawyers must also abide by Model Rules 3.5 and 3.6, which pertain specifically to a lawyer’s duty not to influence a judge in a specific case and to ongoing trial publicity, respectively.²¹ First Amendment guarantees in many cases are superseded by the guarantees of fair trials and judicial proceedings. Thus, with certain exceptions, lawyers involved in a pending case cannot comment publicly on matters that would disrupt the proceedings. This includes criticisms of judges in and out of court.

B. Comments Made after a Trial. After a trial, there are two different situations in which a lawyer’s criticism of a judge may be sanctioned. The general standards in MR 8.2 are applicable to these situations. The first situation is criticism of the lower court judge contained in documents submitted to an appellate court. Some criticism is acceptable and may even be required in pleadings in order to fulfill an obligation

to a client, but those criticisms must not be false and should serve the client's interest.²² There is no First Amendment right to accuse judges of criminal acts during a trial that have no basis in the truth.²³ Some courts have read the ethical rules to apply primarily to out-of-court statements to the public, not to papers filed with the court.²⁴

The second situation is general statements made out of court. Again, the nature of the statement and whether it is false determines whether it is protected under the First Amendment.

C. Campaigns for Judicial Office. Candidates for judicial office have a constitutionally protected right to criticize the incumbent judge during the campaign. However, the libel and defamation standards and MR 8.2 apply. None of the candidates may make false statements in violation of MR 8.2.

CONCLUSION

A lawyer may not make false statements regarding a judge and has a general duty, as a member of the profession, to help maintain the public's confidence in the judicial system. The ethical rules of the states punish lawyers who exceed those limitations when criticizing the judiciary. States cannot prohibit all criticism of judges because lawyers as well as non-lawyers enjoy the First Amendment protection of freedom of speech. Sanctions are generally imposed only on lawyers who knowingly make false statements or make statements with a reckless disregard for the truth. Such statements are normally not protected by the First Amendment. However, lawyers have been disciplined for statements that fail to uphold the dignity of the judicial process, or that disrupt the administration of justice or undermine the ability of the judicial system to function. Lawyers do not abandon their constitutional rights when they join the bar, but they do face ethical guidelines that nonlawyers do not in order to help to ensure that the integrity of the judicial system is maintained.

NOTES

1. See *Model Rules of Professional Conduct*, Rule 8.2 (1998); *ABA/BNA Lawyers' Manual on Professional Conduct* §101:601 (1993).
2. *Model Code of Professional Responsibility*, reprinted in *ABA/BNA Lawyers' Manual on Professional Conduct*, §101:601.
3. *ABA/BNA Lawyers' Manual on Professional Conduct* §101:601-604.
4. 2 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, §8.2:101(2d ed., 1998).
5. *Model Rules of Professional Conduct*, Rule 8.2. But see *In re Johnson*, 729 P.2d 1175 (Kan. 1986) (lawyer may be disciplined for criticisms motivated by reasons other than a desire to improve the legal system).
6. *Model Code*, note 3, *supra*.
7. *Model Rules of Professional Conduct*, Preface, p. viii.
8. *Id.* However, some states still use the provisions established in the Model Code, so consideration of the Code is important.
9. *Model Rules of Professional Responsibility*, Rule 8.2.
10. *Model Code of Professional Responsibility*, DR 8-102, 8-103, reprinted in *ABA/BNA Lawyers' Manual on Professional Conduct*, § 101:601.
11. See *Hazard, supra*.
12. *Model Rules of Professional Conduct*, Rule 8.2, cmt. 1, 2.
13. *Model Rules, supra* at cmt. 3.
14. See *Hazard, supra*; e.g., *In re Riley*, 691 P.2d 695, 705 (Ariz. 1986) (public criticism of judge by lawyer not appropriate because private grievance could have been submitted).
15. See *Comm. v. Rubright*, 414 A.2d 106, 110 (Pa. 1980) (there is an absolute duty to uphold dignity of judicial process); *ABA/BNA Lawyers' Manual on Professional Conduct* §101:602.
16. See generally *Matter of Palmisano*, 70 F.3d 483 (7th Cir. 1995), *cert. denied*, 517 U.S. 1223 (1986) ("indiscriminate accusations of dishonesty . . . do not help cleanse the judicial system of miscreants").
17. See, e.g., *United States Dist. Court for the Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993) ("although [lawyer] does not surrender freedom of expression, he must temper his criticism in accordance with professional standards of conduct").
18. *In re Sawyer*, 360 U.S. 622, 636 (1959). See also, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (cannot punish speech protected by First Amendment unless there is "substantial likelihood of material prejudice").

19. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). See also *Garrison v. Louisiana*, 379 U.S. 64 (1964) (applying standard in *New York Times Co. v. Sullivan* to lawyer who disparaged eight judges and holding that true statements are protected by First Amendment).

20. *Hazard, supra*, §8.2:201.

21. *Model Rules of Professional Conduct*, Rules 3.5, 3.6.

22. *ABA/BNA Lawyers' Manual on Professional Conduct* §101:611.

23. See, e.g., *Ramirez v. State Bar of California*, 619 P.2d 399 (Cal. 1980).

24. See *United States v. Brown*, 72 F.3d 25 (5th Cir. 1995).

APPENDIX B:

MEMORANDUM ON ETHICAL CONSTRAINTS LIMITING A JUDGE'S FIRST AMENDMENT FREEDOM OF SPEECH

To: Edward W. Madeira, Jr., Member of Citizens for Independent Courts Task Force on Criticism of Judges
From: Daniel M. Schaffzin, Pepper Hamilton, L.L.P.
Date: June 1, 1999
Subject: Ethical constraints limiting a judge's First Amendment freedom of speech

I. SCOPE OF MEMORANDUM

This memorandum discusses the recognized canons of judicial conduct as they limit a judge's constitutional right to free speech. Pursuant to instructions, the memorandum does not engage in a survey of the pertinent codes and common law governing judicial conduct in each of the fifty states. The "Discussion" section does, however, utilize case law and judicial canons from several states to demonstrate current standards and conflicts pertaining to the issue at hand. Future users of this memorandum may use the following West's key numbers in updating its research: *Judges* 11(2), 11(4), 11(7), 11(8), 21; and *Constitutional Law* 82(11),

90.1(1.5). Secondary sources consulted include Martin J. McMahon, Annotation, *First Amendment Protection for Judges or Government Attorneys Subjected to Discharge, Transfer, or Discipline Because of Speech*, 108 A.L.R. Fed. 117 (1992 & Supp. 1997); Jeffrey M. Shaman *ET AL.*, *Judicial Conduct and Ethics* §§ 10.01–10.38 (2nd ed. 1995 & Supp. 1997); Robert M. O’Neil, *Assaults on the Judiciary*, *TRIAL*, September 1998, at 54; Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 *HOFSTRA L. REV.* 703 (1997); Gregory C. O’Brien, Jr., *Speech May Be Free, and Talk Cheap, But Judges Can Pay a Heavy Price for Unguarded Expression*, 28 *LOY. L.A. L. REV.* 815 (1995); Erwin Chemerinsky, *Is It The Siren’s Call: Judges and Free Speech While Cases Are Pending*, 28 *LOY. L.A. L. REV.* 831 (1995); Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611 (1987); Edmund B. Spaeth, Jr. with Peggy B. Wachs, *The Judge’s Three Worlds: A Judicial Ethics Course* (1996); Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 *The Long Term View* 71 (1997); Erwin Chemerinsky, *In Defense of Speech: Judges and the First Amendment*, 4 *The Long Term View* 78 (1997); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589 (1989); and Clarence W. Wolfram, *Modern Legal Ethics* §17.5 (Practitioner’s ed. 1986).

II. QUESTION PRESENTED

What are the nature and extent of the ethical constraints that limit a judge’s First Amendment right to speak openly to members of the public, both to address matters of public importance and to defend, clarify, and explain his or her judicial rulings?

III. DISCUSSION

A judge does not forfeit his or her First Amendment rights upon ascending to the bench. William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* (1989)

589, 594. Under the Model Code of Judicial Conduct (hereinafter “Model Code”) and similar state canons of judicial ethics, however, a judge may face more stringent limitations on his or her free speech than an ordinary citizen. See generally Martin J. McMahon, Annotation, *First Amendment Protection for Judges or Government Attorneys Subjected to Discharge, Transfer, or Discipline Because of Speech*, 108 A.L.R. Fed. 117 (1992 & Supp. 1997). The Model Code expressly prohibits a judge from making any public statement that affects the outcome or impairs the fairness of a pending proceeding. *Model Code Canon 3B(9)* (1990); see also *Pennsylvania Code of Judicial Conduct* (hereinafter “Pennsylvania Code”) Canon 3A(6) (1999)(prohibiting public comment about pending proceeding in any court); *New Jersey Code of Judicial Conduct* (hereinafter “New Jersey Code”) Canon 3A(8) (1999)(same). In addition to this express prohibition, a judge must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” *Model Code Canon 2A*; see also *Pennsylvania Code Canon 2A* (same); *New Jersey Code Canon* (same), and may not act in a way which casts reasonable doubt upon the impartiality of the judge, demeans the judicial office, or interferes with the performance of judicial duties. *Model Code Canon 4A*; see also *Pennsylvania Code Canon 4A* (directing judge to “engage in activities to improve the law, the legal system, and the administration of justice”); *New Jersey Code Canon* (allowing quasi-judicial activities that do not cast doubt on judge’s ability to decide issue impartially and for which judge receives no compensation). A judge may, however, “speak, write, teach, and participate in other extra-judicial activities concerning the law . . . subject to the requirements of this code.” *Model Code Canon 4B*; see also *Pennsylvania Code Canon 5* (avocational activities must not “detract from the dignity of his office or interfere with the performance of his judicial duties”); *New Jersey Code Canon 4A* (same as Model Code section). Abiding by the direct and implied prohibitions on speech set forth in the canons of judicial conduct, a judge speaking to the public must be wary of both the content of his speech and the possible effect on its audience. See Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 *HOFSTRA L. REV.* 703, 712–13 (1997).

The United States Supreme Court has not yet considered what limits the First Amendment imposes on a state’s authority to restrict judges from publicly commenting on pending cases or engaging in

public debate. See *Broadman v. Commission on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998). Accordingly, courts have weighed ethical provisions regulating extrajudicial speech against a variety of constitutional standards. See, e.g., *In re Judicial Conduct*, 603 So.2d 494, 498 (Fla. 1992)(state must accomplish legitimate interest in restraining judicial speech through narrowly-tailored limitations not exceeding that necessary to accomplish state's interests); *In re Inquiry of Broadbelt*, 683 A.2d 543, 552 (N.J. 1996)(regulation of judicial speech permitted if furthering substantial government interests unrelated to suppression of expression and no more restrictive than necessary). Generally, courts evaluating the constitutionality of restrictions on judicial speech balance the effect of the challenged speech on "the independence and integrity of the judiciary" against the "imposition of restrictions on a judge's free speech rights." *Broadbelt*, 683 A.2d at 552; see also *In re Disciplinary Proceeding Against Sanders*, 955 P.2d 369, 376 (Wash. 1998)(balancing "government's interest in a fair and impartial judiciary" against "judge's interest in the right to express his or her views").

Courts have assessed the validity of four types of extrajudicial expression: statements concerning pending cases, statements concerning courts and case procedure, statements responding to public criticism, and statements concerning controversial legal issues. See, e.g., *Broadbelt*, 683 A.2d at 543 (assessing conduct of judge who gave television commentary on cases pending outside of jurisdiction); *Office of Disciplinary Counsel v. Souers*, 611 N.E.2d 305 (Ohio 1993)(assessing judge's media statements defending overturned sentencing order); *Sanders*, 955 P.2d at 369 (Wash. 1998)(assessing speech of state supreme court justice at anti-abortion rally); *In re Conard*, 944 S.W.2d 191 (Mo. 1997)(assessing judge's response to public attacks on ruling of his court). In addition, courts have evaluated the limits on the speech of candidates for judicial office. See, e.g., *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993)(assessing state election rule regulating speech of judicial candidates). For the purposes of this memorandum, each form of extrajudicial expression will be considered individually:

A. Judicial Comment on Pending Cases. The issue of the appropriateness of a judge's public statements of opinion arises most frequently in situations where the commentary concerns a matter pending before the judge. Edmund B. Spaeth, Jr., with Peggy B.

Wachs, *The Judge's Three Worlds: A Judicial Ethics Course* 135 (1996). Under the 1990 Model Code, a judge may 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.” *Model Code Canon 3B(9)* (emphasis added). In many states, including Pennsylvania and New Jersey, proscriptions against judicial speech concerning pending matters may be broader than the Model Code. *See Pennsylvania Code Canon 3A(6)(1999)* (ordering judges to “abstain from public comment about a pending proceeding in any court” without regard to the potential impact of the judge’s statements); *New Jersey Code Canon 3A(8)* (same); *see also Michigan Code of Judicial Conduct Canon 3A(6)* (identical provision). Under both the Model Code and parallel state codes, the prohibition on speech concerning pending cases “continues during any appellate process and until final disposition,” but does not extend to “public statements in the course of [a judge’s] official duties or explan[at]ions for public information purposes the procedures of the court.” *Model Code Canon 3B(9)*; *Model Code Commentary to Canon 3B(9)*.

Acting on these express prohibitions, courts have with rare exception upheld disciplinary action taken against judges who have willfully chosen to speak publicly on the merits of pending matters. *See In re Schenck*, 870 P.2d 402, 442 (Or. 1994) (upholding suspension of judge whose newspaper editorial discussed specific case and criticized district attorney handling pending cases); *Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (Cal. 1988) (upholding discipline of judge who discussed draft opinion with press before notifying parties of his ruling). *But see U.S. v. Yonkers Board of Education*, 946 F.2d 180, 184 (2d. Cir. 1991) (Canon 3B(9) not violated when judicial statements about a pending case restate comments previously made by commenting judge in open court); *Goldman v. Nevada Comm’n on Judicial Discipline*, 830 P.2d 107, 136–137 (1992) (judge may comment on case no longer pending). While judges rarely offer unprompted statements on ongoing cases, a judge must use great caution when facing media requests to speak publicly on the merits of a pending case. Gregory C. O’Brien, Jr., *Speech May Be Free, and Talk Cheap, But Judges Can Pay a Heavy Price for Unguarded Expression*, 28 *LOY. L.A. L. REV.* 815, 824 (1995). Two recent cases outline the considerations made by courts evaluating the propriety of extrajudicial

statements made in response to such requests. See *Broadman v. Comm'n on Judicial Performance*, 959 P.2d at 715; *In re Inquiry of Broadbelt*, 683 A.2d at 543.

In *Broadman*, a trial judge made comments to several television stations and magazines about a case pending on appeal in which he ordered the use of the Norplant contraceptive device as a condition of probation. *Id.* at 725. The Supreme Court of California held that the judge “engaged in unjudicial conduct by violating a canon of judicial conduct . . . with knowledge of its restrictions. By making public comments in an attempt to justify and defend his decisions while those decisions were pending, [the judge] adopted the role of an advocate.” *Id.* at 729. The court concluded that the judge’s comments subjected him to discipline where they discussed the merits of ongoing cases and were “prejudicial to public esteem for the judicial office.” *Id.*

In *Broadbelt*, a trial judge who had appeared on “Court TV” and CNBC over fifty times as a commentator on high-profile cases questioned the validity of a request of an overseeing judge to refrain from further television appearances. *Id.* at 545. Although the judge made no statements about cases pending in New Jersey, the state Supreme Court found his conduct to violate New Jersey Code Canon 3A(8)’s restriction on judicial statements regarding cases pending “in any court” in any jurisdiction. *Id.* at 546 (citing *In re Hey*, 425 S.E.2d 221, 222–24 (W.Va. 1992)). Additionally, where the judge’s frequent appearances caused him to be identified with the program, his conduct violated New Jersey Code Canon 2B in “lend[ing] the prestige of judicial office to advance the private interests of others.” *Id.* at 550. Because the judge’s television commentary “was inappropriate and had the potential to compromise the integrity of the judiciary,” the court defended its broad reading of the judicial canons as a means of “avoid[ing] the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction.” *Id.* at 548.

Although the U.S. Supreme Court has not set forth a binding standard strictly prohibiting extrajudicial commentary on pending matters, the limitation on a judge’s speech about ongoing cases “is clearly a content-based restriction.” Chemerinsky, *Is It The Siren’s Call: Judges and Free Speech While Cases Are Pending*, 28 *LOY. L.A. L. REV.* 831, 841 (1995). Any public statement by a judge involving “the facts, applicable law, or merits” or “the parties or their attorneys” in a pending case

risks violating Model Code Canon 3B(9). William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589, 598 (1989). Judges should therefore deliberately avoid any extrajudicial statement about a pending proceeding; both discrete public remarks and those that are objectively innocuous may be interpreted to create an appearance of bias. *Id.*

B. Judicial Comment on Courts and Procedure. Appreciating the need for limited judicial response to inquiries by the public and press in particular, Canon 3B(9) expressly omits from the prohibition against extrajudicial comment on pending cases those statements clarifying court procedures or otherwise discussing the law, the legal system or the administration of justice. *Model Code Canon 3B(9)*; see also Jeffrey M. Shaman *ET AL.*, *Judicial Conduct and Ethics* §10.33 (2nd ed. 1995 & Supp. 1997). In *In re Sheffield*, 465 So.2d 350 (Ala. 1984), the court noted the confusion likely to emerge among judges who are “strictly prohibited from public comments on the merits of a pending case” but “encouraged to explain a pending case in abstract terms.” *Id.* at 355. Recognizing the “fine line between the duties and prohibitions” of Canon 3B(9), the court explained:

Judges should encourage representatives of the news media [to] inquire of them for background information relating to the operation of the court system. While judges may not comment on the merits of a pending case, a judge may and should explain legal terms and concepts, procedures, and the issues involved in the case so as to permit the news representatives to cover the case more intelligently . . . Often there is no one, other than the judge, who is in a position to give a detailed and impartial explanation of the case to the news media.

Sheffield, 465 So.2d at 355 (quoting National Conference of State Trial Judges Commission on News Reporting and Fair Trial, *Judicial Guidelines for Dealing With News Media Inquiries and Criticism* (5th Draft, June 5, 1984)).

Recognizing this exception to the pending proceeding restriction, some courts have held that a judge’s remark explaining the reason for a decision is a comment on the court’s procedure rather than a comment on the merits of a case. See *Office of Disciplinary Counsel*

v. Souers, 611 N.E.2d 305 (Ohio 1993). In *Souers*, the Ohio Supreme Court refused to discipline a judge who, in a newspaper interview, defended a ruling that had been overturned by the court of appeals. *Id.* at 306. Although the judge described the ruling as “ludicrous” and chastised the appellate court for failing to get to “the merits of the case,” the Court noted that Ohio Code of Judicial Conduct Canon 3A(6) permitted the judge’s “defense of his sentencing order, while less than judicious, to explain his procedure in the underlying criminal case.” *Id.*

In contrast, other courts using Canon 3B(9) to assess allegations of judicial misconduct have not viewed “the freedom to explain the court’s procedures . . . [as] an absolute license.” Jeffrey M. Shaman *ET AL.*, *Judicial Conduct and Ethics* §10.33 (2nd ed. 1995 & Supp. 1997). In *In re Charge of Judicial Misconduct*, 47 F.3d 399 (10th Cir. 1995), a judge discussed a pending case during a press conference in chambers, interviews, and appearances on television news shows in hopes of obtaining compliance with a judicial decree. *Id.* at 400. Noting that the judge’s “public comments clearly related to a matter before him and were outside the context of official proceedings,” the Tenth Circuit Judicial Council held that the Tenth Circuit acted appropriately in subjecting the judge to disciplinary action. *Id.* See also *In re Schenck*, 870 P.2d at 201 (presence of some permissible information about court procedure in context of judicial comment “does not sanitize” other material amounting to comment about pending cases).

While a judge is encouraged to clarify court procedure to the press and the public, a judge choosing to do so must be “discrete and self-disciplined” to avoid making statements which step beyond the authorized range of comment under the canons of judicial conduct. See William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589, 600 (1989). One commentator has suggested that unethical judicial commentary or potential misquotation by the press may be avoided through off-the-record judicial statements concerning a case. *Id.* This alternative would meet the public’s need for basic information while precluding public perception that the judge had made remarks that suggested bias. *Id.* See also Illinois Judicial Ethics Committee, Op. 96-5 (1996) (presenting suggested responses for judge faced with reporter’s inquiry about ruling in pending case). Seemingly, a judge whose comments exhibit “a genuine interest in an educated citizenry” and not a desire for “per-

sonal notoriety” is less likely to face scrutiny over public statements on court procedure and current law. Gregory C. O’Brien, Jr., *Speech May Be Free, and Talk Cheap, But Judges Can Pay a Heavy Price for Unguarded Expression*, 28 *LOY. L.A. L. REV.* 815, 827 (1995).

C. Judicial Response to Public Criticism. Although a trend of intensified judicial condemnation has emerged in the late 1990s, judges seeking to respond to public criticism can do so only in conformity with the canons and norms of judicial ethics. See Robert M. O’Neil, *Assaults on the Judiciary*, *TRIAL*, September 1998, at 55–56. Generally, judges cite the need to maintain impartiality as a deterrent to judicial response to verbal attacks from the press or public:

[T]o secure an impartial forum, even for their most vocal critics, and to assure the dignity of the judicial process, judges by and large must stay out of the fray. They do not duel with public officials about the correctness of their decisions; they do not conduct press conferences about cases; and they have no call-in radio and television shows to explain their rulings. They rely on their decisions whether written or oral, to speak for themselves.

Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 *HOFSTRA L. REV.* 703, 712 (1997).

Throughout history, however, judicial speech answering critics has faced various levels “of tolerance . . . depending upon the passion of the speech, the popularity of the speaker, and the power of those against whom the speech was directed.” Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611, 620 (1987). In one well-documented instance, Supreme Court Justice John Marshall used a pseudonym in defending *McCulloch v. Maryland* in newspaper editorials. Ross, *supra* at 607. More recently, Justice Clark spoke publicly in defense of the Supreme Court’s harshly criticized 1962 decision prohibiting state-prescribed prayer in public schools. *Id.*

In fact, recent cases seem to suggest a more sympathetic view of judges wishing to counterattack aggressive assaults on the judiciary. See Robert M. O’Neil, *Assaults on the Judiciary*, *TRIAL*, September 1998, at 57. In *In re Conard*, 944 S.W.2d 191 (Mo. 1997), a judge

ruling in a domestic violence suit was attacked in the press by a police chief and the wife of the accused after the judge allowed the accused to be released from jail and filed a contempt charge against the police chief. *Id.* at 204. Following these attacks, the judge participated in several newspaper interviews to explain the reasoning and motivations underlying his rulings. *Id.* at 198–200. While the Missouri Supreme Court found that the judge’s responses through the press had overstepped the scope of permissible judicial speech where he spoke on the merits of pending criminal charges, the court held that judges do possess a qualified privilege to respond to public criticism. *Id.* at 204–05. The court clarified that a judge may react to public attack so long as the reaction “is limited to a moderate and dignified response to the attack made upon the judge and [is] not of a nature in quantity or substance that creates more harm than benefit to the judicial system.” *Id.* at 204. See also *In re Miera*, 426 N.W.2d 850, 856 (Minn. 1988)(judge has qualified privilege to “publicly explain his side of the affair in moderate, unmalicious, and unabusiv language”).

In a similar situation, Los Angeles Superior Court judge Roosevelt Dorn, presiding over the trial of the defendants accused of beating victim Reginald Denny following the Rodney King verdict, called a press conference “to set the record straight” after the prosecutor used a peremptory bench challenge to bar the judge from the case because of problems with the judge’s calendar. See Robert M. O’Neil, *supra* at 58. The only African-American on the court, Judge Dorn labeled the prosecutor’s stated reasons for seeking his recusal an “out and out lie” and asserted that a recusal would only create a notion “that the black judge was not effectively able to handle the calendar.” *Id.* Later, addressing members of a church during the prosecutor’s unsuccessful attempt for reelection, Judge Dorn stated that “the issue is how African Americans are being treated by elected officials in this community.” *Id.*

Although Judge Dorn’s comments spoke directly about an attorney in a pending case and political election, the judge was never charged with violating the judicial canons governing such conduct. *Id.* Commentators suggest three reasons behind the tolerance of the judge’s borderline conduct. First, the prosecutor’s stated reasons for seeking Dorn’s removal from the case were arguably “false,” “personally insulting,” and “racially derogatory” to the point of potentially undermining citizen confidence among the African American community. *Id.* Second, Dorn’s responses did not discuss the merits of the pending case in a

way that tainted the fairness of the matter before another judge. *Id.* Finally, the judge himself was the best person to answer the allegations of the prosecutor given the serious nature of those allegations and the inability of other judicial officials to adequately speak to knowledge possessed uniquely by the judge himself. *Id.*

In spite of the movement toward recognition of a broader capacity for judicial response, it is suggested that “judges ordinarily should refrain from explaining or defending their decisions even if their decisions have ignited a firestorm of hostility.” William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589, 606 (1989). See also *In re Jimenez*, 841 S.W.2d 572, 581 (“Judicial service . . . is not for the meek or the sensitive. It requires a thick skin and an ability to ignore criticism.”). Still, in addition to personal attacks on individual judges, several situations may warrant judicial defense of a ruling or series of rulings subjected to public scrutiny. Where the general direction of the court has resulted in diminished confidence among a significant portion of the public, a judge may appropriately defend a court in general terms without mentioning any specific decision. Ross, *supra* at 606. Moreover, a judge may deem it necessary to justify the rulings of his or her court “if the institutional prerogatives of the court are threatened,” i.e., where unpopular decisions create a threat that the legislature will curb the court’s jurisdiction or overrule the court’s decisions. *Id.* Finally, it may be appropriate for judges to counter inaccurate reports regarding individual judges or the internal procedures of the court. *Id.* at 612. Ultimately, a judge seeking to combat intense criticism of his or her court should do so “only if the defense is more likely to preserve judicial integrity than diminish it.” *Id.*

D. Judicial Comment on Controversial Legal Issues. Model Code Canon 5A(1) specifies that “a judge or candidate for election or appointment to judicial office shall not: (a) act as a leader or hold office in a political organization; (b) publicly endorse or publicly oppose another candidate for public office; (c) make speeches on behalf of a political organization; (d) attend political gatherings; or (e) solicit funds for . . . or make a contribution to a political organization or candidate . . .” *Id.*; see also *Pennsylvania Code* Canon 7 (same); *New Jersey Code* Canon 7 (same). Although Canon 5A(1) expressly prohibits only partisan electoral activities, Canon 3B(9) advises against “any public comment” by a judge that “impair[s] the fair-

ness” of any pending or impending proceeding. *Id.*; see also Vincent Martin Bonventre, *Yes: Litigants Deserve a Justice With An Open Mind*, 83 A.B.A.J. 72 (1997). Moreover, Canon 4A(1) warns judicial officers to refrain from “extra-judicial activities” that might “cast reasonable doubt on the judge’s capacity to act impartially.” *Id.*; see also Bonventre, *supra* at 72. Accordingly, a judge must exercise caution where opining on a controversial legal or political issue apart from a pending case. Ross, *supra* at 638. Because, however, the canons of judicial ethics do not decisively prevent judicial statements concerning controversial legal issues, courts and commentators alike have offered a wide variety of rules attempting to define the external limits of permissible judicial opinion. Compare Steven Lubet, *Judicial Conduct: Speech and Consequences*, 4 The Long Term View 71 (1997) with Erwin Chemerinsky, *In Defense of Speech: Judges and the First Amendment*, 4 The Long Term View 78 (1997).

In *In re Sanders*, 955 P.2d 369 (Wash. 1998), Washington Supreme Court Justice Sanders told those in attendance at an anti-abortion rally that “[n]othing is more fundamental in our legal system than the preservation of innocent human life.” *Id.* at 371. In response, the Washington Commission on Judicial Conduct’s ruled that Justice Sanders’s words transcended “the mere expression of opinion” into “align[ment]” with a particular political organization involved in pursuing a political agenda” and were thus in violation of the Code of Judicial Conduct. *Id.* Overturning the Commission’s ruling, the Washington Supreme Court held that the Justice’s appearance at the rally to express his beliefs and to thank his supporters did not force the conclusion that he could not rule impartially on the abortion issue as he might encounter it in his role as a judge. *Id.* at 370. In order to restrict the judge’s speech in this context, the court specified, the challenging party must offer “clear and convincing evidence of speech or conduct that casts doubt on a judge’s integrity, independence, or impartiality.” *Id.*

Similarly, in *In re Gridley*, 417 So.2d 950 (Fla. 1982), the Supreme Court of Florida reviewed the conduct of a judge whose published letters to a newspaper announced his views on “Christian forgiveness” and against “capital punishment.” *Id.* at 954. Concluding that the judge did not violate the Canons of Judicial Conduct in submitting the letters, the court noted:

[t]here is no doubt that a judge in an appropriate forum

may express his protest, dissent, and criticism of the present state of the law as long as he does not appear to substitute his concept of the law for what the law actually is, and as long as he expresses himself in a manner that promotes public confidence in his integrity and impartiality as a judge.

Id. at 954–55. Because the judge’s letters made clear that he would abide by his duty as a judge and accept the law as written, he avoided sanction for criticism “close to the dividing line between what is appropriate and what is not.” *Id.* at 955.

While the recent cases demonstrate that judges may face diminished scrutiny when publicly offering insight into a legal issue that is not “pending or impending,” a judge must take great care to avoid demonstrating a clear bias about a public matter that he or she is quite likely to face sooner or later in court. Ross, *supra* at 638. When Justice Antonin Scalia told an audience at Catholic University that it is “absolutely plain there is no constitutional right to die,” many questioned his ability to consider the right to die issue as a neutral and detached magistrate:

It is not that judges should keep their opinions to themselves; they should keep their minds open. It is not that judges should feign neutrality; they should actually remain undecided. It is not that judges should give litigants a false sense of confidence; they should truly listen to and consider the arguments. A judge—like anyone—may be predisposed; but his or her decision ought not to be preordained.

Bonventre, *supra* at 72. Opinions like those of Justice Scalia, however, are found frequently throughout history. See Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611, 622. (1987). For example, Justice Mclean and Justice Story were both noted critics of slavery. *Id.* Likewise, Chief Justice Warren publicly championed changes in the criminal justice and jury systems. *Id.* at 623.

Overall, judges desiring to speak publicly and critically on a controversial legal or political issue should be able to do so “as long as neither the words nor the context suggest an unwillingness to follow the law, nor amount to impermissible political endorsement.” Jeffrey M. Shaman *ET AL.*, *Judicial Conduct and Ethics* §10.17.1

(2nd ed. 1995 & Supp. 1997). If, however, the contents of a judge's commentary demonstrate a predisposition on the factual and legal merits of a "reasonably litigated issue," the judge should not hear a case concerning the matter. Clarence W. Wolfram, *Modern Legal Ethics* §17.5 (1986). Responsible methods to be used by a judge expressing views on law reform or a legal issue include preparing dissenting opinions, petitioning the state supreme court for changes in the rules of procedure, submitting suggested changes to state bar committees, participating in Committee on Legal Education seminars, and actively taking part in the state and local conferences of judges. See *Gridley*, 417 So.2d at 954 (citing *In re Kelly*, 238 So.2d 565, 569 [Fla. 1970]).

E. Speech of Candidates for Judicial Office. Independent of sitting judges, a judicial candidate may not make any statement that "commit[s] or appear[s] to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Model Code Canon 5A(3)(d)(ii)*. In adhering to this express prohibition, however, a judicial candidate may pledge improvement to court administration, comment privately to other judges or court personnel, and "respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d)." *Id.* at Commentary to Canon 5A(3)(d); *Id.* at 5A(3)(e). Where making public statements that may lend the appearance of bias, a judicial candidate should stress his or her obligation to uphold the law regardless of personal opinion. *Id.* at Commentary to 5A(3)(d). See also *Pennsylvania Code Canon 7B* (setting boundaries on permissible judicial campaign conduct); *New Jersey Code Canon 7* (same). Courts considering the validity of state provisions regulating the speech of judicial candidates have struggled to balance the need for judicial independence with the rights reserved to judicial candidates as citizens entitled to freedom of expression. See, e.g., *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1997).

In *Stretton*, 944 F.2d at 137, the Court of Appeals for the Third Circuit upheld as constitutional a Pennsylvania Code of Judicial Conduct provision prohibiting a judicial candidate's announcement of "his views on disputed legal or political issues." *Id.* at 141. In reaching its conclusion, the court noted that the Pennsylvania restriction did

not violate the First Amendment where the state had a “compelling interest in the integrity of its judiciary” and its restriction on political speech did not “unnecessarily curtail protected speech.” *Id.* at 144. Accordingly, the court looked to the public’s need for judicial impartiality as a justification for the limitation of the expression of judicial candidates:

The public has a right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge’s ability to consider the matter impartially. Even if he or she could reach the correct result in a given case, the campaign announcement would leave the impression that . . . the case was prejudged rather than adjudicated through a proper application of the law to facts impartially determined.

Id.

Alternatively, in *Buckley*, 997 F.2d at 224, the Court of Appeals for the Seventh Circuit held that Illinois could not prevent a judicial candidate, during an election, from “announc[ing] his views on disputed legal or political issues.” *Id.* at 225. The court recognized that its decision created “undoubted tension” with the Third Circuit’s decision in *Stretton*, and admitted that “the principle of impartial justice . . . is strong enough to entitle government to restrict the freedom of speech of participants in the judicial process.” *Id.* at 231. The court concluded, nonetheless, that the Illinois proscription was invalid where it was “so sweeping that only complete silence would comply with a literal . . . interpretation of the rule.” *Id.*

To date, the Supreme Court has chosen not to settle the conflict existing at the circuit court level on the issue of permissible speech by judicial candidates. Still, as both the *Stretton* and *Buckley* courts made clear, in order to maintain an open-minded and unbiased judiciary, a judicial candidate should temper any campaign statements that seem to “leave the impression that a case ha[s] been prejudged.” *See Stretton*, 944 F.2d at 142; *Buckley*, 997 F.2d at 230–31. Given the unsettled nature of the law in this particular area, a judicial candidate should avoid making any statement that asserts a bias for a

particular side of a political issue.

III. CONCLUSION

Subject to the canons of judicial ethics, a judge does not possess an unlimited right to free speech. Clearly, a judge risks censure when he or she speaks about the merits of a matter pending in any court. Furthermore, a judge may face disciplinary sanction for speech otherwise acceptable from other citizens where “the state has a compelling interest in protecting the good reputation of the judiciary.” *In re Kaiser*, 759 P.2d 392, 399 (Wash. 1988)(judge disciplined for speech discussing political party affiliation and attorneys in pending case). These restrictions on judicial free speech, however, should not be translated as an absolute ban on all forms of extrajudicial speech.

Independent of statements on pending matters, judges maintain a reasonable degree of freedom where desiring to speak publicly. As expressly stated in the various codes of judicial conduct, a judge may speak to educate the public on court procedure or address the law, legal system, or administration of justice. Additionally, a judge may speak to remedy public misconception about a ruling or address criticism which, if not countered, could diminish public confidence in the judiciary among members of a particular community. Finally, a judge may offer his or her opinion on a controversial legal matter so long as that opinion does not indicate a bias that would affect a case likely to come before his or her court. Seemingly, public judicial speech gives rise to sanction only where it does “measurable damage to the court’s dignity, available time and energy, or appearance of impartiality.” Jeffrey M. Shaman *ET AL.*, *Judicial Conduct and Ethics* §10.07 (2nd ed. 1995 & Supp. 1997).

Although an unequivocal proscription on all forms of judicial expression might allay public fears of judicial bias and self-interest in the short run, such a measure will ultimately work to the detriment of both judges and those served by the judicial system. A judge who, using discretion, participates in public debate will maintain the practical knowledge of the public necessary to hand down practical legal decisions. Likewise, a judge with a qualified right to speak publicly and responsibly may enhance public confidence in the judiciary. Judge

Kaufman, a drafter of the 1972 Model Code of Judicial Conduct, believed that an appropriate code of conduct would “encourage, rather than discourage, judicial activities that exceed the four corners of cases presented for disposition.” Talbot D’Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611, 628 (1987). In an ever-changing world marred by fluctuating faith in the judiciary, Judge Kaufman’s thoughts on extrajudicial activity and speech best state the need for qualified judicial freedom of expression:

There are times when we need men who can feel and understand what goes on in the world about them; we shall not find such men in a gray “bureaucracy” divorced from all outside activities and interests . . . [T]here are times when we need men who are not afraid to roar should the occasion demand it.

Id. Upon this premise and subject only to the per se rules found in the respective codes of judicial conduct, a judge who wishes to speak publicly is limited only by his or her own discretion and common sense. See William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 *GEO. J. LEGAL ETHICS* 589, 642 (1989).

APPENDIX C:

RESPONSE TO CRITICISM OF JUDGES*

AMERICAN BAR ASSOCIATION
JUDICIAL DIVISION LAWYERS CONFERENCE AND
SPECIAL COMMITTEE ON JUDICIAL INDEPENDENCE

The Lawyers Conference of the Judicial Division of the American Bar Association (ABA) has given the lawyers and the courts of America an exceptionally good opportunity to insure that all Americans have a better understanding of the operation of the judicial system, the courts and the judges. The Special Committee on Judicial Independence was proud to cosponsor this measure in the ABA House of Delegates when adopted as ABA policy in February 1998.

There is a strong and understandable inclination on the part of lawyers to shy away from their ethical responsibility to protect the courts from unjust and untrue criticism, particularly when the judge involved is ethically prevented from commenting.

* *Response to Criticism of Judges*, written by the American Bar Association Judicial Division Lawyers Conference and Special Committee on Judicial Independence, was originally published by the American Bar Association as a booklet in July 1998. Copyright © 1998 American Bar Association. All rights reserved. Reprinted by permission.

This concise and well thought out model plan charts a course for appropriate response beginning with a policy statement on why a plan is needed, when a response to criticism should be made by the bar and how to implement the policy and the plan. The plan will serve not only the courts and judges involved in the particular incident, but will provide a basis for community dialogue and education that can strengthen public understanding of the crucial role played by an independent judiciary in a democracy governed by law.

Judges and lawyers across the country should review the ABA plan and then move enthusiastically to put their own bar association plan into action to respond vigorously to unjust or untrue criticism. The benefits to the individual lawyers, the courts and the communities that they serve will far outweigh the efforts required to put the record straight.

William S. Sessions
Chair, ABA Special Committee on Judicial Independence

July 1998

PREFACE: RESPONDING TO CRITICISM OF JUDGES

American judges do important work that is not always clearly understood or adequately appreciated. The Bar has a special responsibility to ensure that judges, as essential leaders of the legal system, are not only treated fairly and with appropriate dignity, but that misunderstandings of the law and the role of judges are addressed and clarified. Our goal is to develop a responsible dialogue that does not end with the Bar. The legal community must work cooperatively, hand in hand, with civic groups and involved citizens to ensure that the judiciary remains a highly respected institution. Activities recommended in this publication should also be coordinated with the courts themselves, acting through their public information officers. It is only through a fully integrated informed dialogue that inevitable criticism can be transformed into a vehicle for furthering understanding of our justice system.

While many of the references to Bar Associations in this publication refer to state and local Bars, national Bars and specialized Bar Associations can also provide effective responses. We hope that this publication will be used by all associations of lawyers to foster further understanding of the role of our judges. So too, references to criticism of “judges” should include criticism of all judicial officers, whether state or federal. This publication does not limit itself to “unjust” criticism of judges, but is meant to guide appropriate responses to a variety of criticisms. There are, in fact, limited instances where it may be appropriate for the judge concerned to respond directly as well. However, these situations are limited, should occur only after careful consideration of the ethical restrictions on public comment and, therefore, are not assisted by this pamphlet.

This revision owes a tremendous debt to the original Subcommittee on Unjust Criticism of the Bench that prepared the 1986 version of this protocol. Recent events, however, convinced the Lawyers Conference that revision was warranted. We thank the many state and local Bars that responded to our survey concerning activities in this area, and the many reviewers who offered excellent suggestions that we have included wherever possible. We also thank the California Judges Association for sharing their insights into the issues presented. The Lawyers Conference especially thanks Larry Polansky for taking pen to paper and pushing this protocol to completion. Finally, Judicial Division Chair Norma L. Shapiro, who encouraged this work and entrusted the Lawyers Conference with its development, deserves a special thank

you, as do the members of the Lawyers Conference subcommittee who reviewed outlines and participated in numerous meetings.

These recommendations were prepared with judges in mind. Judges inevitably will be involved in deciding difficult and unpopular cases. The ethical dilemmas that judges face were considered carefully. Our protocols outlined here are consistent with the American Bar Association's various model provisions governing the conduct of lawyers and judges. We hope that our work will promote appreciation, respect and understanding for the unique role of the judiciary in our government.

Marla N. Greenstein, Chair
ABA Judicial Division
Lawyers Conference

July, 1997

MODEL PROGRAM OUTLINE FOR STATE, LOCAL AND TERRITORIAL BAR ASSOCIATIONS: SUGGESTED PROGRAM FOR THE APPROPRIATE RESPONSE TO CRITICISM OF JUDGES AND COURTS

I. POLICY STATEMENT

A. *Why a Plan Is Needed.* The effectiveness of the administration of justice depends in a large measure on public confidence. The reporting of inaccurate or unjust criticism of judges, courts, or our system of justice by the news media erodes public confidence and weakens the administration of justice. It is vital that nonlitigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial.

Generally, it is undesirable for a judge to answer criticism of her or his own actions by appearing in the news media. This policy has been developed to insure the dignity of the administration of justice, to prevent interference with pending litigation, and to reaffirm the commitment to an independent judiciary, a judiciary dedicated to decision-making based on facts and law as presented.

The risk is apparent that a response by a judge to criticism of her or his own actions may be perceived by the community as “self-serving” and/or as a “defensive” position which fails for lack of credibility. Also, since there invariably is more at stake than an individual judge’s ego or feelings, the bar should recognize the negative reflection on the dignity of the administration of justice if a judge should make an intemperate or emotional response to such criticism.

Further, a judge’s comment contains the potential of reflecting on pending litigation and may have an undesirable effect on litigants. In addition, an inappropriate response may give encouragement to those who would control the judiciary by intimidation and thus weaken the independence of the judiciary.

Finally, judges subjected to criticism may be prevented from responding by ethical restrictions relating to a judge’s ability to engage in public comment, a judge’s need to maintain the appearance of impartiality and the impropriety of *ex parte* communications. Therefore, cooperation of lawyers and bar associations is necessary to successfully meet and accurately, quickly and fairly respond to criticism of judges and courts. This model plan implements the American Bar Association Model Code of Professional Responsibility (EC 8-6) and the Model

Rules of Professional Conduct (Comment Model Rule 8.2) which entitle adjudicatory officials to the support and the early and accurate response where their official actions are criticized.

B. When Action in Response to Criticism Should Be Taken by the Bar: Implementation of this plan is selective. To avoid infringing on the freedom of the press, this plan is designed to effect a response on behalf of the judiciary and courts to criticism that is serious as well as inaccurate or unjustified. There should be no attempt to prevent criticism, but inaccurate or unjust criticism should be answered through an organized public information program. Such criticism typically results from a lack of understanding of the system—the reason for a decision, a sentence or a courtroom action.

The bar should respond publicly to attacks upon a judge only in the following two instances:

1. a public utterance that is unwarranted or an unjust attack on a judge in relation to specific cases, regardless of the source of the attack, or,
2. any “unwarranted” or “unjust” attack or series of attacks on a judge or court which may adversely affect the administration of justice.

Guidelines to determine when a response to criticism is appropriate in a particular case are provided in Section II.C. of the Bar Association Model Program below.

C. Implementation of the Policy and Plan. Because of the restraints placed on judges both by tradition and by the Code of Judicial Conduct, and the ethical obligations imposed by the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct for lawyers, it is recommended that state, local and territorial bar associations adopt a policy and program to provide appropriate and timely responses to criticism of judges and courts.

The following are suggestions for implementation of such a policy and program:

1. Adopt a policy statement that supports the position that judges should generally not respond to criticism and that the bar, state,

local and territorial, should, when appropriate, respond to criticism of judges and courts.

2. Adopt a structure and process for receiving, screening and evaluating criticisms of judges and/or courts. (See Sections II.A. and B. for suggested program.)
3. Develop guidelines to determine when the bar association should respond. (See Section II.C. for suggested guidelines.)
4. Since timing is key to responding, provide a method whereby the bar can respond quickly, accurately and with authority. (See Section II.D.)
5. Coordinate state, local and territorial bar association programs to broaden the base of the response. In some cases, it may be appropriate for the state, local and territorial bar to respond. In other cases, only one or the other should respond.
6. Coordinate the program with the appropriate federal, state, local or territorial judiciary and recommend to other local bar associations the implementation of a comparable policy and program.
7. Provide federal, state, local and territorial judges and court officials with copies of the program and encourage them to contact named bar officials to alert them to media criticism which the judge(s) and/or court believe to be deserving of an appropriate bar association response.

II. MODEL PROGRAM FOR STATE AND LOCAL BAR ASSOCIATIONS

A. Purposes and Functions of Program. The primary purposes and functions of the program are:

- (a) To deal with errors in reporting or inaccuracies in reporting criticism of judges, courts and/or the administration of justice, as further provided in this policy statement;

(b) To be available to the news media as a resource for obtaining information concerning judicial activities, court process or other technical or legal information about the administration of justice;

(c) To encourage broad dissemination of information to the public about noteworthy achievements and improvements within the justice system;

(d) To suggest means by which judges and lawyers can improve the public image of the legal system; and

(e) To generally seek a better understanding within the community of the legal system and the role of lawyers and judges.

B. Referral Procedure

1. Assign the task of administering the program to an appropriate designee, committee and/or contact person.
2. All referrals of criticism of judges and courts should be forwarded to the appropriate contact person at the state, local and/or territorial bar association headquarters. The referral may be oral or written, but in all cases the referring person must be available to assist in gathering background and factual information and must present written material when requested. All referrals should be undertaken with the specific permission of the judge or court criticized with the understanding that the judge or court also will assist in gathering necessary information for the bar association to evaluate.
3. The contact person assigned should immediately begin to gather all pertinent background and factual information including a copy of the text (whether in live or print media) of the criticism.
4. The contact person then should immediately notify the president of the state, local or territorial bar association and the designee or chairperson of the committee assigned the overall responsibility.
5. The designee or committee chairperson should promptly investigate the underlying facts, discussing them to the extent possible

with other committee members and the judge involved, and then promptly prepare and release the response.

Upon securing approval of the president of the state, local or territorial bar association, the designee or committee chairperson may speak in the name of the association.

C. Guidelines to Determine When the Bar Should Respond

1. The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:
 - (a) When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
 - (b) When the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; and
 - (c) When the criticism is materially inaccurate; the inaccuracy should be a substantial part of the criticism so that the response does not appear to be “nitpicking.”
2. The following factors should be considered in determining whether a response should be made in a close case and considered in every case in determining the type of response:
 - (a) Whether a response would serve a public information purpose and not appear “nitpicking”;
 - (b) Whether the criticism adequately will be met by a response from some other appropriate source;
 - (c) Whether the criticism substantially and negatively affects the judiciary or other parts of the legal system, or whether continuing discussion of the controversy would serve to lower public perceptions as to the dignity of the court, the judiciary or the judicial system;
 - (d) Whether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally, the court, or another

element of the judicial system (e.g., grand jury, lawyers, probation, bail, etc.);

(e) Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice (e.g., sentencing, bail, evidence rules, due process, fundamental rights, etc.);

(f) Whether a response would appear defensive or self-serving;

(g) Whether the critic is so obviously uninformed about the judicial system that a response can be made on a factual basis;

(h) Whether the criticism or report, although generally accurate, does not contain all or enough of the facts of the event or procedure reported to be fair to the judge or matter being criticized;

(i) Whether the overall criticism is not justified or fair;

(j) Whether the criticism, while not appearing in the local press, pertains to a local judge or a local matter;

(k) Whether the timing of the response is especially important and can be best met by the committee.

3. The following are the kinds of cases in which response to criticism IS NOT appropriate, except in unusual circumstances:

(a) When the criticism is a fair comment or opinion;

(b) When the feud is between the critic and the judge on a personal level;

(c) When the criticism is vague or the product of innuendo, except when the innuendo is clear;

(d) Where criticism raises issues of judicial ethics appropriate for presentation to the Judicial Inquiry or Disciplinary body;

(e) When a lengthy investigation to develop the true facts is necessary;

(f) When the response would prejudice a matter at issue in a pending proceeding;

(g) When the controversy is insignificant;

(h) When the criticism arises during a political campaign and the bar's response may be construed as an endorsement of a particular candidate for judicial office.

D. The Response

1. **TIMING.** To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 24–48 hours of publication of the criticism or report, especially keeping in mind the deadline(s) of the news media that reported the original criticism. Ideally a response can be more immediate and occur even before publication, for example, through direct communication with a reporter or editor which may clarify the facts and serve to defuse the situation.
2. **FORM OF RESPONSE.** The form and manner of the response should be such that it will receive the same exposure and notoriety as the criticism. A letter to the editor is an effective form of response, because it is the most likely to be printed fully and accurately. Press releases are usually more subject to editing and are frequently viewed as less credible, and pamphlets are too elaborate. Television or radio talk shows may be effective forms of response but should be used more cautiously and sparingly. In some circumstances, press conferences provide effective means to disseminate a response. Direct communication with reporters and editors intended to clarify facts and present another position is encouraged. Whenever possible, any response should be coordinated with the court public information officer if one exists.
3. **DRAFTING CONSIDERATIONS.**
 - (a) The response should be a concise, accurate, “to the point” statement, devoid of emotional, inflammatory or subjective language;

- (b) The statement should be informative and not argumentative or condescending;
 - (c) The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
 - (d) The statement should be written in lay terms suitable for inclusion in a newspaper story;
 - (e) Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
 - (f) Where appropriate, the statement should include an explanation of the process involved (e.g., sentencing, bail, temporary restraining order, etc.);
 - (g) The statement should not attempt to discredit the critic, that is, attack the competence, good faith, motives or associates of the critic;
 - (h) The statement should not provide evidence that the critic has hit a nerve, causing overreaction;
 - (i) The statement should not defend the indefensible;
 - (j) The committee should consider the cause of the criticism or controversy, which might not be immediately apparent.
4. CONTENT OF THE RESPONSE. The following points may be included in a typical response:
- (a) Identify the criticism and its source.
 - (b) We may frequently disagree with the decisions and actions of public officials, including judges. The federal and state constitutions protect our right to express that disagreement.
 - (c) We must remember that judges have no control over what cases come before them, but they must decide each and all of

those cases. Judges must follow the law as established by higher courts. One side always loses in every lawsuit.

(d) Because of their position, judges are not wholly free to defend themselves and it is ordinarily not appropriate for them to personally answer charges made against them or their decisions (C.J.C. 2.A., 3, 3.B.7., 3.B.9., 4.A.1., 4.B.; C.P.R., EC 8-6).

(e) Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism (EC 8-6; Comment M.R. 8.2).

(f) Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit the balance of the points might have for those who agree with the criticism.

(g) The need for independent judges, who will not be influenced by criticism of them or their decisions, requires that the organized bar remind both lawyers and the public of these facts.

(h) The law has established appellate courts so that decisions of judges may be reviewed and, if appropriate, corrected. Our present judicial system provides for change in the law through legislative action or by constitutional revision.

5. RECOMMENDED EDUCATION PROGRAMS. An expanded public education program could be undertaken to familiarize the public with such fundamental concepts as:

(a) The rule of law;

(b) The need to preserve judicial independence and integrity;

(c) The organization and responsibilities of the judicial system;
and

(d) The role of the lawyer in society.