When Judges Should Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct

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WHEN JUDGES SHOULD BE SEEN, NOT HEARD: EXTRAJUDICIAL COMMENTS CONCERNING PENDING CASES AND THE CONTROVERSIAL SELF-DEFENSE EXCEPTION IN THE NEW CODE OF JUDICIAL CONDUCT

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We certainly have not seen the end of criticism of judges. Robust free speech, even of the coarse and inaccurate variety, may simply be one of the prices of a free society. Today's judges may draw some relief from the knowledge that modern critics are normally not as colorful or as sharp of tongue as Horace Greeley or Teddy Roosevelt, as nasty as George Wallace, or as violent and aggressive as David Terry.

In the end, while judges may not like what they hear and may be sorely tempted to respond to their critics, history does seem to teach us that our predecessors endured far worse, and both they and the Republic seem to have survived.1

INTRODUCTION

Attorneys tend to disagree with judges' comments concerning the merits of pending cases—in the form of opinions, orders, or bench rulings—roughly fifty percent of the time. But as we ultimately conclude in this Article, there is strong cause to disagree with judges' extrajudicial comments concerning the merits of pending cases, particularly those in the form of responses to criticism,


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EXTRAJUDICIAL COMMENTS

approaching 100 percent of the time. That is indeed a strong conclusion, particularly because we believe that categorical rules generally should be rendered flexible for the sake of fairness. While we would reconsider our nearly categorical conclusion when presented with a compelling justification to do so, the discussion that follows suggests such reconsideration may be a long time coming; we identify in this Article several previously unidentified or unarticulated justifications for the longstanding ban against most, but not all, extrajudicial\(^2\) comments.

The primary problem is that by commenting on the merits of pending cases over which the judge is presiding, she is elevating her personal interests (most commonly, either self-aggrandizement or self-defense) over the interests of the parties or even the more abstract interests of justice.\(^3\) Another problem with these extrajudicial comments in practice is that they result from, or at least are influenced by, ex parte contacts with the media—contacts that are unknown to, or at least practically uncorrectable by, the parties. Finally, and perhaps most importantly, because the likelihood of disqualification is so high when a judge extrajudicially comments on anything close to the merits, the outspoken judge regrettably buys herself a one-way ticket off of the case. Therefore, unless the commenting judge has some (better) proof that the comment will

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\(^2\) We recognize that the term “quasi-judicial” (or the like) may be a more precise description of the category of speech under consideration because the term “extrajudicial” has been applied to almost every activity occurring off the bench (e.g., drunk driving), and it therefore implies that the conduct at issue is unrelated to the judge’s judicial office. Speaking on pending cases, of course, is not wholly divorced from that office. Nevertheless, the “common usage” of “extrajudicial” in these circumstances burdens us to use the term, however imprecise. Stephen J. Fortunato, Jr., On a Judge’s Duty to Speak Extrajudicially: Rethinking the Strategy of Silence, 12 GEO. J. LEGAL ETHICS 679, 679 n.2 (1999). Here, the term extrajudicial is meant to differentiate between on-bench or in-opinion comments and those occurring outside these judicial venues.

\(^3\) See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001) (“judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media.”); ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, RAPID RESPONSE TO UNFAIR AND UNJUST CRITICISM OF JUDGES 5–6 (2008); Erwin Chemerinsky, Is It the Siren’s Call?: Judges and Free Speech While Cases Are Pending, 28 Loy. L.A. L. REV. 831, 847–48 (1995) (calling “powerful” the argument that “judges speaking about pending cases . . . diverts attention from the case and focuses it on the judge;” but ultimately rejecting the argument as outweighed by the perceived benefits of extrajudicial speech). A somewhat common example of extrajudicial self-defense is when a judge turns to the press to explain or justify a ruling that she believes has been mischaracterized, misunderstood, or both.
benefit (or mitigate a detriment to) some legitimate cause other than herself, she generally should leave the extrajudicial commenting to third parties.

What the new Model Code of Judicial Conduct⁴ aspired to do, but with some resulting ambiguity and ambivalence, was to carve out an exception to the general ban on extrajudicial speech when that speech responded to criticism of the judge's conduct, not the merits. We think the distinction makes good sense, at least when limited as just stated. If the extrajudicial response is merely rebutting criticism unrelated to the merits of a pending proceeding (e.g., *ad hominem* attacks), it would seem that a judge's personal interest in self-defense, or perhaps the affected court system's interest in public confidence, outweighs the interest in ease of administration that attends a categorical ban of all extrajudicial speech. Whatever its good intentions, however, the Model Code unfortunately fails to make that distinction clearly. For reasons demonstrated in this Article, we believe some slight revisions to the language of the Model Code are necessary to clarify and implement this new self-defense exception as well as the existing ban itself.

Part I lists the pertinent ethical rules with which we will be dealing, and Part II describes their evolution through former iterations of the judicial codes. Part III then documents the drafting history of the new rules; the discernible legislative and drafting history is documented exhaustively not only to illuminate the intended meaning and spirit of the current rules, but also to provide a resource for future research on the subject. Part IV begins the substantive analysis by flagging several perplexities inherent in the text of the (old and) new rules, including potential conflicts within the text of the new rules themselves and conflicts vis-à-vis other rules and themes of the Model Code. Part V discusses the merits of the rules and concludes that several forceful arguments counsel against extrajudicial comments on the merits of pending cases. It then discusses and critiques many of the counterarguments—none of which justifies significant extrajudicial comments. Finally, Part VI offers several general approaches and simple solutions to the problems of extrajudicial comments, including the new self-defense exception.

I. RULE 2.10: JUDICIAL STATEMENTS ON PENDING AND IMPENDING CASES

Rule 2.10(A) of the *Model Code of Judicial Conduct* issues the following familiar prohibition: "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing." By calling the Rule "familiar," we do not mean to imply that the Rule is without problems. For instance, it is quite persuasive to argue "that the phrase 'might reasonably be expected to affect the outcome or impair the fairness of a matter' is too vague a guide in a restriction on speech." We agree with that criticism, but it does not solve the problem; rather, it leads to at least two competing solutions—prohibit all public comments or permit them all. Either fix solves the problem, but neither is acceptable. We address these and other issues in Parts V and VI below. For present purposes, we quote the pertinent portions of the Rule solely for the reader's reference and save a discussion of the issues for later.

As suggested above and below, Rule 2.10(A) is substantially similar to the prohibition in the 1990 Code. Rule 2.10(E), how-

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5. *Model Code of Judicial Conduct* R. 2.10(A) (2007) (internal cross-references omitted). The differing violation triggers for "public" and "nonpublic" comments are somewhat perplexing. This distinction is a carry-forward of the 1990 Code, but its drafters did not explain the distinction in the Comment or the legislative history. The Joint Commission intended to make the trigger the same by prohibiting "any public or nonpublic comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court." ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, MINUTES OF MEETING 7 (Dec. 4, 2004). Apparently through a minor drafting oversight, the change did not make its way into the black-letter rule. In any event, the gist of the rule remains the same. Moreover, so-called "public" comments have not been construed narrowly. *See, e.g., Mass. Code of Judicial Conduct* Canon 3B(9) cmt. (Mass. Comm'n on Judicial Conduct 2003) ("Speaking to a journalist is public comment even where it is agreed that the statements are 'off the record.'").


7. The American Judicature Society advocated for the former solution to this vague-standard problem, "that the rule be clarified by prohibiting any public comment on pending cases." Gray, *supra* note 6, at 286. It believes, quite plausibly, that "[b]y refraining from public comment, judges reassure the public that cases are being tried, not in the press, but in the public forum devoted to that purpose." Id. at 287.

8. *See infra* Parts II.C, III.B.
ever, added in the 2007 Code, creates a self-defense exception: "Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter."\(^9\) Rule 2.10(E) is brand new; the 1990 Code contained no substantial counterpart.\(^10\) For better or worse, we now have a rule that permits judges to "respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter."\(^11\) If the successful Codes of the past are any indicator, this Rule will become (and the substance of Rule 2.10(A) will remain) the law of the land. In fact, the impact of the ABA's Model Codes has been truly impressive: "Forty-nine states, the U.S. Judicial Conference, and the District of Columbia have adopted codes based on . . . either the 1972 or 1990 model codes."\(^12\)

Part II next describes the Canons that preceded and influenced Rule 2.10, and Part III discusses the drafting history of Rule 2.10, with emphasis on the new self-defense provision.

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9. *Model Code of Judicial Conduct* R. 2.10(E) (2007); *cf.* Model Rules of Prof'L Conduct R. 1.6(b)(5) (2003) (authorizing attorneys to reveal confidential information to the extent necessary to defend themselves, including "respond[ing] to allegations in any proceeding concerning the lawyer's representation of the client"). The Comment to Rule 2.10(E) adds that, "[d]epending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter." *Model Code of Judicial Conduct* R. 2.10(E) cmt. 3 (2007); *see also* id. R. 4.1 cmt. 9 (2007).

10. *See infra* Part III.B and note 34.

11. *Model Code of Judicial Conduct* R. 2.10(E); *see also supra* note 9.

12. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 Hofstra L. Rev. 1245, 1246 n.4 (2004). Massachusetts, for instance, is poised to adopt the operative language of Rule 2.10(E). The Committee considering the Rule, however, has added a fundamental limitation: the judicial response cannot "address the merits of any judicial decision." *Mass. Supreme Judicial Court, Report of the Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct* (2008), *available at* http://www.mass.gov/courts/sjc/jud-cond-canon-3b9.html. While we are not sure whether it is actually possible to avoid a discussion of, or reference to, the merits of the judge's own legal decisions in responding to criticism arising in the context of the applicable case, the limitation is salutary in that it essentially forecloses, or at least drastically cabins, the response. *See infra* Part VI.B.1.
II. RULE 2.10'S PREDECESSORS

A. 1924 Canons of Judicial Ethics

The 1924 Canons of Judicial Ethics contains no provisions substantially similar to Rule 2.10, but compare the following Canons:

- **Canon 14**: Independence: "A judge should not be swayed by partisan demands, public clamor or considerations or personal popularity or notoriety, nor be apprehensive of unjust criticism."

- **Canon 17**: Ex Parte Communications: "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for ex parte application."

- **Canon 19**: Judicial Opinions: "In disposing of controverted cases, a judge should indicate the reasons for his action, in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law."

- **Canon 23**: Legislation: "A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience."

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13. See, e.g., E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 55 (1973) (noting that "[t]he old canons do not speak to the issue of" public comment on pending or impending cases). In 1968, however, the ABA's Standards Relating to Fair Trial and Free Press "recommended that, with respect to criminal cases, judges should refrain from . . . the making of any statements that may tend to interfere with the right of the people or of the defendant to a fair trial." Standards Relating to Fair Trial and Free Press § 2.4 (1968); see also Thode, supra, at 55.


15. Id. Canon 17.

16. Id. Canon 19. We pick up this theme in Part V.B.2 below (reasoning that in the first instance comments on the merits should be in rulings and opinions, not elsewhere).

17. Id. Canon 23.
- Canon 29: Self-Interest: "A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy."\(^{18}\)

- Canon 34: A Summary of Judicial Obligation: "In every particular his conduct should be above reproach. He should be . . . impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; . . . he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."\(^{19}\)

Thus, although the original Canons did not address the extra-judicial comment issue precisely, Canons 14, 17, and 19, and in a more indirect way, Canons 23, 29, and 34, addressed the issue in a cautious spirit with which we ultimately agree.\(^{20}\) The 1972 Code, in comparison, addressed the issue head on.

**B. 1972 Code of Judicial Conduct**

Canon 3A(6) of the 1972 *Code of Judicial Conduct* provides the following proscription:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.\(^{21}\)

This provision was a novel addition to the 1972 Code. It was included because "[t]he Committee agreed with the proposition [that judges should not make comments concerning criminal cases that might affect the fairness of the trial], but felt that it should be broadened to encompass unauthorized public comment by a judge

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18. Id. Canon 29. Arguably, of course, public comments, including responses to criticism, are not "judicial act[s]," but the Canon's sentiment is to remind judges to avoid acting on "personal interests" in cases before them.

19. Id. Canon 34.

20. See infra Parts V-VI.

about any pending or impending proceeding." The ABA's standards relating to the functions of the trial judge remain consistent with the 1972 Code and ban most public comments on pending matters.

As with the codes adopted and in force in several states, the Code of Conduct for United States Judges still employs the language of the 1972 Code, in substantial part:

A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge’s direction and control. This proscription does not extend to public statements made in the course of the judge's official duties, to the explanation of court procedures, or to a scholarly presentation made for purposes of legal education.

At the risk of spoiling our conclusion, we note that the 1972 Code, and its federal counterpart, make more sense, ethically and otherwise, than the 1990 Code.

C. 1990 Model Code of Judicial Conduct

Canon 3B(9) of the Model Code of Judicial Conduct provides the following revised proscription:

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 judge shall require similar abstinence on the part of court personnel subject to the judge's direc-

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22. Thode, supra note 13, at 55 (citing in part Standards Relating to Fair Trial and Free Press § 2.4 (1968)). The Reporter noted, however, that the then-new Canon 3A(6) prohibited neither comments made in open court while a case or proceeding was transpiring nor explanations of court procedures. Id.

23. ABA Standards for Criminal Justice: Special Functions of the Trial Judge Standard 6-1.2(b) (2000) ("The trial judge should not discuss pending or impending cases, and should avoid responding to personal criticism or complaints about particular decisions, other than to correct a factual misrepresentation in the reporting of the ruling."); see also id. 6-1.2(a) ("The trial judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.").

24. Code of Conduct for United States Judges Canon 3A(6) (1999). The Comment adds particular caution when the comment involves a case over which the judge presides: "If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A." Id. cmt.
tion and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.  

Canon 3B(9) thus loosened the requirements of former Canon 3A(6) (which seemingly had prohibited virtually all public comments concerning a pending or impending case, not just those comments that might “affect its outcome or impair its fairness”). It did so because “[t]he language of the 1972 Code’s provision ... was believed by the Committee to be overbroad and unenforceable.” The Committee apparently was concerned that “judges in their extrajudicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality.” Moreover, the Committee noted that a judge should be able to comment on a case in which she is a party.

In a different, though perhaps inconsequential, dimension, the Committee tightened the prohibition by barring “comment, whether public or private, that might affect the outcome or fairness of a trial or hearing.” It is difficult to understand how a truly private comment could affect the outcome or fairness of a proceeding, unless the comment was an ex parte communication with a juror, party, or lawyer. Perhaps barring private comments assisted the endeavor by (1) assuring that private comments do not become public

25. Model Code of Judicial Conduct Canon 3B(9) (2003) (internal cross-references omitted); cf. id. Canon 5A(3)(e) (“A candidate for a judicial office ... may respond to personal attacks or attacks on the candidate’s record as long as the response does not violate Section 5A(3)(d).”). But see infra note 34 (discussing distinctions between old Canon 5A(3)(e) and new Rule 2.10(E)).

26. See, e.g., Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 10.34, at 351 (3d ed. 2000) (“The proscription [against extrajudicial comments] under the 1972 Code is even broader [than the proscription in the 1990 Code], applying to cases that are pending or impending ‘in any court,’ without regard to the potential impact of the judge’s comments.” (emphasis added)).


28. Id. (emphasis added). The Committee did not explain the leap from teaching and writing about cases “in other jurisdictions” to comments on cases over which the judge is presiding. Moreover, the Committee presumably could have written explicit exceptions into the Canon, following the federal example. See Code of Conduct for United States Judges Canon 3A(6) (Judicial Conference of the U.S. 1999) (excepting, for example, “a scholarly presentation made for purposes of legal education”).

29. Milord, supra note 27, at 21.

30. Id. (emphasis added).
inadvertently and (2) assuring that judges do not prejudge the merits or unduly commit themselves to positions.\footnote{1} In any event, the change has little consequence for our present discussion.

What is clear, however, is that the 1990 Code is substantially similar to the 2007 Code, but the 1990 Code lacks a self-defense exception, to which we return below.

III.
THE DRAFTING HISTORY OF RULE 2.10

A. The Finished Product

RULE 2.10
Judicial Statements on Pending and Impending Cases

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

* * *

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.\footnote{2}

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.


32. Model Code of Judicial Conduct R. 2.10(A), (E) (2007) (internal cross-references omitted). In this Article, we do not deal directly with other aspects of Rule 2.10 (some of which are carry-forwards from previous Codes). See, e.g., id. R. 2.10(C) (requiring that judges ensure that court staff refrain from statements that a judge would not be permitted to make); id. R. 2.10(D) ("Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity."). In the Part II.C below, however, we do list virtually every public comment dealing with Rule 2.10, irrespective of the subsection at which the comment was directed. The general exception is Rule 2.10(B), which bans judicial statements promising outcomes or precommitting with respect to issues. That Rule has an expansive literature of its own. See, e.g., Swisher, supra note 31, at 666–67, 671–73. It is obviously interrelated to our topic, however, and therefore we address it where applicable.
[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge’s conduct in a matter.35

B. The Drafting History

Rule 2.10(A) is, in all relevant detail, a renumbered version of Canon 3B(9) of the 1990 Code. Thus, the primary rule regulating public comment concerning pending cases remains unchanged.34 The central change is the new self-defense exception, Rule 2.10(E); the 1990 Code had no counterpart, only a distant cousin addressing actions of judicial candidates.35 “Following extended discussion,”

35. See Model Code of Judicial Conduct Canon 5A(3)(e) (2003) (“A candidate for a judicial office . . . may respond to personal attacks or attacks on the candidate’s record as long as the response does not violate Section 5A(3)(d).”); id. 5A(3)(d) (“A candidate for a judicial office . . . shall not: (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or (ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” (internal cross-references omitted)). Canon 5A(3)(e) was new to the 1990 Code. See, e.g., Milord, supra note 27, at 51. It was added because “[t]he Committee has been informed that at times in recent contested elections, candidates have been subject to public attacks on their personal as well as their professional lives and have refrained from responding for fear of violating the Code, even though the attacks were based on false information.” Id. In the Joint Commission’s informal notes, this provision was compared to new Rule 2.10(E). The two provisions are substantially dissimilar, of course, in at least the following ways: (i) Former Canon 5A(3)(e) deals with candidates for judicial office (while Rule 2.10(E) deals primarily with sitting judges); (ii) Canon 5A(3)(e) addresses “personal attacks or attacks on the candidate’s record” (while Rule 2.10(E) addresses a judge’s “conduct in a matter pending or impending); (iii) Canon 5A(3)(e) is restricted explicitly by the prohibitions against pledges, promises, and commitments and misrepresentation of facts (while Rule 2.10(E) does not explain its relation to these restrictions, although presumably each express independent restrictions); and (iv) according to the Reporter, Canon 5A(3)(e)’s purpose was solely to respond to “false information” concerning a judicial candidate (while Rule 2.10(E)’s purpose was not concerned explicitly with responses to false information). See id.; Model Code of Judicial Conduct Canon 5A(1) cmt. (2003) (“Where false infor-
the Joint Commission gave birth to the new exception during its February 6, 2004 meeting, which was public and at which testimony was taken. It was a somewhat curious day to create what would become Rule 2.10(E). That morning, the Joint Commission held a public hearing and heard testimony from eleven commentators (over half of whom were judges). The only testimony relating to comments on pending cases favored a very restrictive rule—no comment, period.

Certain members of the Joint Commission nevertheless believed that the new exception was necessary in light of "the inability of judges, under the [1990] Code, to respond to unfair attacks concerning their judicial performance." At the time, however, the Commission decided to add the new language only to the Comment to Rule 2.11 (which later was renumbered as 2.10). There it remained through the entire draft and comment period for Canon 2 of the new Code.

The Rule was not promoted to the black letter of what would become Rule 2.10 until more than a year later, on September 16, 2004.
This suggested change was put to a passing vote. The only comments of record are the following: "A majority [of the Joint Commission] favored adding the portion regarding responding directly to the media;" and "[a]n advisor suggested retaining the admonition that the comment may not affect the outcome." The Reporter's comments are equally concise: "Judges are justifiably reluctant to speak about pending cases. However, the Commission wanted to make clear that when a judge's conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding."

The Commission also chose to apply a similar exception to judicial candidates: "Subject to paragraph (a)(12) [which like Rule 2.10(A), bars comments that would affect the outcome or fairness of a pending or impending proceeding], a judicial candidate is permitted to respond directly to false, misleading, or unfair accusations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case."

Rule 2.10(E) received almost no publicity (a rather comical result for a rule regarding publicity). Advisors and commentators in the know simply did not focus on it the way they focused on other controversial topics, such as the "appearance of impropriety" standard. The Rule was analyzed through publicly submitted comments, however, which are listed below.

42. Id.
43. Id.

Comment [2] suggests that it may be appropriate in some instances for statements that explain or defend the role or action of a judge in a particular matter to be made by a third person, rather than by the judge. This suggestion reflects a preference for keeping to a minimum the extent to which judges discuss cases directly with the media.


45. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. [9] (2007); id. R. 2.10(E) cmt. [3] (2007) (suggesting indirect responses may be preferable); see also MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(e) (2003) ("A candidate for a judicial office . . . may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 5A(3)(d).")

C. The Public Comments

Rule 2.10, including new Rule 2.10(E), received sparse review through the public comment process, and a solid majority of the comments it did receive were negative.\textsuperscript{47} We have listed them below in summary fashion.\textsuperscript{48} The Appendix, however, provides a more complete summary of every pertinent comment.\textsuperscript{49}

Nine commentators addressed Rule 2.10,\textsuperscript{50} some more thoughtfully than others. The commentators included one judge, one law professor, one attorney, two bar associations (but from the same state, New York), two ABA standing committees, the Public Citizen Litigation Group, and the American Judicature Society.\textsuperscript{51} The pro-extrajudicial-speech commentators offered only limited

and rules, including the impropriety standard, but making no mention of the language of current Rule 2.10(E)); Mark Hansen, Next Stop, House of Delegates: Proposed Revisions to ABA Model Code of Judicial Conduct Are Ready for a Vote, 93 A.B.A. J. 62, 62-63 (2007) (failing to mention the new rule as one of the new Code’s “talking points”); Gray, supra note 5, at 285 (noting that “[t]he most controversial issue addressed by the Joint Commission was whether to maintain the requirement, in Canon 2 of the 1990 model code, that a judge shall avoid ‘the appearance of impropriety in all of the judge’s activities’”). One of the Code’s Reporters did notice the problem: he asked, “doesn’t [the exception now found in Rule 2.10(E)] swallow the rule?” ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, FINAL CONCORDANCES (2006) (prepared for Commission’s April 8–9, 2006 meeting in Chicago, Illinois). At the time of the Reporter’s concern, however, the exception did not explicitly limit itself to comments that do not affect the fairness or outcome of the proceeding.

47. See, e.g., Gray, supra note 5, at 286 (noting that the American Judicature Society unsuccessfully objected to current Rule 2.10(E)). “The Society was concerned that encouraging judges to respond to criticism would result in litigants having to read the paper to find out the judge’s thinking about their case and would distort the administration of justice and undermine confidence in the courts as the public sees judges explaining cases on TV rather than in the courtroom.” Id. at 286–87. The Society did propose a limited public record exception for judicial responses to criticism: “This prohibition does not preclude a judge from responding to criticism by reiterating without elaboration what is set forth in the public record in a case, including pleadings, documentary evidence, and the transcript of proceedings held in open court.” Id. at 287.

48. The Joint Commission has posted all of the public comments on its website. See Abanet.org, Joint Commission to Evaluate the Model Code of Judicial Conduct Comments, http://www.abanet.org/judicialethics/resources/comments_rules.html (last visited September 28, 2008). The public comment period spanned nearly three years and involved three solicitations (comments were solicited on the 1990 Code, a preliminary draft of the new Code, and the final draft of the new Code).

49. See infra Appendix.

50. See infra Appendix (providing summaries of all pertinent public comments).

51. See infra Appendix.
commentary. One expressed the concern, without elaboration, that barring extrajudicial comments on pending cases raises First Amendment problems "at least in the context of partisan judicial elections."\textsuperscript{52} The rest tacitly agreed, through their failure to object, that extrajudicial comments should be permitted, at least to the extent allowable in the 1990 Code.\textsuperscript{53}

The opponents of extrajudicial comments were, generally speaking, the more outspoken of the two camps. The American Judicature Society ("AJS"), for example, offered these remarks against extrajudicial comments, including responses to criticism:

AJS is concerned that the phrase "might reasonably be expected to affect the outcome or impair the fairness of a matter" would be considered unconstitutionally vague in a restriction on speech.\textsuperscript{54} Commentary to the Maine Code of Judicial Conduct, for example, notes that "the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar . . ." A judge's first responsibility is to explain his or her decision to the parties; if that is done, then the public and the media are also adequately informed. If it is necessary to narrow the rule, a clearer approach would be to create an exception for comments in teaching or for cases pending outside the judge's jurisdiction.\textsuperscript{55}


\textsuperscript{53} See infra Appendix (providing summaries of all pertinent public comments).

\textsuperscript{54} AJS discounted the First Amendment concerns that provided the impetus to liberalize the rule:

[T]he phrase was presumably added in 1990 to narrow the prohibition in response to First Amendment concerns. But a broader restriction would not be subject to strict scrutiny as it is not based on content and does not apply to campaign speech but is a time, place, and manner restriction; despite the rule, judges may make any comment on a pending case as long as it is on the record in the case, in other words, when and where judges are supposed to be commenting on cases in fulfillment of their responsibilities.

AM. JUDICATURE SOC'Y, COMMENTS ON PRELIMINARY DRAFT OF REVISIONS TO ABA MODEL CODE OF JUDICIAL CONDUCT 19 (Sept. 2005), available at http://www.abanet.org/judicialethics/resources/comm_rules_gray_Canon2_091905_ddt.pdf. But see Chemerinsky, supra note 3, at 841 ("The restriction on judges' speech about pending cases is clearly a content-based restriction. Judges are free to speak about almost anything so long as the content of the speech is not about the pending case . . . Under this approach, the restriction of judicial speech about pending cases would be allowed only if strict scrutiny is met.").

\textsuperscript{55} AM. JUDICATURE SOC'Y, supra note 54, at 19.
Allowing a judge to respond without limitation to allegations "in the media or elsewhere concerning the judge's conduct in a matter" will result in litigants having to read the paper or watch TV to find out the judge's thinking about their case, a distortion of the administration of justice that will inevitably undermine confidence in the courts as the public see judges deciding cases in the media rather than the courtroom and the media manipulating that process.\(^5\)

The New York County Lawyers' Association, in comparison, primarily relied on precedent from influential jurisdictions to show by implication the wisdom of banning extrajudicial comments: "[W]e believe that the [near-absolute ban] adopted by New York and [California, Delaware, Massachusetts, Maine, Minnesota, Missouri, and the federal judiciary] represents the wiser course."\(^5\) As our final substantive example, Luther Munford of Phelps Dunbar L.L.P. supported an outright ban for the protection of judges:

The rules should simply prohibit the judge from making public statements concerning allegations in the media or elsewhere. Freedom to speak for some judges will be coercion to speak for others. No longer will a judge be able to tell the press "I can't." Once you allow an exception, then the judges who wisely do not want to comment to the press will have no shield behind which they can hide.\(^5\)

In sum, by our count, five out of the nine commentators favored a near-outright ban on extrajudicial comments concerning pending cases. Three commentators either supported the new Rule in full or expressed no relevant objection to it.\(^5\) Finally, one commentator favored ensuring that "public" and "private" com-


\(^{58}\) E-mail from Luther T. Munford, Phelps Dunbar LLP, to Eileen Gallagher, ABA Justice Center (Mar. 15, 2005, 4:35 PM) (sent from Tracey Booker on behalf of author), available at http://www.abanet.org/judicialethics/resources/comm_rules_munford_31505_ddt.pdf. Mr. Munford did not, however, provide a reason why judges "wisely" should not comment extrajudicially.

\(^{59}\) We have included the New York State Bar Association's comments as favoring the new self-defense exception (and implicitly the current extrajudicial comment rule generally), even though it expressed the reservation that the judge's response should be "measured and dignified." N.Y. State Bar Ass'n Special Comm. to Review the Code of Judicial Conduct, Comments, supra note 57, at 4.
ments are banned equally, but only to the extent that either type of comment affects the outcome or fairness of a matter. As reflected in the foregoing summary, the drafters of the new Rule ultimately sided with the minority view of the commentators. By this point, we have exhaustively explored the drafting history of Rule 2.10(A) and new Rule 2.10(E), and the following Parts analyze the finished product.

IV. DUALITIES OR CONTRADICTIONS: SOME PRELIMINARY OBSERVATIONS

In this Part, we flag several textual and policy perplexities of the new Rule 2.10(E). We do so only in a conclusory fashion, because we believe the heart of the debate rests elsewhere. That said, bringing these distinctions to light early in the discussion is key: it allows us to avoid a recurring flaw with previous treatments of extrajudicial speech by (among other things) separating distinct forms of such speech and addressing textual problems in regulating those forms.

A. Pending v. Impending

As an initial clarification, we note that the Rule permits responses "concerning a judge's conduct in a matter." It is difficult (but not impossible) to fathom an instance in which "a judge's conduct in a matter" involves an "impending" as opposed to "pending" matter. Therefore, we hardly need to discuss a judge's response with respect to "impending" matters. In other words, the exception in Rule 2.10(E) presumes that "a matter" is pending—only then does it make sense to say that the judge's conduct occurred "in a matter."

B. Restriction v. Permission

The first part of the Comment states that the "[r]ule's restrictions on judicial speech are essential to the maintenance of the in-
dependence, integrity, and impartiality of the judiciary." Yet it does not explain why judicial self-defense should be excepted from these "essential" restrictions. Thus, we have an unresolved contradiction. Obviously, the Code favors some limited amount of self-defense, but it does not explain if and how the exception coheres with the rest of the Rule and the other provisions in the Code.65

C. Official Capacity v. Personal Capacity

The second part of the Comment states that judges may comment on cases in which they are "a litigant in a personal capacity."66 "In cases in which the judge is a litigant in an official capacity," however, "the judge must not comment publicly."67 Literally, then, judges may self-defend (or otherwise comment) in cases over which they preside, but not in cases in which they are litigants in an official capacity. Facially, the distinction makes no sense. Indeed, it is seemingly perverse: when judges are litigants in their official capacity, they practically play no role. In the classic example, a writ of mandamus, the judge is merely named, but she typically does not appear in the matter as an attorney or witness. Thus, the judge (at the mandamus stage of the proceedings) plays a lesser, if not non-existent, role in the case.68 Therefore, in the main, it is less likely that the judge’s response would prejudice the proceeding (or be perceived as doing so). In contrast, the presiding judge, whom the Rule and Comment except from the ban, concurrently is deciding and managing the pending case. Therefore, we have more reason, not less, to circumscribe her comments than those of the formally named judge.

In all fairness to the new Code’s seemingly puzzling Comment, it largely echoes the 1990 Commentary, which created this personal-official capacity dichotomy.69 Indeed, the 1990 Commentary was informed by the 1972 Code, with respect to which the dichotomy would have made sense. The 1972 version of the rule facially

64. Id. R. 2.10 cmt. [1].
65. We offer some explanations and conclusions below. See infra Parts IV.D, VI.B.1.
67. Id. The example given is in a writ of mandamus. Id.
68. Before the mandamus stage or appeal, of course, the judge typically presided over the case.
69. See Model Code of Judicial Conduct Canon 3B(9) cmt. (2003); Code of Conduct for United States Judges Canon 3A(6) (1999) ("This provision does not restrict comments about proceedings in which the judge is a litigant in a personal capacity, but in mandamus proceedings when the judge is a litigant in an official capacity, the judge should not comment beyond the record.").
barred all comments concerning pending cases. It made sense, was necessary, and was only fair, then, to authorize a judge to speak concerning a case in which she was a party (not a judge). That much is still true today under the new Code, but the text of Rule 2.10(E) (and even Rule 2.10(A) for that matter) renders the rest of the Comment conflicting because it states that public comment is prohibited. Our best guess is that the Comment, when read in this way, is merely an oversight. In any event, the text of Rule 2.10(A) and (E) of course trumps conflicting commentary.\(^{70}\)

**D. A Tautology?**

Perhaps most importantly, we have some significant existential questions regarding the new self-defense exception. Rule 2.10(A) bans "any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."\(^{71}\) Yet Rule 2.10(E) states that a judge may respond to criticism "[s]ubject to the requirements in paragraph (A)."\(^{72}\) Thus, Rule 2.10(E) does not do any work; Rule 2.10(A) bans only prejudicial statements; if a statement—including a response to criticism—is not prejudicial, it is not banned. Indeed, such a statement was not banned under the 1990 Code either.\(^{73}\) Conversely, if a statement—including a response to criticism—is prejudicial, it is banned. The result would have been the same as well under the 1990 Code.\(^{74}\)

Rule 2.10(E)'s sole purpose (if it is to have one), then, must be to make explicit what was implicit: non-prejudicial responses to criticism are not banned. That explicitness may have some benefit by instilling confidence in the timid judge that his contemplated re-

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\(^{70}\) See, e.g., Model Code of Judicial Conduct Scope (2007) ("Comments neither add to nor subtract from the binding obligations set forth in the Rules.").

\(^{71}\) Id. R. 2.10(A).

\(^{72}\) Id. R. 2.10(E) (emphasis added).

\(^{73}\) Compare id. R. 2.10(A), with Model Code of Judicial Conduct Canon 3B(9) (2003).

\(^{74}\) Another important textual ambiguity in the new self-defense exception is its failure to distinguish between conduct-based criticism and merit-based criticism. We think this distinction is so important that we do not address it in this section (which gives only introductory and cursory treatment to various textual conflicts and ambiguities), choosing instead to give this distinction the greater attention it deserves in Part VI.B.1 below. In short, we note that conduct-based criticism (i.e., criticism unrelated to the merits of the case, such as *ad hominem* attacks on the judge) might warrant a response without violating the underlying policies behind the ban on extrajudicial speech.
sponse will not violate the Code (so long as he is confident that his response will not prejudice the proceeding or violate some other provision of the Code, which, as discussed below, may be a problematic assumption). While hardly creating "breathing space" for defensive speech, the new Rule does prompt its use. Fortunately, these potential problems attendant to the text of the new Rule do not preclude meaningful analysis, to which we turn below.

V. THE MERITS OF EXTRAJUDICIAL COMMENTS

A. Policy Statements

Before we begin the in-depth analysis, we list for the reader's reference the usual policy statements for and against the rule bar ring (some or all) public comments on pending cases. A few disclaimers are in order. First, while we think that the following summary quotations are a fair representation of the policy viewpoints from a diverse group of commentators, what follows is not an exhaustive listing of every commentator's opinion. Second, we flag the inevitable: some of the following quotations contain as much rhetorical flourish as analysis.

We first list the pro-speech policy statements—which tend to be less-frequently expressed—followed by the con-speech policy statements. We then address and analyze the policies we find particularly persuasive.

• There are three main benefits when judges speak publicly while cases are pending. One is educating the public. When a judge explains aspects of a case or the legal system there is an enormous benefit in informing the public. . . . A second benefit to having judges speak about pending cases is more subtle and therefore more often overlooked: It helps people to see judges as human beings. . . . The courtroom setting, with a black-robed judge sitting on a raised bench, makes judges seem more godlike than human. . . . A third benefit of judges speaking to the media is that it might enhance the image of the bench, the courts, and maybe even government generally. A positive performance by a judge can improve the credibility of the judiciary.76

75. Cf., e.g., Steven Lubet, Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment, 2 GEO. J. LEGAL ETHICS 665 (1989) (arguing that judges need clear and favorable rules in order to feel comfortable enough to comment extrajudicially).
76. Chemerinsky, supra note 3, at 844–45.
The ABA Judicial Division has issued an interesting, but somewhat opaque, view about the policies behind the rules and norms governing judges' responses to criticism. In the pro-response column, it lists essentially only one reason:

- 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 non-litigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial.\(^\text{77}\)

The no-response column, in comparison, is substantial:

- Generally, it is undesirable for a judge to answer criticism of her or his own actions 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. . . .

- 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.\(^\text{78}\)


\(^{78}\) Id. The Judicial Division offered two more reasons: "[1. A] judge's comment contains the potential of reflecting on pending litigation and may have an undesirable effect on litigants; [and 2.] an inappropriate response may give encouragement to those who would control the judiciary by intimidation and thus weaken the independence of the judiciary." Id. The problem with these reasons, however, is that they are rather vague and subject to multiple, perhaps incorrect, interpretations. For instance, the statements leave unidentified the "undesirable effect" or "those who would control the judiciary by intimidation."
The following is a list of other “against” policy statements, some of which offer overlapping reasoning.

- [C]omment about the merits of a case may jeopardize the litigation process in any of several ways. Such statements may prematurely commit the judge to a position before all evidence has been presented or they may be animated more by a desire to please the public audience than by a commitment to render an impartial decision. For these and other reasons, statements about the merits of pending or impending cases, just like expressions of opinion on other issues subject to judicial interpretation, are broadly condemned.  

- As a matter of fairness, we do not allow judges to comment publicly about pending cases outside the courtroom and to announce their views prior to the close of the evidence. If Judge Loquacious (our counterpart to Juror Loquacious) talks to reporters about a case pending personally before him, he may also talk himself into a mind set. Like Juror Loquacious, he may well be reluctant to admit that he had misjudged some testimony, or that he had been in error in asking the parties to explore a particular issue, or that his initial instincts were fatally wrong.

- Judges should clearly and comprehensively explain their decisions to the parties on the record and ensure that the public and media have access to the court and its rulings. By refraining from additional commentary, judges reassure the public that the judiciary is trying cases, not in the press, but in the public forum devoted to that purpose, and the code of judicial conduct advances public confidence by enforcing that principle.

- Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. . . . Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed

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whether a publicity-seeking judge might consciously or sub-consciously seek the publicity-maximizing outcome.\(^{82}\)

- [The Canon] minimizes the risk that such comments will . . . create a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.\(^{83}\)

While we otherwise find the above policy statements palatable, they (in the main) fail to state precisely the shortcomings of extrajudicial commenting, or if they do, they fail to rely on the most analytically problematic shortcomings in framing their objections.\(^{84}\)

Below, we try to avoid these common errors by discerning and describing the three strongest objections to extrajudicial commenting.

\section*{B. The Primary Problems with Extrajudicial Comments}

\subsection*{1. The Problem of Self-Centeredness}

The primary problem is that by commenting on pending cases over which the judge is presiding, she is elevating, or at least paying attention to, her personal interests (most commonly, either self-aggrandizement or self-defense, such as to explain or justify a ruling she believes has been mischaracterized, misunderstood, or both) over the interests of the parties, or more abstractly, the interests of

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\(^{82}\) United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001).

\(^{83}\) In re Benoit, 523 A.2d 1381, 1383 (Me. 1987) (censuring and suspending judge for sending letters to newspapers concerning the criminal sentences that he had imposed in still-pending matters). The last concern quoted above (i.e., that it is bad to allow the public to know that judges sometimes disagree on the outcome of a case) is mostly illegitimate: to the extent it even makes sense, it implies that it is unethical for judges to disagree with one another (or at least to disagree with one another in a public manner). Perhaps a litigant would suffer some psychological damage by hearing another judge criticize the judge presiding over the hearing at issue, but that seems remote, and if the commenting judge's critique is meritorious, the litigant should be eager to listen. The critique could, for example, convince the litigant that she should appeal the presiding judge's ruling. There is some merit in the concern that dueling judges (on the same issue of the same case) might lead to disobedience of the presiding judge. That, however, need not be a concern in practice because the rule generally bars comments regarding any pending case, not just the judge's own cases (regardless of whether drawing the distinction would make good sense). And with respect to the public in general, it seems hopelessly naïve to assume that the public does not know that judges disagree.

\(^{84}\) Or, in yet another iteration, they may raise strong objections, but group distinct objections into one rhetorical mass.
justice. 85 That is not to say that a judge needs to be wholly detached from the cause or the parties (indeed, a human connection may be indispensable in achieving fairness), but the judge’s own interests are irrelevant. In other words, the things that matter in a case—the things on which a judge should be focusing—are the parties, law, justice, and to a lesser extent, the system; the judge is not a factor in this equation. 86 This self-centeredness in submitting to the press also leads to the charge that the judge’s decisions will be determined by whatever considerations will result in favorable, or minimize unfavorable, coverage—not the legitimate considerations just mentioned. 87 Bluntly put, we should not countenance this self-centered behavior by our public officials serving in their official capacity.

Moreover, in order to be and remain impartial, and to be “perceived” as impartial, the judge must be above the fray, not become an advocate in it. 88 To be sure, there may be times when the interests of the parties and justice counsel for an extrajudicial comment

85. See, e.g., Microsoft, 253 F.3d at 115 (“Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media.”); ABA JUDICIAL DIV. LAWYERS CONFERENCE & SPECIAL COMM’N ON JUDICIAL INDEPENDENCE, RESPONSE TO CRITICISM OF JUDGES 7 (1998) (listing the following factors as counseling against response: “Whether a response would appear defensive or self-serving; . . . [w]hen the feud is between the critic and the judge on a personal level; . . . [a]dminister would prejudice a matter at issue in a pending proceeding”); Chemerinsky, supra note 3, at 847–48 (calling “powerful” the argument that “judges speaking about pending cases . . . diverts attention from the case and focuses it on the judge;” rejecting the argument because “I do not believe that it outweighs the benefits of judges in pending cases speaking to the press and granting interviews. If the interview educates people about the law and it helps people to see judges as human beings, then it is desirable even if some might see the judge’s behavior as an egotistical act”).

86. Obviously, judges matter as people. For instance, a judge’s physical security during a case is of great importance, but the topic at hand does not implicate such considerations. Moreover, purely conduct-based criticism of the judge might warrant a purely conduct-based extrajudicial response. See infra Part VI.B.1.

87. E.g., Microsoft, 253 F.3d at 115 (“Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome.”).

88. See, e.g., United States v. Cooley, 1 F.3d 985, 995 (10th Cir. 1993) (noting that judge’s public protestations would “unavoidably create the appearance that the judge had become an active participant . . . rather than remaining as a detached adjudicator”); cf. In re Andrews, 875 So. 2d 441 (Fla. 2004) (censuring
from the presiding judge, but those times appear both rare and speculative. Unless the commenting judge has some (better) proof that the comment will benefit (or mitigate a detriment to) some legitimate cause other than herself, she should leave the extrajudicial commenting to third parties. In short, to a certain extent, "self-defense" is—by its very nature—self-interested behavior that (with rare exceptions) has no proper place within the realm of the judge’s official duties. The same can (and should) be said of a judge’s acts of self-aggrandizement, such as garnering celebrity status through punchy interviews or media spots. A related and final point takes its analogy from attorneys’ ethics. Like preserving impartiality in judicial ethics, preserving confidentiality is one of the core principles of the attorney-client relationship and the legal profession. Yet when an attorney’s own conduct is called into question (even if not by the client and even if not yet in formal proceedings), the attorney can jettison confidentiality and disclose otherwise confidential information to the extent necessary to refute the allegations.90 The breadth of this exception to the duty of confidentiality has been frequently criticized as overbroad, self-serving, and even hypocritical.91 To the extent that such criticisms regarding the alleged overbreadth of the exception to the duty of confidentiality have validity, the problem of overbreadth should not be repeated in the context of judicial ethics: extrajudicial comments—which are otherwise universally circumscribed—should not be allowed solely because the judge’s rulings have been the subject of criticism or even mischaracterization.91

Another problem with extrajudicial comments—one that commentators often omit from discussion—is ex parte contacts, which we address below.

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89. See Model Rules of Prof’l Conduct R. 1.6(b)(5) (2003) (authorizing attorneys to reveal confidential information to the extent necessary to defend themselves, including “respond[ing] to allegations in any proceeding concerning the lawyer’s representation of the client”).


91. When the judge’s conduct (not the merits) is the issue, however, we would permit a response as a more narrow and reasonable exception to the general rule. See infra Part VI.B.1. This exception would apply a fortiori to judicial disciplinary proceedings, which by their very nature, focus on the targeted judge’s conduct.
2. The Problem of Ex Parte Contacts

Another problem with these comments in practice is that they result from, or at least are influenced by, ex parte contacts with the media—contacts that are unknown to, or at least practically uncorrectable by, the parties. As raised below, the problem is essentially fourfold: (1) parties generally are completely or partially unaware of these extrajudicial comments; (2) this extrajudicial speech—i.e., the dialogue between the judge and her audience—generally is not subject to cross-examination, objection, or appeal; (3) a regime of extrajudicial speech fails properly to incentivize judges to explain their official actions where it counts, namely, in their rulings and opinions; and (4) the outspoken judge, through her ex parte comments, may deter parties or affect the content of their in-court communications.

When judges speak to the press, they engage in ex parte communications, raising several concerns. First, litigants may not know the existence or extent of the comments (or may not know of them until long after the relevant proceedings). A related point is that if there is a dialogue between the judge and reporter (or other media respondent)—which is highly likely—it will not be part of the record. We think it safe to assume that these interviews were not monologues. Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case.

92. See generally Model Code of Judicial Conduct R. 2.9(A) (2007) ("A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter."); Model Code of Judicial Conduct Canon 3B(7) (2003) ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law[]. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .").

93. United States v. Microsoft Corp., 253 F.3d 34, 113 (D.C. Cir. 2001) (holding that judge's secret press interviews violated Canon 3A(4) and ordering disqualification); see also Rotunda, supra note 80, at 612 ("Judge Loquacious's ex parte communications during the trial are more troubling than Juror Loquacious's ex parte communications for another reason. Juror Loquacious will be talking to other jurors. But Judge Loquacious will be communicating with reporters, and these reporters, unlike the jurors, will have been exposed to information that is outside the record. The problem is not simply that the judge is talking to reporters; it is that reporters are talking to the judge.").
Moreover, if curious persons know that the judge can and will talk about the merits of a pending case, those persons inevitably will seek to discuss—if not outright debate—the case with the judge.94

Second, and perhaps more importantly for present purposes, the judge is not subject to cross-examination. It would be no overstatement to say that the Supreme Court has been quick to protect litigants' right to cross-examination.95 Extrajudicial comments, to the contrary, are often in denigration of that right. To be sure, comments or no comments, judges ordinarily are not subject to cross-examination, but then again, ordinarily the record is uncompromised, and the judge's judicial thoughts are shared and debated solely with the litigants (plus court staff), thereby significantly reducing the need for cross-examination. Similarly, keeping the judicial commentary on the record allows parties to object or seek to appeal when appropriate.96

94. Such inquiring minds are not limited to members of the media. Other examples would include an outspoken attorney who is friends or acquainted with the judge and who happens to run into the judge at the courthouse or a cocktail party.

95. See, e.g., In re Murchison, 349 U.S. 133, 138 (1955) (reversing conviction in part because judge "called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination"); Judith R. v. Hey, 405 S.E.2d 447, 454 (W. Va. 1990) (citing Papa v. New Haven Fed'n of Teachers, 444 A.2d 196 (Conn. 1982)) (noting concern that a judge's comments can effectively make her "an unsworn witness without allowing the defendants an opportunity to offer testimony to refute the judge's assertions").

96. The Microsoft opinion persuasively makes these points:
The problem here is not just what the District Judge said, but to whom he said it and when. His crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy—all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. See Liteky, 510 U.S. at 555-56; CODE OF CONDUCT Canon 3A(6) (exception to prohibition for "statements made in the course of the judge's official duties"). But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge's remarks would be reported. Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write.

Microsoft, 253 F.3d at 115; see also Rotunda, supra note 80, at 617 ("The proper way for the judge to explain his rulings and to educate the public and news media is to write an opinion, not to give press conferences or engage in extrajudicial comments."); id. at 624 ("In fact, even if [the judge's on-the-bench] comments are not
Third, from whatever (more likely) selfish or (less likely) unselfish desire the urge to explain their rulings to reporters springs, allowing extrajudicial comments wastes the opportunity to channel that urge into better behavior. The reason is simple: if we allow judges to explain their rulings extrajudicially, they have less incentive to issue a more thorough ruling or opinion in the first place; if in contrast we bar (or at least shame) judges from extrajudicially commenting, they will be forced to explain more fully their rulings in their actual rulings and opinions. We thus have incentivized more explicative rulings and opinions. The advantages include (in the main) a better appellate record and a more considered ruling.

Finally, we pose a perhaps atypical concern: What if some litigants would be more hesitant to prosecute or defend their cases before a judge who discusses their information with the media? To be sure, most of what judges know from litigants is public record. But being in the public record and being generally known—indeed, being generally broadcasted—are obviously different. The concern is analogous to one of the primary policies behind maintaining attorney-client confidential and privileged information: by building the trust in the client that she can disclose information to the attorney without its being relayed to anyone indiscriminately, especially the media, she will be more inclined to disclose. While the litigant-judge relationship does not hold the same promise of confidentiality and privilege as the attorney-client relationship, it has (at least heretofore) held the lesser promise that what the litigant writes he can still write what he wants in his opinion, where it becomes part of the record. Then, the litigants and the appellate court can respond to it. Or, the judge could wait until the case is no longer pending before engaging in any extrajudicial comments.

97. See supra Part V.B.1 (discussing the self-centered motivating factors producing extrajudicial comments and concluding that those factors are unnecessary and disruptive to the judicial role).

98. We assume everyone is on board with our goal of encouraging more explicative rulings and opinions (even if some are not on board with our means). See, e.g., Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 WILLAMETTE L. REV. 723, 751–52 (2008) (explaining some of the condemnation of short, "unpublished" opinions); Sarah M.R. Cravens, Judges as Trustees: A Duty to Account and an Opportunity for Virtue, 62 WASH. & LEE L. REV. 1637 (2005) (noting some of the benefits of judicial reason giving). Furthermore, judges who issue cryptic or incomplete rulings may be violating several judicial ethics provisions, including diligence and competence. See Lawrence J. Fox, Those Unpublished Opinions: An Appropriate Expediency or an Abdication of Responsibility?, 32 Hofstra L. Rev. 1215, 1225–26 (2004).

gant tells the judge through pleadings or testimony will be repeated only in limited legal venues (e.g., in an opinion or a hearing), if at all. One could argue that this concern might cause timid litigants to dismiss their cases or not to prosecute or defend their cases in the first place. It could also lead to a curious type of litigant censorship—that is, litigants might edit their legal disclosures in ways they would not in a system in which judges are not media sources. While we doubt that this censorship would go so far as to result in perjury—the detriments outweigh the rewards—it still might be undesirable in the sense that "less" candid or detailed accounts would be disclosed to the judge. In short, the outspoken judge might earn less trust and, therefore, receive less disclosure than a more discrete judge.

While we recognize that the preceding concerns are both atypical (particularly in the sense that they are unusual in a discussion of the policies behind the prohibition of ex parte contacts) and somewhat speculative, they are nonetheless alarming.

3. The Problem of Disqualification

In the aftermath of Republican Party of Minnesota v. White, which held that a judicial ethics rule prohibiting judicial candidates from announcing their views publicly violated the First Amendment, many opponents of extrajudicial speech found solace in the hope of disqualifying outspoken judges. Their hope may be well

100. Cf. Tobin A. Sparling, Keeping Up Appearances: The Constitutionality of the Model Code of Judicial Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias, 19 GEO. J. LEGAL ETHICS 441, 472 (2006) (opining that "[w]hen a state allows [biased extrajudicial] speech to go unpunished, the targets of the bias . . . understandably, may be reluctant to expend time and resources in a judicial system perceptibly stacked against them on account of who they are").

101. Take, for example, the Microsoft case, in which the judge gave extensive interviews with the press throughout the proceedings. His remarks even included negative characterizations of some of the litigants, namely, Bill Gates and Microsoft. See United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001). Of course, unlike the typical civil litigants, Bill Gates and Microsoft had little choice but to litigate against the government's antitrust case. Generally, however, civil litigants retain substantial, if not complete, control over whether to pursue or settle litigation and the manner (if not the content) of disclosure.


103. See, e.g., J.J. Gass, After White: Defending and Amending Canons of Judicial Ethics 23 (Brennan Center for Justice 2004) ("If regulations of campaign conduct are invalidated or limited in the wake of White, states may respond by beefing up their recusal standards. Perhaps the government cannot bar candidates from announcing their views on controversial issues, but it can protect litigants' interests by requiring judges to recuse themselves from cases where their campaign conduct has created reason to doubt their impartiality.").

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founded. Recusal\textsuperscript{104} is required by the Model Code and by statute “in any proceeding in which the judge’s impartiality might reasonably be questioned.”\textsuperscript{105} The Code now demands recusal in another important respect as well: “[Whenever t]he judge . . . has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”\textsuperscript{106} Moreover, the disqualification cases are fairly clear both in words and in practice that “any reasonable doubts about the partiality of the judge ordinarily are to be resolved in favor of recusal.”\textsuperscript{107}

Although different phraseology is used, the operable test for recusal or disqualification (in both federal and state court) is relatively simple: “Under § 455(a), ‘disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown.’”\textsuperscript{108} That section “was designed to promote public confidence in the integrity of the judicial process by replacing the

\textsuperscript{104} In this Part, we treat judicial recusal and disqualification as interchangeable. In common usage, the former means a decision of the judge whose impartiality is in question that the case should be handled by a different judge; the latter typically means a decision of another (ordinarily superior) court or judge that the case should be handled by a different judge. We warn the reader, however, that the terms recusal and disqualification have different meanings from state to state.

\textsuperscript{105} MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) (internal cross-reference omitted); accord 28 U.S.C. § 455(a) (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003). As an important preliminary observation, it must be remembered that “the Code of Judicial Conduct does not overlap perfectly with § 455(a): it is possible to violate the Code without creating an appearance of partiality; likewise, it is possible for a judge to comply with the Code yet still be required to recuse herself.” In re Boston’s Children First, 244 F.3d 164, 168 (1st Cir. 2001). But as this Part demonstrates, there is little practical difference between the two (in either wording or application).

\textsuperscript{106} MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (5) (2007); see also MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2003) (requiring recusal whenever “the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding”).

\textsuperscript{107} E.g., In re United States, 441 F.3d 44, 56 (1st Cir. 2006) (disqualifying judge pursuant to 28 U.S.C. § 455(a)).

\textsuperscript{108} United States v. Tucker, 78 F.3d 1318, 1324 (8th Cir. 1996) (quoting in part Gray v. Univ. of Arkansas at Fayetteville, 883 F.2d 1394, 1398 (8th Cir. 1989)); see also E. Wayne Thode, The Code of Judicial Conduct: The First Five Years in the Courts, 1977 UTAH L. REV. 395, 402 (1977) (noting that the test for recusal is “Would a person of ordinary prudence in the judge’s position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge’s impartiality?”).
subjective 'in his opinion' standard with an objective test.' According to the Supreme Court, "quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned.'" Furthermore, in puzzling whether that somewhat amorphous trigger has been activated, courts analyze the import of the extrajudicial speech cumulatively, not discretely. In sum, as noted above and below, the outspoken judge ordinarily must recuse herself in light of her extrajudicial comments.

_In re Boston's Children First_, for example, involved a controversial race-based public school policy, and the plaintiffs sought class certification. Plaintiffs' counsel gave a well-circulated newspaper the factually dubious information that the district judge had denied class certification (a motion for which had not even been filed at the time counsel gave the statement). Counsel also "made the provocative claim that "if you get strip-searched in jail, you get more rights than a child who is of the wrong color." Finally, the article stated that the judge "'refused to hear arguments to expand the school suit to a class action because the affected students may no longer have standing in the case. But in the strip-search case, [the judge] held just the opposite opinion.'"

The judge quickly responded to the article with both a letter and telephone call to the same newspaper. Her response was brief. In its entirety, it stated that (1) she had not denied a motion for class certification (as none was pending when the article went to press) and (2) "'[i]n the [strip-search] case, there was no issue as to whether [the plaintiffs] were injured. It was absolutely clear every woman had a claim. This is a more complex case.'" Solely on


111. _See In re United States_, 441 F.3d at 68; _In re Martinez-Catala_, 129 F.3d 213, 221 (1st Cir. 1997).

112. 244 F.3d 164, 165 (1st Cir. 2001).

113. _Id._ at 165–66.

114. _Id._ The strip-search comment referred to an unrelated case over which the same district judge presided and in which she had granted class certification to a class of female inmates. _See Mack v. Suffolk County_, 191 F.R.D. 16, 17, 25 (D. Mass. 2000).

115. _Boston's Children First_, 244 F.3d at 166 (quoting Dave Wedge, _Lawyer Fights School Ruling_, BOSTON HERALD, July 26, 2000, at 5).

116. _Id._ (quoting Dave Wedge, _Race-Based Admissions Case To Be Heard_, BOSTON HERALD, Aug. 4, 2000, at 24). With respect to the telephone call with the newspaper, it was unclear who called whom, but the content of the conversation was never in dispute. _Id._
the basis of the foregoing response, plaintiffs’ counsel moved to disqualify the judge under 28 U.S.C. § 455(a) because the judge’s “impartiality might reasonably be questioned.”117

The First Circuit agreed with plaintiffs’ counsel and disqualified the judge. While the panel cited several reasons for doing so, it primarily relied on two points: (1) the “appearance of partiality created by defense of a judge’s own orders”;118 and (2) “the very rarity of such public statements, and the ease with which they may be avoided, make it more likely that a reasonable person will interpret such statements as evidence of bias.”119 We think the first point, but ordinarily not the second, is a sound legal basis on which to disqualify judges under § 455(a).120 In light of the judge’s relatively mild and brief comments, however, we find it difficult to understand how any comments on the merits of pending cases (beyond repeating applicable parts of the record) over which a judge is presiding would not result in disqualification of that judge.121 And in light of the judge’s duty to sit—the duty not to shun or displace work, directly or indirectly—virtually any such comments violate the judge’s ethical duties.122 A judge should not voluntarily cause her disqualification.

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117. Id. (citing 28 U.S.C. § 455(a)).
118. Id. at 170.
119. Id. The panel continued: “Interested members of the public might well consider [the judge's] actions as expressing an undue degree of interest in the case, and thus pay special attention to the language of her comments.” Id.
120. We do, however, question the fairness of part of the second basis—namely, in light of the “very rarity” of extrajudicial comments, it is “more likely that a reasonable person will interpret such statements as evidence of bias.” Id. While we agree that the rarity of the statements indeed makes it more likely that litigants (and citizens generally) “will interpret such statements as evidence of bias,” the ethics rules likely cause such rarity. Therefore, it is unfair to use the absence of such comments—which are prohibited by the very rules that opponents want liberalized—as the reason for adhering to the rule in the future. Empirically, a proponent of the ban might be able to show that the rarity of extrajudicial comments preexisted the ethical ban, but it is reasonable to assume until then (and even after) that the rarity is caused in part by the rule’s explicit prohibition of such comments.
121. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 114 (D.C. Cir. 2001) (noting that “courts have taken a hard line on public comments, finding violations of § 455(a) for judicial commentary on pending cases that seems mild”).
122. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 2.7 cmt. (2007) (“The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.”). For a famous example of one strand of the duty to sit, see Laird v. Tatum, 409 U.S. 824, 837 (1972) (Rehnquist, J.) (refusing to recuse and noting that all circuits had recognized the duty to sit).
The First Circuit is not alone in corroborating our conclusion that very few (if any) such comments would not result in disqualification. In *In re IBM*, for example, the basis for disqualification was on-the-bench criticism of the prosecutor's decision to dismiss the case, refusals or threatened refusals to approve stipulations, and off-the-bench interviews with two major newspapers in town immediately following the case's dismissal. The court did not seem to care about the content of the interviews. Moreover, as the famous *Microsoft* case noted, "opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth all deal[] with the merits of the action." It further noted that the fact that judges "may have intended to 'educate' the public about the case or to rebut 'public misperceptions' purportedly caused by the parties" does not "excuse" the Rule violation.

As these cases demonstrate, extrajudicial comments and responses to criticism almost always result in or risk disqualification. The decision to respond, then, is at some level irresponsible; in the garden variety response, it places the judge's personal decision to "correct" the press over the judge's responsibility to preside over the case. Judicial conduct virtually guaranteeing disqualification seems overly self-centered.

123. 45 F.3d 641, 642 (2d Cir. 1995). The panel described the interviews only vaguely: "[N]ewspaper interviews given by the Judge concerning IBM's activities in general and Assistant Attorney General Baxter's role in particular." *Id.*

124. *Microsoft*, 253 F.3d at 112 (emphasis added) (disqualifying judge for giving numerous press interviews while case was pending before him, notwithstanding the fact that he conditioned his interviews on reporters' agreement not to publish the content of the interviews until after the judge had issued his primary order).

125. *Id.* As Professor Ronald Rotunda noted, "the district court . . . defended these remarks by arguing that the judge needed to talk to reporters to 'correct some of the public distortions' of the facts by 'one or both of the parties.'" Rotunda, *supra* note 80, at 619 (quoting comments by Judge Jackson). The D.C. Circuit rejected that defense. *See id.* For a more egregious example of entering the fray, see *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993) (disqualifying judge for appearing on national television for his "campaign" to ensure that abortion protesters did not violate his orders); *Judith R. v. Hey*, 405 S.E.2d 447 (W. Va. 1990) (disqualifying judge for defending his actions and disparaging litigant's character).

126. *See supra* note 122.

127. *See supra* Part V.B.1 (noting problems of self-centeredness). A disclaimer is in order: there may be cases in which the responding judge does so not out of self-interest or other personal reasons, but to rehabilitate the public image or otherwise advance the interests of a particular court system or the judiciary as a whole. Of the cases we have examined, that motive rarely, if ever, predominates. That
4. The Problem of Conflicting Duties

We are not the first to note that the Code involves a balance of conceivably conflicting duties and interests,\(^\text{128}\) some of which we raise here. The new Rule's explicit self-defense exception notwithstanding, the following is a non-exhaustive discussion of significant landmines still lurking for extrajudicial commentators.\(^\text{129}\)

The judge must be careful—indeed, may face a substantial obstacle—not to violate Rule 1.3, "Avoiding Abuse of the Prestige of Judicial Office."\(^\text{130}\) It is clear that a judge cannot use "her position to gain personal advantage or deferential treatment of any kind."\(^\text{131}\)

Any response to criticism, then, arguably cannot use the judge's status as judge to silence critics or otherwise allude to the judge's superior claim to the law (in the sense of both knowledge and command).\(^\text{132}\) In short, it will be hard not to pull rank or elicit deference. Similarly, in responding by letter, the judge should be

\(^{128}\) See, e.g., Steven Lubet, Judicial Discipline and Judicial Independence, LAW & CONTEMP. PROBS. 59 (1998) (discussing the tension between accountability and judicial independence inherent in a judicial discipline regime).

\(^{129}\) It should be remembered that, generally speaking, each provision of the Code (unless otherwise stated) is subject to every other. See, e.g., MASS. CODE OF JUDICIAL CONDUCT Pmbl. (Mass. Comm'n on Judicial Conduct 2003) ("The Code must be read as a whole. Judges must be alert to the possibility that more than one Canon or Section may apply to a particular situation. As an example, before concluding that an action appears to be permitted by one of the more detailed provisions of the Code, the judge should consider whether, in the circumstances, the action is improper when measured against a more general provision, for instance, Section 2A. Occasionally a provision of the Code is explicitly stated as being 'subject to the requirements of this Code,' or similar language. The absence of language to that effect elsewhere should not lull the judge into indifference to the rest of the Code when the judge focuses on a particular provision; every provision is subject to every other provision.").

\(^{130}\) MODEL CODE OF JUDICIAL CONDUCT R. 1.3 (2007).

\(^{131}\) Id. R. 1.3 cmt. [1].

\(^{132}\) See In re Broadbelt, 683 A.2d 543, 550 (N.J. 1996) ("In the instant case, Judge Broadbelt's regular appearances on commercial television violated Canon 2B[, which prohibits lending the prestige of office to advance private interests]. Because of the frequency of Judge Broadbelt's appearances, Judge Broadbelt became regularly identified with the program, thereby lending it the prestige of his judicial office."); S.C. Advisory Comm. on Standards of Judicial Conduct, Formal Op. 14-1991 (1991) (concluding same, but with respect to a radio show). The most recent opinion on the subject is mixed. See Jenevein v. Willing, 493 F.3d 551 (5th Cir. 2007) (holding that while the content of an elected judge's extrajudicial speech was protected by the First Amendment, the judge could be disciplined because that speech was given at a press conference in which he sat behind the bench and wore his robe).
careful of the use of her letterhead not "to gain an advantage in conducting . . . her personal business."\textsuperscript{133} In our opinion, judicial responses to criticism—even though such responses address pending cases—are by nature "personal" or "extrajudicial." While judges' responses may be well deserved, their responses are not necessary to the completion of their judicial responsibilities.\textsuperscript{134} Responses must therefore be issued with extreme caution.

An even more important impediment is Rule 1.2, which demands that "[a] judge shall act \textit{at all times} in a manner that promotes public confidence in the \textit{independence}, integrity, and \textit{impartiality} of the judiciary."\textsuperscript{135} Unless the response is meant to deny or correct charges of dependence or partiality, there is effectively little room to make personal responses regarding a pending matter (most often, one over which the judge is presiding) and not convey a lack of independence or impartiality over the subject matter of the criticism and perhaps even the case itself. Succumbing and responding to personal criticism by nature encroaches, to varying extents, on the objective and impartial nature of the judge's approach to the case (or the relevant portion of the case); personal attacks and responses do not lend themselves to objective and impartial reactions and appearances.\textsuperscript{136} Indeed, "any response to critics of the judge's actions or motives places that judge in a potentially adversarial position that may cast doubt on his impartial-

\textsuperscript{133} \textit{MODEL CODE OF JUDICIAL CONDUCT} R. 1.3 cmt. [1] (2007); \textit{see also In re Hill}, 8 S.W.3d 578, 582 (Miss. 2000) (holding that judge's letter in support of police chief improperly lent the prestige of his judicial office and noting that a "finding of pecuniary gain is not required").

\textsuperscript{134} For the counterpoint, see Stephen J. Fortunato, Jr., \textit{On a Judge's Duty To Speak Extrajudicially: Rethinking the Strategy of Silence}, 12 GEO. J. LEGAL ETHICS 679, 708-09 (1999). For the sources of the duty to respond to baseless personal attacks, that article cites the judicial oaths of office, separation of powers, and several philosophers. Respectfully, with the one attenuated exception of upholding judicial integrity, we fail to see any connection between those sources and any so-called duty. Indeed, as discussed further below, a healthy concern for judicial integrity ordinarily cuts the other way.

\textsuperscript{135} \textit{MODEL CODE OF JUDICIAL CONDUCT} R. 1.2 (2007) (emphasis added).

\textsuperscript{136} Professor Ronald Rotunda provides a good example of one aspect of this problematic phenomenon: When a judge starts explaining to (and trying to persuade) [the media] why he thinks one side should win, his explanations may start to appear like arguments and later, [he] may be reluctant to back off, admit that he had been in error, and that he should change his mind when faced with other evidence. Rotunda, \textit{supra} note 80, at 611-12.
The Comment to Rule 1.2 reminds the judge of the downside that attends the prestigious judicial office: "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code."\(^{138}\)

Moreover, "when engaging in extrajudicial activities," Rule 3.1 bars judges from "participat[ing] in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality" or "be coercive."\(^{139}\) While this provision provides little practical guidance, for the reasons given in Parts V.A and B, extrajudicial comments might offend the spirit of this provision. For example, the judge is not maintaining independence by remaining above and beyond criticism, and the judge is not maintaining impartiality if she becomes an advocate for an issue in the case.

Finally, public comments that go beyond that which is contained in the public record may offend Rule 3.5 (and its predecessors): "A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties."\(^{140}\) Under the new Code, "[n]onpublic information" is simply "information that is not available to the public," which is an even broader definition than that contained in the 1990 Code.\(^{141}\) The judge cannot use such infor-


\(^{138}\) MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. [2] (2007). Indeed, the 1990 Code Commentary was right on point: "Examples are the restrictions on judicial speech imposed by Sections 3B(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (2003). Canon 3B(9), of course, housed many of new Rule 2.10's provisions.

\(^{139}\) MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C)-(D) (2007).

\(^{140}\) Id. R. 3.5 (internal cross-reference omitted); accord MODEL CODE OF JUDICIAL CONDUCT Canon 3B(12) (2003) ("A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." (internal cross-reference omitted)); CODE OF JUDICIAL CONDUCT Canon 5C(7) (1984) ("Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or any other purpose not related to his judicial duties."). The Comment would allow use of nonpublic information only "to protect the health or safety of the judge or a member of the judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code," MODEL CODE OF JUDICIAL CONDUCT R. 3.5 cmt. [2] (2007).

\(^{141}\) MODEL CODE OF JUDICIAL CONDUCT Terminology (2007). The definition also gives some non-exhaustive examples, namely, "information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases,
mation of "commercial or other value" "for personal gain or for any purpose unrelated to his or her judicial duties." The problem could be exemplified by any number of public comments. For example, in responding to public accusations by defense counsel, a judge states to the press that "defense counsel appeared to fall asleep halfway through the hearing" at issue. This was information acquired in the judge's "judicial capacity," but the response is "unrelated to the judge's judicial duties."

Even assuming that this "hearing" was not sealed and a transcript is available, and even assuming the accuracy of the judge's recollection, the judge's response discloses information that was nonpublic, unless the fact of counsel's sleepiness was placed on the record. While a judge could respond that this information lacked no "commercial or other value" to the judge, she by no means would have an unassailable argument: if the information wholly lacked "value" to the judge, there would be no reason to bring it to the media's attention. To be sure, it may have value only in the


143. Id. R. 3.5. Responding to criticism, of course, is not part of a judge's duties. Indeed, absent horrific media attention of an almost unheard-of intensity, a judge could perform every single judicial and administrative function without the need to resort to public comments. There may be rare exceptions, such as where the unchecked criticism will result in a trial unfair to a criminal defendant (which the judge has a duty to guard against) and other (presumably better) remedies are unavailable or somehow ineffectual.

144. She would have some resort to the drafting history of the rule, which essentially was promulgated by the 1990 Code. See MILORD, supra note 27, at 22 (calling the rule "new"). The rule's (then) newness is debatable: the 1972 Code has a somewhat similar restriction with respect to a judge's "financial activities." See CODE OF JUDICIAL CONDUCT Canon 5C(7) (1984) ("Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or any other purpose not related to his judicial duties."). Therefore, the 1990 Code's Reporter was on shaky ground when she wrote "this Section had no counterpart in the 1972 Code." MILORD, supra note 27, at 22. Some of the "financial" roots of the 1972 Code, however, were captured by the 1990 Code's Reporter: "This new Section is directed primarily at prohibiting judges from abusing the public trust for their private gain; for example, a judge would be subject to discipline for investing in stock based upon a tip the judge had learned through information sealed by court order." Va. Jud. Ethics Advisory Comm., Op. 01-1 (Feb. 7, 2001) (citing MILORD, supra note 27, at 22), available at http://www.courts.state.va.us/jirc/opinions/2001/01_01.html; MILORD, supra note 27, at 22.
sense of rehabilitating the judge's or the judiciary's reputation, but that is a form of value.\textsuperscript{145}

In sum, judges still operate under several restrictions that temper and caution their responses. Above, we have explicated the substantial problems with extrajudicial comments about the merits of impending or pending cases; below, we discuss the typical defenses for extrajudicial comment, which we generally conclude are unpersuasive.

\textbf{C. The Defenses of Extrajudicial Comments}

1. A Typical Defense

One prominent judge, Judge Fortunato, has lodged two defenses for a self-defense exception.\textsuperscript{146} First, he claims that in the face of baseless criticism, judges should denounce "the charges as groundless and fatuous and chastis[e] the critic and the press for failing to produce one shred of evidence in support of the accusations, . . . and . . . the charges are contributing to public cynicism about government generally."\textsuperscript{147} Not only would such a response quell the concern over the judge's integrity, but it further "might be regarded by people genuinely concerned about the future of our democracy as having made a small contribution toward restoring respect for our institutions."\textsuperscript{148} With respect, we do not think either benefit likely follows.

That flat denial—"I am innocent of all charges"—is nothing appreciably different from the criminal defendant's denial through the press release of his or her attorney. While we have no empirical evidence to prove it, we are rather confident that common sense and experience confirm that such denials are either outright disbelieved or taken with such a heavy dose of salt that they are nearly worthless.\textsuperscript{149} The hard question is presented not by the flat or blanket denial, but by the response that rebuts false or unjustified criti-


\textsuperscript{146} In this Part, we do not pretend to be answering every critic; we merely are rebutting one prominent critic raising two fairly representative arguments.

\textsuperscript{147} Fortunato, supra note 2, at 695.

\textsuperscript{148} Id.

\textsuperscript{149} See, e.g., ABA JUDICIAL DIV. LAWYERS CONFERENCE & SPECIAL COMM'N ON JUDICIAL INDEPENDENCE, RESPONSE TO CRITICISM OF JUDGES 3 (1998) ("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.").
cism, and, in so doing, potentially restores some amount of integrity to the judge or to our judicial institution. But even assuming the latter scenario is a significant potentiality, the response should be made by a third party, thereby capturing this benefit and avoiding the detriments inherent in extrajudicial responses.¹⁵⁰

Judge Fortunato then makes a second, but related, defense—the silence alternative surely will lead the public to assume the judge's guilt.¹⁵¹ In other words, "[i]t is not unreasonable to assume that some members of the public will consider the failure to reply to a widely publicized charge . . . as the equivalent of an admission."¹⁵² Perhaps in general that argument has some force, but with respect to extrajudicial comments on pending cases, it falls flat on its face. Judges cannot respond because the Code prohibits it, and judges have never been prohibited from responding with that explanation for their silence.¹⁵³ The "silence as an admission" doctrines assume that a response is permitted. Here, a response is not. Indeed, one would not fault a criminal defendant for remaining silent in the face of a criminal accusation if a law penalized the response; hence one logically should not fault the judge either. Obviously, with the new Code's self-defense exception, the "silence as an admission" arguments have more force, but for the reasons listed in Part V.B above, the response (if it, for example, touches on the merits or involves nonpublic information) might still be unethical notwithstanding the new Rule.

Finally, the judge claims that "silence, at bottom, is a selfish response [because] it has nothing to do with the independence of the judicial branch of government, but it has everything to do with keeping a judge out of harm's way until the storm has blown over."¹⁵⁴ Again, the judge has lodged an argument that undercuts his own position. The primary point of silence is, in our opinion, to avoid the fray, not to become embroiled in it. Contrary to concerns over "selfish[ness]," judges should avoid "the storm" because it impacts their independence and impartiality. That storm is looming outside the courtroom, which is where it should stay—bringing it

¹⁵⁰. See infra Part VI.B.2 (suggesting this approach). If the response does not touch on the merits, however, the third-party vehicle may be unnecessary. See infra Part VI.B.1.
¹⁵¹. Fortunato, supra note 2, at 701.
¹⁵². Id.
¹⁵⁴. Fortunato, supra note 2, at 701.
into the courtroom (through the vehicle of the judge’s attention) is the “selfish” move.

Moreover, the judge who needs to rebut criticism—particularly if she needs to comment substantively on the issues or likely issues—is involving herself in the case in a way that breaches impartiality. “A judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.” Likewise, a judge must not “allow his or her judgment or analysis to be influenced by public reaction.” While the extent of this influence is debatable both in general and in specific cases, one cannot deny that some influence is penetrating the judge’s skin: if it were not, the judge would have no urge to respond or comment. Again, that influence is distracting her attention from her core duties with respect to the case at issue.

2. The First Amendment Defense

The First Amendment may be more of an oasis than a viable defense. We are unaware of any cases holding that a presiding judge’s comments concerning a pending case were significantly protected by the First Amendment (or were not outweighed by countervailing state interests). We are sensitive to First Amend-

155. ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.6(e) (2000); see also id. Standard 6-1.6(e) cmt. (“Concern about media coverage and public response is not consistent with impartiality and the rule of law.”).

156. Id. Standard 6-1.6(e) cmt. In addition to the problems of “coveting publicity” and “influence[ ] by the prospect of favorable coverage in the media,” there is the problem that a judge who is preoccupied with correcting what has been extrajudicially disseminated to the media is, indeed, preoccupied. Nancy Gertner, To Speak or Not To Speak: Musings on Judicial Silence, 32 Hofstra L. Rev. 1147, 1159–60 (2004) (discussing novel approach of using a “new form of judicial opinion, beginning ‘In re Yesterday’s Globe’” to correct inaccuracies in the media through the vehicle of a judicial opinion). While this preoccupation with the media is related to her duties to safeguard the proceedings, it is still distracting her time and energy away from attending to the parties and court administration. Presumably, for a judge with several or more newsworthy cases, such concern with the media’s performance, including its inevitable errors, could consume a large portion of the judge’s time.

157. See, e.g., In re Hey, 452 S.E.2d 24, 31 (W. Va. 1994) (surveying First Amendment cases concerning public employee speech and concluding that speech involving pending cases could be prohibited consistent with the First Amendment); cf. Gass, supra note 103, at 3 (noting that “[j]udges have unsuccessfully challenged the ‘Commit Clause’ . . . found in the ABA’s 1990 Model Code. The Commit Clause prohibits a judicial candidate from making ‘statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.’”).

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ment concerns, however, which in part is why (1) we prefer a blanket prohibition (to avoid the vagueness of a softer standard), and (2) we recognize below that extrajudicial comments concerning other judges’ pending cases might be entitled to protection.158

While we note that the current rule has yet to fail constitutionally,159 we nevertheless fear that the current rule’s trigger is vague. It bars extrajudicial comments only when the comments “might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.”160 To be sure, we can (and ordinarily do) presume that many comments will affect the outcome or fairness of the proceeding, but we admit that we cannot say that such comments actually will do so. Indeed, absent unusually blatant and bold extrajudicial comments, it would be seemingly impossible to prove the effect or interference that the comments had on the proceeding.161 We therefore largely agree with the American Judicature Society that “[t]he ‘difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar.’”162

158. See infra Part V.C.4. Although only indirectly related to First Amendment concerns, we note that a categorical ban probably should not apply to extrajudicial responses to criticism of a judge’s conduct unrelated to the merits. See infra Part VI.B.1. This exception is harmonious with the First Amendment because extrajudicial speech is banned to preserve the interests in the sanctity of the proceedings and the judge presiding over them. See supra Part V.B. When the speech is unrelated to the merits of the proceeding in any substantive way, that interest is faint.

159. See, e.g., In re Broadbelt, 683 A.2d 543, 552 (N.J. 1996) (adopting “the Gentile/Hinds standard[,] and under that standard, the regulation of a judge’s speech will be upheld if it furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary”). The court then upheld the wording of the current Canon:

Avoiding material prejudice to an adjudatory proceeding is one example of a governmental interest sufficient to uphold restrictions on a judge’s speech. The preservation of the independence and integrity of the judiciary and the maintenance of public confidence in the judiciary—the interests underlying Canons 3A(8) and 2B—are obviously interests of sufficient magnitude to sustain those Canons under the Gentile/Hinds standard, and we are satisfied that the restrictions on a judge’s speech imposed by those Canons are no greater than necessary.

Id.


161. Something in the order of a juror’s statement (acknowledging the comments affected her or another juror) might be required.

162. Commenting on Pending Cases, 25 Judicial Conduct Rep. 9 (2003). Largely for this reason, several influential jurisdictions have not adopted the prejudice requirement of the 1990 Code. See id.; Mass. Code of Judicial Con-
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A speech-restricting rule must "provide 'fair notice to those to whom [it] is directed.'" While we are sympathetic to the 1990 Code's drafters—who attempted to allow speech that did not affect, or had only a de minimus effect on, pending proceedings—we are troubled that the standard they chose is somewhat unclear to the judges who must abide by it. Therefore, states should resort to the (or maintain their) broader ban—that is, judges should not comment on the merits of pending or impending cases. A California Supreme Court case illustrates these points. First, it upheld Canon 3A(6) against a First Amendment attack in words with which we agree:

As we have explained, there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient. As we have also explained, former canon 3A(6) effectively promotes this interest because public comments by judges on matters pending before them may give the appearance that the judge has prejudged the merits of the controversy, has become an advocate for the interests of one of the parties, or has resorted to extrajudicial means to defend the judge's own rulings. Accordingly, we conclude that the burden that former canon 3A(6) imposes on the general interest of judges in making public comments on court proceedings is outweighed by the benefits it achieves in furthering the state's interest in the soundness of the judicial system; therefore, former canon 3A(6) is not invalid under the First Amendment as an impermissible restriction on public speech.

DUCT Canon 3B(9) (Mass. Comm'n on Judicial Conduct 2003) (banning public comment "about a pending or impending Massachusetts proceeding").

163. Gentile v. State Bar of Nev., 501 U.S. 1030, 1048 (1991) (quoting in part Grayned v. City of Rockford, 408 U.S. 104, 112 (1972)). There, the Supreme Court struck down a restriction on attorney speech concerning an impending case because the ethical rule's "safe harbor" provision—i.e., "[t]he right to explain the 'general' nature of the defense without 'elaboration'"—"provide[d] insufficient guidance" to the commenting attorney. Id.

164. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 112 (D.C. Cir. 2001) (calling Canon 3A(6) "straightforward and easily understood"). As noted below, extrajudicial comments on other judges' pending cases might be permissible. See infra Part V.C.4.

165. Broadman v. Comm'n on Judicial Performance, 959 P.2d 715, 728–29 (Cal. 1998). While noting that the "Supreme Court has not yet considered what limits the First Amendment to the Federal Constitution imposes on a state's authority to restrict judges from publicly commenting on pending cases," the court concluded that the restriction passes the test announced in Pickering v. Board of Education, 391 U.S. 563 (1968), for public employees, and "likely" passes the test.
Second, it rejected the suggestion that Canon 3A(6)—which is phrased in clear and nearly absolute terms—was somehow void for vagueness. In sum, to the extent that the First Amendment is implicated, it counsels for a greater (and clearer) ban, not a lesser one.

3. The Privilege Defense

Some courts ostensibly have recognized a "qualified privilege" for judicial responses to criticism, but so far as we can tell, it has been recognized only in those situations in which the judge's office has been threatened, and even then, only a "highly tempered" and "dignified" response is permitted. The legal source of this privilege is mysterious; our best guess is that it arises from fairness concerns. Thus, given that the source of the privilege is unknown, and that the privilege has never immunized a judge's extrajudicial com-
ments concerning pending cases,\textsuperscript{169} we seem to be dealing with a nonissue.\textsuperscript{170}

4. The Uncommon Defense: Comments on Other Judges' Cases

One of the more intelligible distinctions, which is occasionally drawn in state codes, is between extrajudicial comments on cases in general and cases over which the judge is presiding.\textsuperscript{171} Some codes apply the extrajudicial comment ban only to cases in the applicable state or cases applying the applicable state's law.\textsuperscript{172} We find this distinction appealing—it seems fairly clear that the strongest policies behind the ban apply most squarely to cases over which the judge has been, is, or is about to be presiding. As noted above, suppressing the fact that judges disagree is not a good reason for a categorical ban on comments concerning extra-jurisdictional cases.\textsuperscript{173} The most articulate support, however, that we have seen in favor of such a broad ban is the following:

\textsuperscript{169} See, e.g., Conard, 944 S.W.2d at 204–05. Indeed, in dicta, one case explicitly rejected the defense to the extent the response involved pending cases. \textit{In re} Hey, 452 S.E.2d 24, 32 n.9 (W. Va. 1994) (“This case must be distinguished from those in which a judge responds to attacks on his ruling(s) in a pending case. In that circumstance, the State's interests in maintaining the appearance of impartiality and independence of the judiciary trumps an individual judge's right to defend himself. But those interests of the State are not implicated to the same extent or in the same way when a judge publicly comments on charges of misconduct made against him in a formal disciplinary proceeding.”).

\textsuperscript{170} While this privilege is mostly a myth, we note in positive recognition its underlying fairness concerns. As described in the Introduction and Part VI.B.1 below, if a judge is responding to criticism of her conduct, and that response does not discuss the merits of a pending case, we believe that her interest in self-defense, and the affected judiciary's interest in public integrity, arguably outweigh the advantages of a categorical ban on extrajudicial speech. Indeed, the so-called privilege may be designed to protect such conduct, but its creators failed to draw the distinction, which is unfortunate.

\textsuperscript{171} See, e.g., \textit{CAL. CODE OF JUDICIAL ETHICS} Canon 3B(9) (Cal. Judges Ass’n) (2008) (permitting comments on cases for the purpose of “legal education programs and materials,” but stating that “[t]his education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case”).


\textsuperscript{173} \textit{See supra} note 83 and accompanying text.
[When judges] make pronouncements about cases that are not before them, they present themselves to the public as "judges," but they are not behaving in a judicial fashion, usually giving their views off the cuff, without having considered all the relevant evidence and legal doctrine. The current mode code of judicial conduct prohibits such "deception" of the public and such misuse of the judicial role—wisely in my view.174

While we agree that extrajudicial comments on extra-jurisdictional cases often are not (nearly) as trustworthy as the presiding judge's considered rulings, we do not feel that such comments rise to the level of deception. Nevertheless, the lack of trustworthiness makes us leery of such comments, and therefore perhaps cabining such comments to explaining court procedures might be better.175 If our lack of trustworthiness concern is misplaced or overstated, however, we recognize that the state interest in regulating extra-jurisdictional comments would be weaker than the interest in regulating the "core" comments that we addressed in Part V.B.176

VI.
SOLUTIONS TO THE PROBLEMS OF EXTRAJUDICIAL COMMENTS

A. Approaches to Solutions

We should not forget that these are ethics rules that we are construing. As such, there are traditionally two ways to effect them: mandatory or permissive enforcement.177 The following considera-

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175. And leaving commentary to attorneys might be best. See infra Part VI.B.2 (discussing third-party comments and responses).

176. That is, those comments that the judge makes fairly contemporaneously about the merits, broadly construed, of her pending case. Such "core" comments fully implicate the concerns raised in Part V.B, and therefore such comments are the proper target of the ban; other categories of comments may be improper targets. See supra note 83.

177. Here, of course, we are using permissive in the negative sense—the "should not." Permissive rules in the Canons often are referred to as hortatory or aspirational, at least when appended with a "should" or "should not" directive. See generally MODEL CODE OF JUDICIAL CONDUCT Scope (2007) ("Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in
tion favors the latter method: by not barring judges from comment-
ing—by instead merely advising them that the proper course is not
to comment—we allow problematic judges (be they overly self-in-
terested, overly defensive, or otherwise overly biased) to expose
themselves.178 Under a mandatory ban, however, those judges
might refrain from comment solely out of fear of discipline.179 In
their heart of hearts, however, they may yearn to be—or may actu-
ally be—partial or biased with respect to the issue at hand. There-
fore, while a ban would preserve the appearance of impartiality (for
we would never know of the existence of such judges), it might dis-
serve actual impartiality.180 In other words, "forcing . . . judges to
conceal their prejudice" or partiality might actually undercut "the
more compelling state interest of providing an impartial court for
all litigants."181 This concern is not purely hypothetical. For exam-
ple, one can only imagine the justice lost if Judge Morris Jackson

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178. Such an advisory approach would serve the "guidance" function of the
Model Code. See, e.g., Sparling, supra note 100, at 451 ("The Judicial Model Code
seeks to advance the public welfare in two fundamental ways. On the one hand, it
continues the work of its predecessor by serving as a guide for judges; while, on the
other hand, it sets forth the rules to which judges are expected to abide and by
which their conduct will be judged.").

179. See, e.g., Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d
1006, 1015 (Miss. 2004) ("Allowing—that is to say, forcing—judges to conceal
their prejudice against gays and lesbians would surely lead to trials with unsuspect-
ing gays or lesbians appearing before a partial judge. Unaware of the prejudice
and not knowing that they should seek recusal, this surely would not work to pro-
vide a fair and impartial court to those litigants."). In Wilkerson, the judge's extra-
judicial comments—in the form of a letter to a newspaper "claiming that
homosexuals belong in mental institutions"—did not relate to a pending case
(rather, the judge was responding to a newspaper article). Id. at 1008. For obvi-
ous reasons, a litigant's recusal interest would be even greater if the biased or
partial extrajudicial statements related, or were addressed, to the litigant's case.

(2007) (arguing against appearance-based recusal and disqualification standards
because such standards are often a poor proxy for achieving the desired end,
justice).

181. Wilkerson, 876 So. 2d at 1015.
Hampton, while speaking on his views of the victims in a case over which he had presided, had not broadcasted his views to a reporter:

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

2. "I don't care much for queers running around on weekends picking up teenage boys. I've got a teenage boy;" and

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

While a mandatory approach might have the effect of suppressing such offensive or otherwise problematic comments, a permissive approach, in comparison, would (a) serve as a guide to judges when faced with these difficult situations, and (b) allow the rest of us to analyze and critique whether the judge is impartial and in compliance with the other tenets of her judicial office—"[s]unlight is said to be the best of disinfectants; electric lights the most efficient policeman." In sum, there is a strong argument that a mandatory approach might prevent us from learning the names of the "problem" judges. If we had our way, the revised Rule would read (more or less): "A judge should not comment on the merits of his or her own impending or pending cases; a judge may respond to criticism of his or her conduct unrelated to the merits of impending or pending cases."

Our "disinfectant" purpose is not optimal. Instead, it is a practical strategy, giving judges good guidance but allowing the egotistical or infirm judges to expose and discredit themselves. As Professor Vincent Johnson has suggested, in a slightly different con-

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182. In re Hampton, 775 S.W.2d 629, 630 (Tex. 1989) (quoting Lori Montgomery, Why Judge Was Easy on Gay's Killer, DALLAS TIMES HERALD, Dec. 16, 1988)). We note, however, that the Texas judicial ethics code in place at the time did bar such comments because the case was on appeal at the time of the comments. See SHAMAN ET AL., supra note 26, at 352 n.266 (reporting that Judge Hampton was censured in an unpublished decision of the Texas Commission on Judicial Conduct). As the reported disciplinary decisions reveal, some judges will make their opinions known even at the risk of sanction. We are confident that the majority of judges would not do so. See, e.g., Lubet, supra note 75 (noting author's experience in advising judges that they will not break the speech rules).

183. L. BRANDIES, OTHER PEOPLE'S MONEY 62 (1943).

184. As we have noted in Part V.C.4 above, the dangers to impartiality and integrity are drastically reduced when the judge is speaking of another court or case. We do not, however, pretend to have given the dichotomy an exhaustive analysis in this Article; we raise it here merely to flag the issue for future analysis. Lines can be drawn, moreover, that would limit the proscription at many different places, such as the applicable court, district, circuit, or state.
text (namely, judicial campaign speech and conduct), sometimes the black-letter rule must remain more permissive than would otherwise be desirable:

[D]iscipline cannot be imposed on [certain] judges or judicial candidates for constitutional or other reasons. This does not mean that persons involved in judicial races should engage in those forms of conduct. The interests of society are often best served by those who conduct themselves in accordance with standards of behavior far exceeding the lower range of what is protected by the Constitution.\(^{185}\)

Furthermore, in addition to giving guidance to good judges, the advisory approach is immune from First Amendment concerns.\(^{186}\)

**B. Solutions**

1. Extrajudicial Self-Defense

In hindsight, the Rule 2.10(E)-created conundrum could be resolved easily: Follow Massachusetts. After considering and analyzing the new (Model) Rule 2.10(E), the committee charged with recommending a revised Massachusetts Code adopted the following revised language: “This Section does not prohibit a judge, directly or through a third party, from making public comments concerning his or her conduct provided that such statements do not reasonably put into question the judge’s impartiality and do not address the merits of any judicial decision.”\(^{187}\) Thus, judges may respond to criticism only if their responses do not involve the merits.\(^{188}\) That may be hard to do, but it is not impossible. For instance, in response to an allegation that “Judge Friendly is drunk whenever he takes the bench,” a judge presumably could respond and avoid addressing

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185. Johnson, supra note 79, at 816. Most bans on extrajudicial speech on pending cases are constitutional, but the point here is that a mandatory ban (even if constitutional) might be undesirable for other reasons. See supra Part V.C.2.


188. Indeed, the proposed rule goes further than just the “merits”—it bars responses addressing the “merits of any judicial decision.” See id. We think barring discussion of “any judicial decision”—including decisions that may not involve pending matters—is overbroad, but when read in context, perhaps the ban was meant to apply only to “any judicial decision” in a pending matter.
the merits of his decisions. But even in this vague hypothetical, the judge would be tempted to point to his attentive rulings or opinions as evidence that he was not drunk on the bench. The proposed condition, then, places a salutary and significant limit on the judge's response by cabining it to general conduct unrelated to the merits of specific cases. No similar limit is contained in Rule 2.10(E) or its comment. The conduct-merits distinction, moreover, properly structures incentives. If the would-be extrajudicial comments concern the merits, we generally want judges to put those comments in their opinions or rulings, and by limiting their ability to make extrajudicial comments, we incentivize judges to make judicial comments; if the extrajudicial comments do not concern the merits, however, we generally neither need nor want judges to clutter their opinions or rulings with such irrelevant asides.

The proposed Massachusetts rule has another, but significant, related benefit—added clarity. Both it and Rule 2.10(E) allow responses to criticism concerning the judge's "conduct," but only the Massachusetts rule actually defines that term:

"Conduct" as used in subsection (d) refers to the manner in which a judge behaves and not the substance of a judge's rulings. For example, an allegation that the judge consistently fails to work a full day is an example of conduct contemplated by subsection (d).

In our opinion, the preceding definition of "conduct" accurately describes the common understanding of the term in this context, and, even more importantly, we think it captures what the term means in Rule 2.10(E). The failure in Rule 2.10(E) to define "con-

189. In contrast, if the criticism is that "Judge Friendly released the child molester on bail because the judge is a criminal-coddling liberal who does not believe in prisons," the judge's response presumably would have to resort to the merits in order to be persuasive. Perhaps a persuasive, but general, response could be crafted—such as "all citizens are entitled to bail by our state constitution"—but even such a general response has a strong air of partial advocacy to it.

190. To qualify this statement somewhat, judges should place relevant comments in their opinions and rulings in the first place. Assuming that criterion is met, judges ordinarily may repeat, extrajudicially, the specific content of those opinions or rulings.

191. See supra Part V.B.2 (describing some of the value of proper incentives in this context). We do, however, recognize a judge's duty of creating a record in denying disqualification or abstaining from recusal. Thus, even if the basis for a disqualification motion is related only to a judge's conduct, not the merits, nothing we say above should be taken to obviate the judge's duty to make a record. Moreover, in such circumstances, the "merits" are the alleged bases for the disqualification.

192. MASS. SUPREME JUDICIAL COURT, supra note 187, at cmt.
duct” in language similar to the Massachusetts comment presumably was mere oversight. Therefore, the ability to respond to criticism is limited to that which involves the judge’s individual conduct—not the merits of a pending matter.

In sum, Massachusetts surprisingly captured the meaning and presumed purpose of Rule 2.10(E) even better than Rule 2.10(E) itself, by using this belt-and-suspenders approach: (1) limiting responses explicitly to comments not addressing the merits; and (2) defining “conduct” to exclude the merits.\textsuperscript{193} We recommend, therefore, that when states adopt the Model Rule, they revise it consistently with the preceding changes.

2. Third-Party Responses

In light of the strong reasons not to comment, the best, and perhaps only, comments should be through an independent third party. While absent from the black-letter Rule, this approach is suggested in Rule 2.10’s Comment and Reporter’s Explanation.\textsuperscript{194} The ABA elsewhere has recommended a similar approach by suggesting that state and local bar associations should respond to “misleading criticism” of judges.\textsuperscript{195} Indeed, the onus on the bar fairly

\textsuperscript{193} Moreover, this approach is also consistent with at least one other new facet of the Model Code. In a new comment, judges are permitted to speak to jurors after the conclusion of the case, but judges are prohibited from “discuss[ing] the merits of the case.” \textit{Model Code of Judicial Conduct} R. 2.8 cmt. [3] (2007). Therefore, although the Code since 1990 has failed to limit extrajudicial comments explicitly to comments that do not involve the merits, it is telling that the distinction has been maintained in analogous settings. Here, the prohibition is presumably to preserve a judge’s or “juror’s ability to be fair and impartial . . . .” See \textit{id.} R. 2.8 cmt. [2].

\textsuperscript{194} \textit{Model Code of Judicial Conduct} R. 2.10(E) cmt. [3] (2007) (“Depend[ing] on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge’s conduct in a matter.”); \textit{see also} ABA \textit{Joint Comm’n to Evaluate the Model Code of Judicial Conduct, Report 73} (Dec. 20, 2006) (Reporter’s Explanations of Changes) (“Comment [3] suggests that it may be appropriate in some instances for statements that explain or defend the role or action of a judge in a particular matter to be made by a third person, rather than by the judge. This suggestion reflects a preference for keeping to a minimum the extent to which judges discuss cases directly with the media.”).

can be said to be both long standing and understandable: “Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor.”196 Similarly, court public information or media relations officers would be permitted to address pending cases because such officers are not presiding over the cases they seek to explain.197

One important condition should be stated: The response should be independent, for purposes of both appearances and (more importantly) actual impartiality. If the bar (or other) responders are merely mouth-puppets for the judge, the use of “third-party” responders becomes nearly a useless sham. That is, none of the problems articulated in Part V would be avoided.

CONCLUSION

We acknowledge that educating “the public” is a daunting task. We recognize that the public is generally un- or under-educated about the role of the judiciary and the implications, ethical and otherwise, of extrajudicial comment. We also recognize that the media is often inclined to subordinate the importance of judicial independence, integrity, and impartiality in its desire to generate stories based on extrajudicial comment. We have cause to be realistic, then, in dealing with the public about the ethical implications of extrajudicial comment. There are at least two approaches to the problem: pragmatic and principled. The pragmatic approach would permit extrajudicial comments and responses to criticism

(same). The new Code’s comment expresses a similar, but more watered down, preference for third-party responses. Model Code of Judicial Conduct R. 2.10(E) cmt. [3] (2007) (“Depending on the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge’s conduct in a matter.”); see also Model Code of Judicial Conduct R. 4.1 cmt. [9] (2007); ABA. Standards for Criminal Justice: Special Functions of the Trial Judge Standard 6-1.2(b) cmt. (2000) (noting that the judge’s “duty to abstain from comment” permits a limited exception “for correcting the accuracy of news reports of an official ruling,” but “when [such] comment is appropriate, it may be preferable for the chief or supervisory judge in the district to make such comment, rather than the judge whose conduct has been criticized”).

196. Canons of Prof’l Ethics Canon 1 (1908). Rightly, the text of the Canons renounces any inference that judges are always above criticism: “Whenever there is proper ground for serious complaint of a judicial officer” such complaints are “encouraged” and “protected.” Id.

197. In any event, they often comment or respond not on the merits, but on general court procedures for the education of the public or press. See, e.g., Model Code of Judicial Conduct R. 2.10(D) (2007) (permitting explanations of “court procedures”).
(even responses related to the merits of a pending case) if, on balance, it enhances the public perception of the integrity and impartiality of the judiciary. The pragmatic approach would presumably allow extrajudicial comment based on the assumption that the public does not understand the important values underlying judicial silence, and that if silence does not persuade the public that judges are actually impartial, then perhaps the public will believe judges are impartial simply because judges are permitted to say so (i.e., the appearance of impartiality). However, we choose the principled approach premised on our conclusions that silence will, on balance, more faithfully enhance and preserve the integrity and impartiality of the judiciary,¹⁹⁸ and, therefore, silence (with limited exceptions) should be the general rule. Our conclusion that silence is preferable to unfettered extrajudicial comment is reinforced by our belief that the public will, with the assistance of the profession, eventually recognize and appreciate the essential relationship between the limitations on extrajudicial comment and an impartial judiciary.

¹⁹⁸. Subject, of course, to the distinctions urged throughout this Article, the main example of which is found in Part VI.B.1 (permitting responses to criticism of conduct but not to the merits of a pending case).
APPENDIX:
PUBLIC COMMENTS CONCERNING RULE 2.10(A) AND (E)

1. Public Citizen Litigation Group (By Attorney/Former Professor Alan B. Morrison):

Mr. Morrison sees no reason to limit the admonition to “public comment” and recommends that the Rule also cover the situation when a judge says something “privately” that becomes known and has the adverse impact.¹⁹⁹

2. Professor Andrew Kaufman, Harvard Law School:

As a strong believer of the notion that judges should not make comments on pending or impending cases, Professor Kaufman observes that the Commission’s proposal cuts the heart of the prohibition. He observes that rarely will it be apparent that a judge’s comment “might reasonably be expected to affect [a case’s] outcome or impair its fairness.” Professor Kaufman speculates that the Commission’s purpose in refraining from an absolute prohibition relates to a judge’s free speech rights or accommodation of some judges’ desire for a public forum to discourse about the law. His view is that the right to comment freely about matters pending before another judge is not of the essence of the free speech rights that should be preserved for judges.²⁰⁰ [Professor Kaufman added that when judges] make pronouncements about cases that are not before them, they present themselves to the public as “judges,” but they are not behaving in a judicial fashion, usually giving their views off the cuff, without having considered all the relevant evidence and legal doctrine. The current model code of judicial conduct prohibits such “deception” of the public and such misuse of the judicial role—wisely in my view.²⁰¹


²⁰⁰. Id. (quoting and summarizing statements of Andrew Kaufman on June 9, 2004).

3. **ABA Standing Committee on Professional Discipline:**

The Committee did not object to the current rule, including the self-defense exception (then-listed only in a comment).

4. **ABA Standing Committee on Ethics and Professional Responsibility:**

The Committee likewise did not object to the current rule, including the self-defense exception (then-listed only in a comment). It further commented that "some members of the Committee expressed doubt as to whether the restrictions on judicial statements in this Rule would survive further constitutional challenges, at least in the context of partisan judicial elections."  

5. **New York County Lawyers’ Association:**

As to comments made to or for general public consumption, we believe that the [near-absolute ban] adopted by New York and [California, Delaware, Massachusetts, Maine, Minnesota, Missouri, and the Code of Conduct for United States Judges] represents the wiser course. Public perception of judicial bias or lack of impartiality is far too prevalent to warrant the lifting of the prohibition against judicial comment to the extent embodied in the current Model Code of Judicial Conduct.

6. **American Judicature Society:**

AJS is concerned that the phrase "might reasonably be expected to affect the outcome or impair the fairness of a matter" would be considered unconstitutionally vague in a restriction on speech. Commentary to the Maine code of judicial

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conduct, for example, notes that "the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar...." A judge's first responsibility is to explain his or her decision to the parties; if that is done, then the public and the media are also adequately informed. If it is necessary to narrow the rule, a clearer approach would be to create an exception for comments in teaching or for cases pending outside the judge's jurisdiction.206

[AJS would not] preclude a judge from making a public comment reiterating without elaboration what is set forth in the public record in a case, including pleadings, documentary evidence, and the transcript of proceedings held in open court.207 Allowing a judge to respond without limitation to allegations "in the media or elsewhere concerning the judge's conduct in a matter" will result in litigants having to read the paper or watch TV to find out the judge's thinking about their case, a distortion of the administration of justice that will inevitably undermine confidence in the courts as the public see judges deciding cases in the media rather than the courtroom and the media manipulating that process.208

7. New York State Bar Association Special Committee to Review the Code of Judicial Conduct:

The comment allows a judge to respond directly (or through a third party) to allegations concerning the judge's conduct in a matter. While we agree with this decision, we believe Canon 2 should [require that] ... [t]he response must be measured and dignified and it is preferable for someone else, such as a bar association, to make the response.... Indeed, these comments are far more appropriate in a non-election situation, since bar associations are more likely to be willing to come to

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subject to strict scrutiny as it is not based on content and does not apply to campaign speech but is a time, place, and manner restriction; despite the rule, judges may make any comment on a pending case as long as it is on the record in the case, in other words, when and where judges are supposed to be commenting on cases in fulfillment of their responsibilities.

Am. Judicature Soc'y, supra note 54, at 19. But see Chemerinsky, supra note 3, at 841 ("The restriction on judges' speech about pending cases is clearly a content-based restriction. Judges are free to speak about almost anything so long as the content of the speech is not about the pending case.... Under this approach, the restriction of judicial speech about pending cases would be allowed only if strict scrutiny is met.").

207. Id. at 20.
the aid of a judge when the context is not a contested election.209

8. Luther T. Munford, Phelps Dunbar L.L.P.:

The rules should simply prohibit the judge from making public statements concerning allegations in the media or elsewhere. Freedom to speak for some judges will be coercion to speak for others. No longer will a judge be able to tell the press "I can't." Once you allow an exception, then the judges who wisely do not want to comment to the press will have no shield behind which they can hide.210

9. Ronnie A. Yoder, Chief Administrative Law Judge for the United States Department of Transportation:

Judicial comment on media "allegations" should not be encouraged.211

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209. N.Y. STATE BAR ASS'N SPECIAL COMM. TO REVIEW THE CODE OF JUDICIAL CONDUCT, supra note 57, at 4.
