



## **Sticks and Stones: Ethical Limits on Judicial Responses to Public Criticism**

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In the digital age, anyone can readily publish their opinion and critique of a court case, judicial ruling, or particular member of the bench. Probate judges are especially susceptible to being reviewed in the manner of a personal attack because of the interpersonally volatile nature of the matters they handle, such as child custody and inheritance disputes. So, how can judges properly respond if they find themselves or their rulings unwarrantedly maligned in the public domain?

The answer is informed by First Amendment doctrine and the ethics rules that all judges must abide by. Starting with the doctrine, critical speech by litigants, members of the public, and the press about judges and how they carry out their official duties will more often than not be protected under the First Amendment, even if false. The First Amendment also disfavors prior restraint of speech and publication, meaning that judges have limited ability to impose “gag orders” to prevent public discussion of matters pending before them. And while judges may be tempted to publicly respond to *ad hominem* attacks or misinformation in order to set the record straight, judicial ethics rules prevent this kind of counter speech while the matter is pending before them.

Recognizing the foregoing challenges, this presentation explores judges’ options for redress when confronted with untrue or unwarranted public criticism. These options include private defamation actions but, more advisably, the formation of state or district-level judicial response committees.

### **I. Applicable First Amendment Doctrine**

#### **A. *False statements of fact are often protected***

“Fake news” is the phrase often used in today’s parlance to describe false statements. This term encompasses not only inaccurate assertions of fact, but also the speaker or author’s

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interpretation or opinion of those alleged facts. It can be difficult to prove that an opinion is empirically false. This presents an obstacle to separating out statements that are truly false from statements that we simply disagree with or find to be logically flawed.<sup>2</sup> But assuming demonstrably false statements of fact can be cleanly identified, they are as a general rule constitutionally protected under the First Amendment, unless they meet the legal requirements for defamation (discussed below).

The leading U.S. Supreme Court case on false speech is *United States v. Alvarez*, 567 U.S. 709 (2012). There, the plaintiff was criminally convicted under the Stolen Valor Act (“the Act”) which made it a crime for anyone to falsely claim they had received a congressional decoration or medal for service in the armed forces. The plaintiff challenged this provision of the Act as being an unconstitutional content-based restriction on speech. The Supreme Court agreed.<sup>3</sup>

First, the Court found that there is no general First Amendment exception for false statements.<sup>4</sup> Next, the Court found that the Act was an overly broad speech restriction because it criminalized all false statements on one subject (i.e., receipt of congressional honors for military service) in almost limitless times and settings, with no consideration for whether the false statement was made for purposes of material gain.<sup>5</sup> Moreover, the Court determined that there were less speech-restrictive means of achieving the same important governmental purpose of “protect[ing] the integrity of the military awards system.”<sup>6</sup> Namely, the Court identified the alternatives of counter-speech criticizing or ridiculing individuals who made false claims of receiving military honors, or the creation of a publicly searchable government database of verified honors recipients.<sup>7</sup>

Thus, *Alvarez* teaches that false or inaccurate factual statements about a particular case, judge, or court proceeding are generally going to be constitutionally protected unless they meet the legal standards for defamation.

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<sup>2</sup> See John R. Vile, *False Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), available at: <https://www.mtsu.edu/first-amendment/article/1506/false-speech>.

<sup>3</sup> *United States v. Alvarez*, 567 U.S. 709, 715 (2012).

<sup>4</sup> *Id.* at 719. Categories of speech historically exempted from First Amendment protection include, for example, “incitement [to imminent violence or unlawful acts], obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting-words,’ child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.” *Id.* at 716.

<sup>5</sup> *Id.* at 722-23.

<sup>6</sup> *Id.* at 729.

<sup>7</sup> *Id.* at 729.

**B. Defamatory statements are not protected**

Defamation, either written (libel) or spoken (slander), is a category of false speech that is not protected by the First Amendment.<sup>8</sup> Defamation is defined differently by each state, but the general elements include: a published false statement of fact (not opinion or joke) made about an identifiable person (the plaintiff), where the speaker or publisher acted with the requisite level of fault, and the false statement caused the plaintiff to suffer reputational damage.<sup>9</sup>

Under the First Amendment, for a false statement about a public figure, such as a judge, to be defamatory, it must be proved by clear and convincing evidence that the statement was made with “actual malice.” This is a term of art meaning that the person who made or published the statement knew it was false or entertained serious doubts as to its truth.<sup>10</sup> This is a higher standard of proof than is required when a false statement of fact is made about a private individual, in which case the aggrieved individual need only show negligence on the part of the speaker or publisher.<sup>11</sup>

In some cases, judges who have been publicly maligned or attacked in connection with carrying out their judicial duties have brought successful defamation actions against their critics. As one example, in *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 51 (2007), the Massachusetts Supreme Court affirmed a \$2 million jury verdict against a reporter and newspaper that had published reputation-damaging statements about the plaintiff judge. The primary statements at issue related to the judge’s alleged treatment of a young sexual assault victim whose assailant. The paper reported that the judge had “heartlessly demeaned victims” and that when allegedly confronted by prosecutors about his lenient sentencing practices, had said, “She can’t go through life as a victim. She’s [fourteen]. She got raped. Tell her to get over it.”<sup>12</sup> This alleged quote by the judge was repeated in a second news article that described how, after the young victim “took the stand and tearfully told the judge how the rape has affected her,” the judge sentenced the defendant to only eight years of probation.<sup>13</sup> The “[t]ell her to get over it” quote, as twice attributed to the judge in the paper, received national attention and resulted in his receiving death threats, losing his high standing in the local legal community, and suffering deteriorated physical and mental health.<sup>14</sup>

Evidence presented at trial established that the context for the judge’s alleged quote had been fabricated as there was no evidence of a “confrontation” between prosecutors and the judge about the judge’s sentencing practices. Additionally, the young victim had never taken the stand to explain to the judge the assault’s effect on her. Rather, prosecutors had read her impact

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<sup>8</sup> *Id.* at 716.

<sup>9</sup> Ashley Messenger, *Media Law: A Practical Guide (Revised Edition)* 26, 47 (2019).

<sup>10</sup> *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>11</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

<sup>12</sup> *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 44 (2007).

<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.* at 46.

statement in court.<sup>15</sup> The reporter also could not identify a source for the statement that the judge had “heartlessly demeaned victims.”<sup>16</sup> Asserting the defense of “substantial truth,” the reporter and newspaper argued that the alleged quotation “[t]ell her to get over it” accurately captured the “gist” of the judge’s “get over it” remark.<sup>17</sup> However, the court ruled that the alleged quotation, as falsely contextualized in the article, “would lead one to believe the judge was indifferent, even callous, to crime victims.” But the judge’s actual statement attested to by various witnesses at trial – i.e., a conversational remark made after the sentencing hearing that “she needs to get over it,” “she has to get over it,” or “She’s got to get on with her life. She’s got to get over it.” -- did not support that the judge was so unfeeling.<sup>18</sup> The court upheld the jury’s finding of falsity on the grounds that “[a] statement is false, for purposes of libel, if there has been a ‘material change in the meaning conveyed by the statement.’”<sup>19</sup>

Applying the “actual malice” standard, the court ruled that in addition to the reporter’s having fabricated much of the context for the judge’s alleged quotation, there was substantial evidence that the reporter knew that he had “no percipient source” for the words “tell her” attributed to the judge. The court therefore also upheld the jury’s finding that the reporter and newspaper either knew the statement was false or acted with reckless disregard for its probable falsity at the time of publication.<sup>20</sup>

In contrast, in *Keohane v. Stewart*, 882 P.2d 1293 (Col. 1994), the Colorado Supreme Court found no actionable defamation of the plaintiff judge by a member of the public who had written two caustic letters to the editor implying the judge had taken a bribe in a much-publicized criminal case, but did find a city councilmember liable for his statements made to a reporter that essentially asserted as a fact that the judge had accepted a bribe. Controversially, the judge in *Keohane* had found “not guilty” by reason of mental impairment a doctor who was accused of masturbating and ejaculating into the mouth of a female adolescent patient while she was aestheticized.<sup>21</sup> The first letter to the editor over which the judge sued was titled, “Sick Pillars of the Community.” It did not mention the judge by name but referred to conspiracy and “payoffs” between members of the medical profession and the court stating, “It’s bad enough for these criminal acts to have occurred, but for his fellow appointed ‘pillar’ to let him off with nothing as punishment, makes you wonder who is the sickest!”<sup>22</sup> The author further expressed her outrage using all “capital letters and multiple exclamation points (‘HOW SICK!!!!!’); gross overgeneralization (‘The ‘upper crust’ ... will do anything for money’); and such colorful and exaggerated terms as ‘sickie,’ ‘terrorists,’ ‘sleaze,’ and ‘scum.’”<sup>23</sup>

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<sup>15</sup> *Id.* at 53-54.

<sup>16</sup> *Id.* at 53.

<sup>17</sup> *Id.* See also 3 *Smolla & Nimmer on Freedom of Speech* § 23:8.

<sup>18</sup> *Id.* at 54, 55, 57.

<sup>19</sup> *Id.* at 56-57 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)).

<sup>20</sup> *Id.* at 59, 61-64.

<sup>21</sup> *Keohane v. Stewart*, 882 P.2d 1293, 1296 (Col. 1994).

<sup>22</sup> *Id.* at 1300.

<sup>23</sup> *Id.* at 1301.

The Colorado Supreme Court held that even though the statements in the letters were capable of being proved true or false, the language used by the author was protected under the First Amendment as “imaginative expression” and “rhetorical hyperbole,” and the letters, viewed as a whole, voiced only suspicion and conjecture about a high profile acquittal.<sup>24</sup> The court ruled that “[s]uch speculative commentary on matters of public concern is critical to the ‘uninhibited, robust, and wide-open’ public debate essential to a democratic society,”<sup>25</sup> and that the “Sick Pillars” letter could not be reasonably interpreted as stating actual facts about an individual.<sup>26</sup>

The court similarly found no actual false statements of fact had been made about the judge in a second letter to the editor, written by the same author, titled “White Collar Crime, Gold Rush of the ‘80’s.”<sup>27</sup> This second letter proposed a hypothetical situation detailing how a “judge is really in a position to clean up financially,” if, “as an example,” the judge approaches “an old buddy” who is suspected of a crime and stands to lose his license to practice medicine or law and offers to “find a way out” in exchange for a “home in another state” and some “six figure money.”<sup>28</sup> The letter continues that “[i]f this could be proven, it is . . . called extortion. Using your position, elected or appointed, to line your own pockets is despicable at best and a criminal act at worst.”<sup>29</sup> The court found the foregoing-described scenario to be the author’s “own hypothetical explanation” for the controversial outcome of the trial and ruled that it was constitutionally protected.<sup>30</sup>

However, the court did find actionable as defamation the following statements that a city councilmember made to a reporter: “That’s the best judge money can buy,” “What do you think, was he paid in drugs or money?” and “Do you think he was paid off in cash or cocaine?”<sup>31</sup> Even though framed as questions, the court ruled that the reasonable person could interpret the councilmember’s remarks as asserting a fact – i.e., that the judge had engaged in the illegal and unethical activity of accepting a bribe – that was capable of being proved true or false.<sup>32</sup> Thus, unlike the author of the letters to the editor, the councilmember was not shielded by the First Amendment’s protection of conjecture, opinion, hyperbole, and commentary.

The *Murphy* and *Keohane* cases illustrate how very context-specific, word-parsing, and blurred the line can be between unprotected defamation and very-much-protected critique and expression of opinion on matters of public concern.

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<sup>24</sup> *Id.* at 1300-1301 (citing, *inter alia*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

<sup>25</sup> *Id.* at 1300 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>26</sup> *Id.* at 1301.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1302.

<sup>31</sup> *Id.* at 1296, 1302.

<sup>32</sup> *Id.* at 1302-1304.

**C. Prior restraints on speech (“gag orders”) are constitutionally disfavored**

Judges faced with *ad hominem* attacks or the dissemination of “fake news” about themselves or one of their rulings may be tempted to issue a “gag order” prohibiting public statements about certain aspects of the judicial proceeding over which they are presiding. However, gag orders are considered a form of prior restraint on speech and publication, which courts view as “the most serious and the least tolerable infringement on First Amendment rights.”<sup>33</sup> Gag orders are therefore presumptively unconstitutional<sup>34</sup> and the court “carries a heavy burden of showing justification for the imposition of such a restraint.”<sup>35</sup> In the context of a judicial proceeding, gag orders are usually limited to protecting a criminal defendant’s right to a fair trial.<sup>36</sup> And even in juvenile proceedings, or cases where the privacy of child victims are involved, reviewing courts only uphold gag orders in very narrow circumstances.<sup>37</sup>

For instance, in *S.B. v. S.S.*, 243 A.3d 90 (Pa. 2020), the Pennsylvania Supreme Court approved a gag order in a child custody case where, after the father of the child was cleared by the trial court on allegations of sexual abuse, the mother protested her disagreement on Youtube and other social media, stating that she wanted to bring attention to “child sexual abuse victims.” The mother’s lawyer also posted a link to the child’s in-court testimony about the alleged abusive encounter. The trial court issued a gag order that prohibited the mother and her counsel from speaking publicly about the case in any forum and it directed them to remove any information about the case that they had already posted online.<sup>38</sup> In upholding this order, the Pennsylvania Supreme Court reasoned that it restricted “only the manner” of the speech, not its content, and was therefore subject to only intermediate scrutiny rather than strict scrutiny.<sup>39</sup> Under this slightly less protective standard, the supreme court found that the speech restrictions were justified by the important governmental interest in protecting the psychological and emotional well-being of the child and the child’s privacy, were narrowly tailored to serve those interests, and therefore did not violate the First Amendment.<sup>40</sup>

As a contrasting example of a gag order review, in *Baskin v. Hale*, 337 Ga. App. 420 (2016), the Georgia Court of Appeals vacated an order that prohibited the parties in a child custody dispute from “putting, placing[,] or causing to be placed any information concerning this [ ] case upon or in any social media, website, or other public medium” until the parties’ second son reached the age of 18.<sup>41</sup> The trial court had based this prior restraint on the mother having posted “derogatory” comments on social media that the court found to be “detrimental to the

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<sup>33</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>34</sup> *Id.* at 558.

<sup>35</sup> *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

<sup>36</sup> 2 *Smolla & Nimmer on Freedom of Speech* § 15:7.

<sup>37</sup> *Id.* § 15:7.

<sup>38</sup> *S.B. v. S.S.*, 243 A.3d 90, 95-97 (Pa. 2020),

<sup>39</sup> *Id.* at 113.

<sup>40</sup> *Id.*

<sup>41</sup> *Baskin v. Hale*, 337 Ga. App. 420, 422 (2016).

parties’ minor children [ ] and intimidating.”<sup>42</sup> But the court of appeals reversed due to “the absence of any evidence of imminent danger to a compelling interest” (this is strict scrutiny language) that would warrant such a blanket, non-narrowly-tailored restraint on speech.<sup>43</sup>

Most significantly for our purposes, the Court of Appeals in *Baskin* also vacated the trial court’s order that prohibited the parties from publicly alleging that the court reporter’s transcript of a hearing in the case was flawed or had been altered.<sup>44</sup> The reviewing court observed that “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern” under the First Amendment.<sup>45</sup> It therefore held “we cannot condone the superior court’s attempt in this case to restrict the parties’ and lawyers’ right to publicly criticize the court and the litigation for the next ten years.”<sup>46</sup> This ruling recognizes the strong First Amendment protections that exist for speech that critiques government officials and government processes, including judges and the judicial system. *Baskin* thus portends that a gag order intended to limit negative commentary about a particular judge, or the judge’s handling of a particular matter, would almost certainly be found unconstitutional by a reviewing court.

In sum, while there are narrow circumstances where a gag order may be justified, judges must be careful not to restrict speech simply because it creates annoyance, embarrassment, or inconvenience for them or the broader judiciary.

## II. Judicial Ethics Rules and Judicial Response Committees

### A. Judicial Ethics Rules

All lawyers are bound by their state’s professional conduct and ethics rules. Judges must abide by additional ethical constraints in each state that exist to ensure the judiciary remains an independent body relatively free of political or social influence and impropriety. Judicial ethics rules are intended to promote public trust in the judiciary and respect for its decisions as fairly interpreting the law. At the same time, however, the rules of judicial conduct limit individual judges’ ability to respond to public attacks or misstatements made about them or their rulings.

For purposes of this presentation, we surveyed the judicial ethics rules in five states: Texas, California, New York, Georgia, and Illinois. These states were selected for their size and diverse geographic locations. However, as seen below, the judicial ethics rules are substantially similar across the five states.

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<sup>42</sup> *Id.* at 421–22.

<sup>43</sup> *Id.* at 428.

<sup>44</sup> *Id.* at 422.

<sup>45</sup> *Id.* at 427–28.

<sup>46</sup> *Id.* at 428.

All five states require judges to uphold high standards of conduct to preserve the integrity and independence of the judiciary,<sup>47</sup> and prohibit judges from being “swayed by partisan interests, public clamor or intimidation, or fear of criticism.”<sup>48</sup>

The five states also prohibit judges from:

- (1) publicly commenting about matters pending before them, or that may soon be pending before them, in a manner that would suggest their probable decision on the matter; or
- (2) disclosing or using, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity (only Illinois does not include this prohibition).<sup>49</sup>

The foregoing constraints limit the ability of a judge to respond publicly to disparaging remarks or misinformation relating to a matter over which they are presiding or have previously presided. However, all five states include caveats that allow judges to make public statements in the course of their official duties to explain the procedures of the court, or that are not about a pending or impending matter and do not disclose nonpublic information. Four of the five states (Illinois being the exception) also allow judges to publicly comment about proceedings in which the judge is a litigant in a personal capacity.<sup>50</sup>

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<sup>47</sup> Texas Code of Judicial Conduct (“Texas Code”), Canon 1 (Sept. 2021), available at: <https://www.txcourts.gov/media/1452409/texas-code-of-judicial-conduct.pdf>; California Code of Judicial Ethics (“Cal. Code”), Canon 1 (2020), available at: [https://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](https://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf); Code of Judicial Conduct, New York State Bar Association (“NY Code”), Canon 1 [Sec. 100.1] (1996), available at: <https://nysba.org/app/uploads/2020/02/CJC-1.pdf>; Georgia Code of Judicial Conduct (“Georgia Code”), Rule 1.1 (2016), available at: <https://www.gabar.org/upload/FINAL-CJC-Draft-to-publish-for-comment.pdf>; Illinois Code of Judicial Conduct (“Illinois Code”), Canon 1 (1993), available at: <https://www2.illinois.gov/sites/jib/Pages/Code.aspx>.

<sup>48</sup> Texas Code, Canon 3(B)(2); Cal. Code, Canon 3(B)(2); NY Code, Canon 3(B)(1) [Sec. 100.3]; Georgia Code, Canon 3(B); Illinois Code, Canon 3(A)(1).

<sup>49</sup> Texas Code, Canon 3(B)(10) & (11); Cal. Code, Canon 2(A) & 3(B)(10); NY Code Canon 3(B)(8) & (10) [Sec. 100.3]; Georgia Code, Rule 3.6(A) & (C); Illinois Code, Canon 3(A)(7). New York and Illinois go even further to say a judge should not comment on pending or impending proceedings in *any* court, not just those matters pending or soon to be pending in front of the particular judge. *See* NY Code Canon 3(B)(8) & (10) [Sec. 100.3]; Illinois Code, Canon 3(A)(7).

<sup>50</sup> Texas Code, Canon 3(B)(10); Cal. Code, Canon 3(B)(9); NY Code, Canon 3(B)(8) [Sec. 100.3]; Georgia Code, Rule 3.6(A)(1)(3); Illinois Code, Canon 3(A)(7).

## ***B. Suggested protocols for responding to attacks on the judiciary***

In 2018, the ABA’s Standing Committee on the American Judicial System (“Standing Committee”) published a pamphlet titled *Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary*.<sup>51</sup> This document provides suggested protocols for responding to “inaccurate, unjustified, and simply false criticisms of judges,” including “fake news.”<sup>52</sup> The Standing Committee advocates that it should be the responsibility of bar associations to speak out in defense of judges and the judiciary when “either is unjustly criticized, especially when exercising their professional, ethical and constitutional duties, or when such unjust criticism serves to erode the public’s trust and confidence in the judicial system.”<sup>53</sup> Providing such a response more accurately informs the public and helps them better understand the overall legal system.<sup>54</sup>

### **Step 1 - Deputize and equip a rapid response team**

The Standing Committee’s proposed process starts with each state or local bar association identifying and forming a rapid response team that “is authorized to determine whether a response is appropriate and, if so, determine the extent of the response.”<sup>55</sup> The Standing Committee suggests that for consistency of messaging there should be a single response team in each jurisdiction whose members would ideally include the bar association president, as well as several media-savvy members of the association.<sup>56</sup>

The Standing Committee recommends that, in addition to being deputized to react defensively, the rapid response team should be responsible for monitoring public discussion of judges and the judiciary in the jurisdiction in order to proactively “spot” attacks on individual members of the bench.<sup>57</sup> The Standing Committee further suggests that the response team develop a “tool kit” which would include sample op-ed pieces, letters to the editor, and guidance for social media posts that explain and defend the role of the judiciary.<sup>58</sup>

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<sup>51</sup> American Bar Association, *Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary* (2018), <https://www.americanbar.org/content/dam/aba/administrative/american-judicial-system/2018-rapid-response-to-fake-news.pdf>. This pamphlet has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

<sup>52</sup> *Id.* at 1.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 3-4

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.*

## **Step 2 - Respond to attacks or misinformation**

The Standing Committee identifies the following situations where it would be appropriate for the rapid response team to come to the defense of a judge:

- (1) when the criticism is “materially inaccurate”;
- (2) when the criticism “displays a lack of understanding of the legal system and/or the role of the judge in the judicial process”; and/or
- (3) when the criticism “is serious and will most likely have more than a passing or *de minimis* negative effect in the community.”<sup>59</sup>

Upon becoming aware of an attack on or misinformation about a judge, the rapid response team should immediately consult the judge about whether they are in favor of a public response.<sup>60</sup> Because time is of the essence in curtailing circulation of false or inaccurate information, any response is highly recommended to occur in the same news cycle as the initial unwarranted or misleading statement.<sup>61</sup>

The team’s response should be “a clear and concise message that is simple to understand, persuasive, not defensive, and is written in lay terms.”<sup>62</sup> The form and manner of response should ideally match the original media outlet of the attack -- i.e., if the misinformation was posted on social media (Facebook, Twitter, etc.), any response should also be posted on the same social media platform.<sup>63</sup> Other response mediums that may be appropriate depending on how the unwarranted attack or misinformation has been disseminated include posting the response on the bar association’s or judicial ethics committee’s website; sending a letter or email to the party disseminating the unjust criticism; sending a letter or placing a call or email directly to the reporter or editor of the news publication where the original attack or misstatement appeared; drafting an op-ed to be distributed to appropriate media and online outlets; or holding a press conference, which is recommended if “fake news is being widely disseminated.”<sup>64</sup>

## **Step 3 - Distinguish situations where a response is not warranted**

Not all attacks or criticisms of the judiciary will warrant a public response. For instance, when the statement at issue contains justified criticism or is an expression of fair comment or opinion about the merits of the case at issue, no response is likely necessary.<sup>65</sup> Additionally, and without limitation, no response may be appropriate if: the judge who is the subject of the criticism does not want to respond, a response would require taking a position on a political

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<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 4-5.

<sup>64</sup> *Id.* at 5, 7.

<sup>65</sup> *Id.* at 5-6.

issue, a response would require a lengthy investigation into the true facts of the situation, or a response would create a conflict with the interests of the responding bar association.<sup>66</sup>

Finally, the Standing Committee discusses factors to be considered in a “close case,” where it is not readily apparent whether a response is warranted. These factors include, again without limitation, whether a response would serve a public information purpose or appear to be “nitpicking” or self-serving; whether the attack or criticism “substantially and negatively” affects the judiciary as a whole, as opposed to a single judge; and whether the timing of the response is important and can best be met by the rapid response team.<sup>67</sup>

### **Have any states implemented rapid judicial response teams?**

The five states surveyed -- Texas, California, New York, Georgia and Illinois -- all have professionalism or ethics committees that investigate official misconduct complaints brought against judges, and issue written ethics decisions and guidance.<sup>68</sup> None of the five states have a judicial response team, per se. Texas, however, comes the closest. Its State Commission on Judicial Conduct is authorized by the Texas Constitution to issue a public statement concerning any proceeding when sources other than the Commission cause notoriety concerning a judge and the Commission determines that the best interests of a judge or of the public will be served by issuing the statement.<sup>69</sup>

Though not one of the surveyed states, North Carolina is the only state we are aware of that has an official Judicial Response Committee. Formed by the Chief Justice of the North Carolina Supreme Court’s Commission on Professionalism (CJCP), the role of this non-partisan, non-political Committee is “to respond to unwarranted attacks on judges by the media and

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<sup>66</sup> *Id.* at 5, 7.

<sup>67</sup> *Id.* at 6-7.

<sup>68</sup> See Office of State Commission on Judicial Misconduct, <http://www.scjc.texas.gov/>; California Supreme Court Committee on Judicial Ethics Opinions, <https://www.judicialethicsopinions.ca.gov/>; *Committee on Professional Ethics*, New York State Bar Association <https://nysba.org/committees/committee-on-professional-ethics/>; *About Us*, Georgia Judicial Qualifications Commission, <https://gajqc.gov/>; *Professional Conduct*, Illinois State Bar Association, <https://www.isba.org/committees/professionalconduct>.

<sup>69</sup> Office of State Commission on Judicial Misconduct, Public Statements, <http://www.scjc.texas.gov/public-information/public-statements>. Notably, Rule 8.02 (a) of Texas’s Disciplinary Rules of Professional Conduct provides that “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.” Available at: <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271>

public” in any format including “print, broadcast or social media.”<sup>70</sup> Members of the North Carolina Judicial Branch may contact the CJCP to request the Committee’s assistance and the Committee will review the situation and determine the appropriate response.<sup>71</sup>

## Conclusion

While it is only human for judges to want to speak out when they are personally attacked or when misinformation is placed in the public domain about one of their cases or rulings, judges have ethical restraints on their ability to directly respond and constitutional restraints on their ability to prevent people from disseminating inaccurate information or unwarranted criticism.

To briefly recap, false statements are often protected speech under the First Amendment. And preventing the spread of false information is not one of the narrowly recognized circumstances under which a judge can impose a prior restraint on speech and publication in the form of a gag order. While reputation-damaging false statements of fact about a judge can be legally actionable as defamation, the difficulty of parsing alleged facts from statements of opinion, speculation, and commentary, as well as the requirement of showing that the speaker or publisher acted with “actual malice,” make for time-consuming and costly litigation, with no guarantee of success. Moreover, by the time a defamation action is filed and resolved, the reputational harm to the individual judge, or the judiciary as a whole, will have long since been done. Thus, all things considered, a rapid judicial response team such as recommended by the ABA’s Standing Committee on the American Judicial System provides the timeliest, and therefore the likely most effective, mechanism for responding to unwarranted public attacks and critique without compromising the ethical obligations of the implicated judge or offending the First Amendment.

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<sup>70</sup> *Judicial Response Committee*, <https://www.nccourts.gov/commissions/chief-justices-commission-on-professionalism/judicial-response-committee>.

<sup>71</sup> *Id.*