

Rapid Response to Unfair and Unjust Criticism of Judges



Standing Committee on Judicial Independence



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RAPID RESPONSE TO UNFAIR AND UNJUST CRITICISM OF JUDGES

The Bar has a special responsibility to ensure that judges remain highly respected leaders of our legal system and communities. Serious inaccurate or unjustified criticism should be answered through a public information program. We should coordinate activities recommended in this publication with the courts themselves, usually acting through their public information officers. Most importantly, and we cannot emphasize this enough, responses to attacks on the judiciary must be made promptly within the same news cycle to be effective.

While many of the references to Bar Associations in this publication refer to state and local Bars, national Bars and specialized Bar Associations can also provide effective responses. We hope that this publication will be used by all associations of lawyers to foster further understanding of the role of our judges, state or federal. This publication focuses on unjust criticism of judges which also encompasses situations in which a criticism may reflect a misunderstanding of a judge's legal role or the judicial system. We can use this "teachable moment" to explain fundamental concepts of the role of judges to the public. In making determinations with regard to what is a fair or an unjust criticism of a judge, we must always keep in mind that in a democratic society citizens and the media have the right to make reasonable and fair criticism of all public officials, including judges. But, as Justice Sandra Day O'Connor reminds us, "Criticism is fine, retaliation and intimidation are not."

This pamphlet builds upon the efforts of the original subcommittee on Unjust Criticism of the Bench that prepared the 1986 protocol, the 1997 protocol of the ABA Judicial Division and Lawyers Conference drafted through the encouragement of Judge Norma L. Shapiro and the protocols of many state and local bar associations that were received in preparation of the current document.

We drafted the recommendations in this pamphlet carefully, keeping in mind the ethical dilemmas judges face in deciding difficult and often unpopular cases. The protocols are consistent with the American Bar Association's various model provisions governing the conduct of lawyers and judges. Above all, we hope that "Rapid Response to Unjust and Unfair Criticism of Judges" assists you in responding rapidly and appropriately to unjust and unfair attacks on your judges.

April, 2008

Doreen D. Dodson, Chair
ABA Standing Committee on
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As a matter of policy, a bar association, as well as members of other constituencies, should be empowered and have in place a mechanism 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. The standard for review will be whether the criticism unjustly impugns the integrity of the judge or the judiciary, or where responses by the bar to criticism are warranted given a misunderstanding of the judge's legal role or the judicial system.

Members of a bar association, as well as members of other constituencies, should have access to a process through which such criticism can be considered in a timely manner to maximize an effective response. Set forth below are suggested procedures for such a response.

RAPID RESPONSE MECHANISM

PURPOSE:

To provide a mechanism through which a bar association and members of other constituencies can provide timely responses to the serious, unjust criticisms of judges and the judiciary or to misunderstandings about the role of a judge or the judicial system. The focus of these responses is to provide the public with information to help them better understand the legal issues related to a specific situation, including the role of judges, the application of the law, and the restrictions and responsibilities placed on judges in the canons and rules.

PROCESS:

Prep Work (Have a system in place before attacks are launched.)

1. A state and/or local bar should identify and form a rapid response team of knowledgeable and accessible individuals who are authorized to determine whether a response is appropriate and, if so, determine the extent of the response. These individuals should be media savvy and committed to the fairness and impartiality of the judiciary. A logical group is the bar president, bar public relations staff, and/or other bar leadership. The members of this group will depend on a number of factors in your state. Therefore, you should tailor this group to your particular state. Ideally, there will be one rapid response team in the state, with other constituents as partners, but, where there is more than one team in a state, every effort should be made to coordinate the response(s) prior to public dissemination. The bar president, with the team, should make the ultimate determination as to whether to respond. Periodic meetings of this group are helpful to keep everyone on message. This group will be responsible for "spotting" attacks on judges in their various forms and, together with the executive director, receive information of attacks. Therefore, the local judges and members of the bar should have the names of each team.

2. Develop a media kit for use by local bar leaders to include sample Op-Ed pieces, speeches and letters to the editor. The American Bar Association has developed resource kits that you can adapt or use as templates: <http://www.abanet.org/judind/toolkit/impartialcourts/home.html>

Once an Attack is Launched or a Complaint is Filed

1. Consult the judge who is the subject of the attack before releasing any comment/response. The judge may prefer that there be no response. It is important to consider his/her opinion.
2. Respond to the media attacks in the same news cycle. Care needs to be given to make sure that the adversary's message is not being reinforced in efforts to respond to attacks. (See the ABA's Countering the Critics pamphlet at www.abanet.org/judind/toolkit/impartialcourts/home.html.) Thus, when the judge is attacked, the response, with rare exceptions, MUST if at all possible be in the same news cycle and should not repeat the negative message of the attacker. We cannot stress enough the importance of a prompt response. Of course thoughtfulness, accuracy, and good communication with involved parties are not to be sacrificed for speed. A careful assessment, using the guidelines of whether a response is warranted or appropriate, must be made.
3. Develop a coherent message using such tactics as speaking in sound bites. Time must be devoted to developing a clear and concise message that is simple to understand and persuasive, not defensive and is written in lay terms. Once the message is established, priority needs to be given to make sure those delivering the message stay on message. Where appropriate, advice and counsel also may be solicited from the state court's public information officer.
4. Develop the form and manner of the response so that it will receive prompt appropriate exposure commensurate with the criticism. This is usually achieved by using the same media outlet as the attack. The following are possible options for response to attacks:

No response. The matter presented may contain justified criticism. The matter may be beyond the scope of the Association policy, or be criticism of the merits of the case. The matter may be too political and outside the interests of the Association. After consulting with the judge who is the subject of the unjust criticism as suggested above, you might find that the judge prefers not to have the matter debated in a public forum.

Letter. In cases where the criticism is determined to be unjust, a letter can be sent to the party disseminating the unjust criticism explaining why the Association believes the criticism is unjust.

Letter to the Editor. In cases where the criticism is determined to be unjust, a letter to the editor briefly explaining the unjust criticism, the reasons why it was determined to be unjust, and any additional explanation that would help the public better understand the particular situation may be sent to the appropriate media outlets. A phone call to the reporter or editor who initiated or encouraged an attack may also be appropriate.

OpEd or Editorial. In some cases where the criticism is determined to be unjust, a longer, more in-depth explanation might be in order. An OpEd piece or editorial may be prepared and distributed to the appropriate media outlets to help the public better understand the particular situation and how that criticism impugns the integrity of an individual and/or the legal system.

News Conference. In more extreme cases where the criticism is determined to be unjust, a news conference can be scheduled during which the unjust criticism can be explained in an effort to assist the public in better understanding the reasons why the criticism is unjust and how that criticism impugns the integrity of an individual and/or system.

Guidelines To Determine Whether to Respond:

1. Except in unusual circumstances, the following are the kinds of cases in which responding to criticism is appropriate:
 - a. When the criticism is materially inaccurate; the inaccuracy should be a substantial part of the criticism so that the response does not appear to be “nitpicking;”
 - b. When the criticism displays a lack of understanding of the legal system or the role of the judge in the judicial process; and /or
 - c. When the criticism is serious and will most likely have more than a passing or *de minimis* negative effect in the community.
2. The following factors should be considered in determining whether a response should be made in a close case and considered in every case in determining the type of response:
 - a. Whether a response would serve a public information purpose and not appear “nitpicking;”
 - b. Whether the criticism adequately will be met by a response from some other appropriate source;

- c. Whether the criticism substantially and negatively affects the judiciary or other parts of the legal system, or whether continuing discussion of the controversy would serve to lower public perceptions as to the dignity of the court, the judiciary or the judicial system;
 - d. Whether the criticism is directed at a particular judge but unjustly reflects on the judiciary generally, the court, or another element of the judicial system (e.g., grand jury, lawyers, probation, bail);
 - e. Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice (e.g., sentencing, bail, evidence rules, due process, fundamental rights);
 - f. Whether a response would appear defensive or self-serving;
 - g. Whether the critic is so obviously uninformed about the judicial system that a response can be made on a factual basis;
 - h. Whether the criticism or report, although generally accurate, does not contain all or enough of the facts of the event or procedure reported to be fair to the judge or matter being criticized;
 - i. Whether the overall criticism is not justified or fair;
 - j. Whether the criticism, while not appearing in the local press, pertains to a local judge or a local matter;
 - k. Whether the timing of the response is especially important and can be best met by the rapid response team.
3. Except in unusual circumstances, the following are the kinds of cases in which response to criticism MAY NOT be appropriate:
- a. When the criticism is a fair comment or opinion;
 - b. When the criticism reflects animosity or a feud between the critic and the judge on a personal level;
 - c. When the criticism is vague or the product of innuendo;
 - d. Where criticism raises issues of judicial ethics appropriate for presentation to the judicial disciplinary body;
 - e. When a lengthy investigation to develop the true facts is necessary;

- f. When the response would reasonably be expected to affect or prejudice a matter at issue in a pending proceeding;
- g. When the criticism is insignificant;
- h. When the criticism arises during a political campaign and the bar's response may be construed as an endorsement of a particular candidate for judicial office;
- i. When the response would defend the indefensible.

RECOMMENDED EDUCATIONAL PROGRAMS:

Consider educating not only members of the bar but also members of the public about such fundamental concepts as:

- (a) The rule of law;
- (b) The need to preserve fair and impartial courts;
- (c) The organization and responsibilities of the judicial system; and
- (d) The role of the judge in society.

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