

Protocol for Responding to Unfair Criticism of Judges

American Board of Trial Advocates

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Protocol for Responding to Unfair Criticism of Judges

Presented by the American Board of Trial Advocates

I. GOAL

Maintain and support public confidence in the judiciary by providing timely assistance to members of the bench in responding to adverse publicity, misinformation, or unwarranted criticism of an individual judge or the judiciary.

II. SUMMARY OF PROPOSAL

Establish guidelines for each chapter of ABOTA to use to develop analytical and response teams to formulate and provide responses to misinformation or unwarranted criticism of an individual judge or the judiciary.

III. WHY A PROGRAM IS NEEDED

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

It is unethical for a judge to answer criticism of her or his actions appearing in the news media regarding pending or impending matters. This policy has been developed to ensure 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. Therefore, cooperation of attorneys is necessary to respond accurately, quickly, and fairly to unwarranted criticism of judges and courts.

IV. PROGRAM PURPOSES AND FUNCTIONS

To deal with errors and misinformation in reporting criticism of judges, courts, and/or the administration of justice, as further provided in this outline.

To be available to the news media to provide information concerning judicial activities, court process, or other information about the administration of justice.

To provide means by which judges and lawyers can improve the public image of the legal system and seek a better understanding by the community of the legal system and the role of lawyers and judges.

V. IMPLEMENTATION

Each chapter of ABOTA is to form a team of three or more members responsible for carrying out the function of this program according to the policies and guidelines contained in this outline. A public response should be made to criticism only if a majority of the members agree to the type of response, the timing and content of the response, and how the response is to be presented.

VI. GUIDELINES TO DETERMINE WHEN ABOTA SHOULD RESPOND TO CRITICISM OF JUDGES

A public response should be made to criticism or attacks on judges only in the following two instances:

- A public utterance that is unwarranted or an unjust attack on a judge in relation to specific cases, regardless of the source of the attack, or

- Any "unwarranted" or "unjust" attack or series of attacks on a judge or court that may adversely affect the administration of justice.

The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:

- When the criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
- When the criticism displays a lack of understanding of the legal system or the role of the judge and is based at least partially on such misunderstanding; and
- 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."

Factors for consideration in determining whether to respond to criticism:

- Whether a response would serve a public information service and not appear to be petty;
- Whether the criticism will be adequately met by a response from some other appropriate source;
- 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;
- Whether the criticism is directed at a particular judge but unjustly reflects generally on the judiciary or the court or lawyers;
- Whether a response provides the opportunity to inform the public about an important aspect of the administration of justice (e.g., evidence rules, due process, fundamental rights, etc.);
- Whether the critic is so obviously uninformed about the judicial system that a response can be made on a factual basis;
- Whether the criticism or report, although generally accurate, does not contain all or enough facts about the reported event or procedure to be fair to the judge or matter being criticized;
- Whether the overall criticism is not justified or fair;
- Whether the judge or court, which is the subject of the criticism, authorizes the making of a response.

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

- When the judge or the court which is the subject of the criticism declines the offer of the team to respond;
- When the criticism is a fair comment or opinion;
- When the feud is between the critic and the judge on a personal level;
- When the criticism is vague or the product of innuendo, except when the innuendo is clear;
- Where the criticism raises issues of judicial ethics appropriate for presentation to the Judicial Inquiry or Disciplinary body;
- When a lengthy investigation is necessary to develop the facts;
- When the response would prejudice a matter at issue in a pending proceeding;
- When the controversy is insignificant;
- When the criticism arises during a political campaign and the response may be construed as an endorsement of a particular candidate for judicial office.

VII. THE TIMING, FORM, DRAFTING CONSIDERATION AND CONTENT OF THE RESPONSE

Timing

- To be effective, the response must be prompt and accurate and, if at all possible, should be made within 24-48 hours or as soon as practicable.
- When aware that unwarranted criticism will be made or reported, direct communication with a reporter or editor may clarify the facts and serve to defuse the situation.

Form of Response

- The form and manner of the response should be such that it will receive the same exposure and notoriety as the criticism.
- A letter to the editor is an effective form of response because it is the most likely to be printed fully and accurately.
- Press releases are usually more subject to editing and are frequently viewed as less credible, and pamphlets are too elaborate.
- Television or radio talk shows by on-air appearance or through facsimile or e-mail may be effective forms of response, but should be used carefully.
- In some circumstance, press conferences provide effective means to disseminate a response.
- Direct communication with reporters and editors intended to clarify facts and present another position is encouraged.
- Whenever possible, any response should be coordinated with the court's public information officer, if one exists.
- Whether a response would appear defensive or self-serving.

Drafting Considerations

- The response should be a concise, accurate, "to-the-point" statement, devoid of emotional, inflammatory, or subjective language;
- The statement should be informative and not argumentative or condescending;
- The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- The statement should be written in plain language, suitable for inclusion in a newspaper story;
- Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
- Where appropriate, the statement should include an explanation of the process involved;
- The statement should NOT attempt to discredit the critic; that is, attack the competence, good faith, motives, or associates of the critic;
- The statement should not provide evidence that the critic has hit a g| nerve, causing overreaction
- The statement should not defend the indefensible;
- The team should consider the cause of the criticism or controversy, which might not be immediately apparent.

Content of Response:

The following points may be included in a typical response:

- Identify the criticism and its source.
- We may frequently disagree with the decisions and actions of public officials, including judges. The federal and state constitutions protect our right to express our disagreement.
- We must remember that judges have no control over which cases come before them, but they must decide each and all of those cases. Judges must follow the law as established by higher courts. One side loses in every lawsuit.
- Because of their position, judges are not wholly free to defend themselves and it is ordinarily not appropriate for them to personally answer charges made against them or their decisions.
- Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism.
- Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit that the balance of the points might have for those who agree with the criticism.

Procedure for evaluating whether to respond to public criticism of a judge or the courts:

- Each local chapter team should establish procedures for notification of unwarranted or unjust criticism, gathering factual and background information, conducting the necessary investigation, evaluating whether a response is warranted, and contacting the judge or court to secure permission to respond;
- All responses to unfair public criticism of judges or the courts should be made in the name of the team member or the president of the local chapter, or his or her designee.