
Dealing with Controversy

A primer for the formation of a committee to respond to the unfair criticism of judges

By Jim Keating

The Illinois Chapter of the American Board of Trial Advocates has established a committee to respond to unfair criticism of judges. In forming this committee, we utilized ABOTA's publication, "Protocol for Responding to Unfair Criticism of Judges," as a guideline and looked to the needs of our particular legal community. What follows is a brief historical summary concerning the formation of the committee, along with anecdotal reports of particular investigations and responses which the committee has undertaken. We hope our experiences will be of assistance to those who are interested in forming such committees.

IS THERE A NEED FOR SUCH A COMMITTEE?

The initial considerations in determining whether to establish a committee to respond to unfair media criticism are:

- (1) Is the legal community in need of such a committee?
- (2) Would a committee be the appropriate vehicle to respond to unfair criticism?

In deciding whether the formation of such a committee would be appropriate, the Illinois ABOTA Chapter looked to the Illinois Supreme Court Rules governing the conduct of the judiciary. In Illinois, the rules governing judicial conduct

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specifically forbid judges from responding to criticism concerning pending matters before them. Illinois Supreme Court Rule 63, Para. 6, states in pertinent part:

"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 the judge's direction and control."

The Illinois courts have explained that this rule serves to prevent interference with pending litigation as a result of media attention and serves to preserve the integrity of the court. Inasmuch as the Illinois judiciary is prohibited from publicly responding to media criticism, which is believed to be unfair and unwarranted, the Illinois ABOTA Chapter concluded that a vehicle for response was needed and should be established.

IF NOT JUDGES, WHO THEN?

Once it is determined that a mechanism should be implemented in order to respond to media criticism of the judiciary, the chapters must then determine from whom such responses should emanate. If judges are unable to respond to blatantly unfair criticism of their decisions, who then? Would it be appropriate to have counsel for the litigants to respond to media criticism? The Illinois Chapter debated this issue concerning whether responses to media criticism should emanate from individual attorneys or through a group response, such as from an ABOTA committee.

We determined that individual responses to media criticism, regardless of the qualifications and reputation of the

individual, were inadequate for several reasons. Individual responses could appear to be self-serving, particularly if the responding attorney regularly appeared before the jurist; the particular bias or interests of an individual attorney would come under close scrutiny and perhaps subject the attorney to unnecessary criticism; a response from a "collective voice" of respected attorneys would more likely "reach print;" the conclusions reached by an ABOTA committee would be given more credence by the public, especially since any conclusion of the committee would only be reached after a thorough investigation. Furthermore, the composition of ABOTA members from both the plaintiff and defense bar eliminates any inference that an ABOTA response is a result of a hidden agenda.

THE FORMATION OF THE COMMITTEE

A committee can be formed once it has been determined that there is a need in the community for a vehicle to respond to unfair media criticism of the judiciary and that an ABOTA committee should be formed and comprised of at least three ABOTA members. After the Illinois Chapter committee was organized, we were apprehensive that this committee might remain dormant or at best, under utilized. How would we become apprised of media criticism emanating from newspapers in other locales in our state? Should the committee scan local newspapers daily and watch the local nightly news to ferret out unwarranted criticism of the judiciary? And what about downstate and outlying counties? Should the commit-

tee enlist the assistance of other ABOTA members in other areas of the state to ensure that all media coverage was reviewed? How would our committee become a clearinghouse to investigate and respond to unfair media criticism if we were not apprised of all significant media coverage? Further, what if a particular judge did not want our committee to respond? These questions were soon answered after we established contact with the Illinois Judges Association.

ABOTA PARTNERSHIP WITH THE JUDICIARY

The committee initially contacted justices of the Illinois Supreme Court to determine whether our committee's assistance would be welcomed by the Illinois judiciary. The justices indicated that while the Illinois Supreme Court could not bestow upon the committee its official imprimatur, they did indicate that the Illinois Judges Association might be interested in cooperating with our committee. We contacted the Illinois Judges Association and explained the purpose of our committee. We were advised that the Illinois Judges Association had organized a "Criticism Response Team," which had been formed to assess and respond to unwarranted or uninformed criticism of the Illinois judiciary. Our committee met several times with members of the Illinois Judges Association and its response team. We discussed ways in which our committee could be used to investigate and respond to unfair media criticism.

The Criticism Response Team recommended to its members at large that the association avail itself of the offer of

assistance from the Illinois ABOTA Chapter. The Illinois Judges Association passed a resolution approving the Illinois ABOTA Chapter as its spokesperson to investigate and respond to unfair media criticism.

Our initial concerns were that the Illinois ABOTA Chapter's committee might become merely a vestigial appendage with an unwieldy title (only to be added to members' C.V.s). These concerns vanished after the Illinois Judges Association passed its resolution. We were no longer concerned that our assistance might not be desired or that we might not become aware of media criticism outside of our local area. The Illinois Judges Association response team would act as the initial clearinghouse and direct matters to our committee's attention. The response team developed a procedure with its members at large to refer incidents to the ABOTA committee for review. Once this procedure was in place, our phones started ringing and the fax machines were soon disgorging newspaper articles from around the state for our review. It is noteworthy that prior to the formation of our committee, the Illinois Judges Association only received one request from a judge for assistance in the last three years. Since the Illinois Judges Association designated our committee as its spokesperson in unfair criticism of judges cases, we have been involved in more than six matters in six months. Build the park and the fans will come.

THE USE OF ABOTA PROTOCOLS

Not all media criticism is unfair and not all criticism requires a response. Although the Illinois Judges

Association serves as a first-step filter of matters for review, the ABOTA Chapter must make its own determination after an investigation of whether to publicly respond to media criticism. Each case we have reviewed is different and at the onset of each matter we are cognizant of the guidelines in determining whether to respond.

DOES THE JUDGE REALLY WANT OUR HELP?

Once a matter comes to our attention, we determine whether our assistance is desired by the judge. If the matter has been referred to our committee by the Illinois Judges Association, we can assume that the Association has been in contact with the jurist. If the matter has not been referred to us by the association, we first contact the judge who is the subject of the criticism to determine whether he or she desires our committee to investigate and/or respond. We advise the judge that our committee does not act as apologists for the court and if our investigation reveals that either the criticism is fair comment or justified, we will not respond. If the jurist declines our assistance, we do not pursue the matter. In one instance, we noted that the local newspapers were harshly criticizing the decision of a judge. The case was no longer pending and the judge was himself responding to the media criticism. Our committee was not requested to intervene. However, if a matter is referred to us by the association or the individual judge desires our committee to investigate and respond, we then proceed with our investigation.

RAPID RESPONSE TEAM

Although it is beneficial to have the assistance of the judge during our investigation, it is not necessary. Some judges are not available during the time period allotted to perform our investigation. It is suggested that a response be made, if possible, within 24 to 48 hours after the criticism has been published or aired. A prompt response is important to minimize any damage caused by the unwarranted criticism. Also, an untimely response will not be published because it is old news.

Inasmuch as the committee must complete its investigation and response in a very short time span, committee members must be forewarned that when a matter is referred to them for review, they may be required to set aside one entire day, sometimes two days, in order to conduct a thorough investigation and prepare a timely response. Although most ABOTA members have extremely congested schedules, we found that by expanding the numbers of committee members, we did not have to call on the same individuals each time a matter was presented.

After our first response, the interest of other ABOTA members was piqued and the committee's membership rose dramatically.

INITIAL STEPS

After a matter has been referred to our committee, we obtain all copies of the news article or videotape of the offending media piece. In many of the situations we have reviewed, the subject matter was published in at least six

different leading publications. In one instance, although each of the articles pertained to the same judicial decision, we found that the authors criticized the judge in different ways. As a result, we were compelled to draft an individual response to each publication.

WHAT IS A PUBLIC UTTERANCE?

Although the committee was established to respond to unfair media criticism of the judiciary, we have had to determine on occasion whether the criticism emanated from the media.

What are public utterances and what falls under the aegis of the media? With the advent of the Internet, our traditional understanding of the media had to be expanded. During the Revolutionary War, the media consisted of individuals distributing leaflets on street corners. Our committee was referred a matter where certain criticism of a judge was "published" on an individual's web site. Was this a public utterance? Was this part of the media? During our investigation we learned that the criticism which was found on a web site was later copied and used in newspaper reports. As a result, our committee categorized the criticism as appropriate for review and response.

WHAT IS "UNFAIR OR UNJUST CRITICISM"

The most difficult task of the committee is to determine whether the criticism is unfair, unjust and/or unwarranted. We have found that highly publicized trials concerning emotionally charged issues subject the trial judge to close media scrutiny. In particular, if



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the trial is a criminal bench trial, the decision can be made the fodder of sensationalized headlines.

Unfortunately, it is sometimes easier for the media to condemn the results of a decision in the front pages without adequately investigating the facts and evidence presented during the trial. We have found that where a result is particularly counter-intuitive, the court can be the subject of much public criticism, especially when the rules of law and evidence are either difficult to understand or have not been fully explained in the article.

Our committee obtains all the media articles pertaining to the issue; we also attempt to obtain trial transcripts and copies of the judicial opinion, where possible and feasible.

In one of the first cases submitted for our Committee's review, we were requested to investigate particularly harsh criticism of a downstate judge. This judge had dismissed the state's petition to terminate the parental rights of a mother of a baby and ordered that the baby be returned to the mother. This particular decision was the subject of heated public criticism because the mother had 12 years earlier pleaded no contest to a charge of second-degree murder of her two-year old son. The mother had apparently stood by while her husband brutally caused the death of the young boy. The mother served nine years of a 30-year sentence. After her release, the woman remarried and had another baby boy, which the Illinois

Department of Children and Family Services removed from the mother shortly after birth.

This judge was pilloried in the press for his decision. The news media even printed a cartoon depicting the judge throwing the baby in an open grave while the mother stood by with a shovel. The caption read, "Here's hoping the past is the only thing you're going to bury."

On its face the court's decision appeared unreasonable to the lay person. However, the media "reporting" of this decision was excessive and unfair. The media did not reveal to the public the underlying facts of the case. Without all the facts, it was quite understandable that there was a public outcry at the result.

Our investigation revealed that the expert witnesses retained by the state testified at trial that the mother was fit to care for and protect the welfare of the child. Further, it was the state-retained experts' recommendation that the baby be returned to the care and custody of the mother. Additionally, evidence was presented that the mother had reached a level of "rehabilitation" through counseling, education and the presence of a loving husband and supportive family network. The court also took into account the fact that the acts of the mother in 1989 were an outgrowth of the physical, sexual and emotional abuse she had suffered both as a child and as a wife. The court took great pains to explain that although the mother's past history of suffering did not excuse her conduct, it did help explain it.

Although the court's decision appeared to conflict with our instinctual feelings of protection for a child, the decision appeared to be factually and legally sound and not the result of hastily or ill-conceived notions of justice. Our committee, therefore, formulated several responses to the various newspapers that had unfairly criticized this judge.

THE DECISION TO RESPOND

After the committee reviews offending articles and any court orders or transcripts, we attempt to reach a consensus on whether to respond and in what fashion. We have found editorials and opinion pieces in newspapers to be particularly vexing to respond to because the author is oftentimes not

identified, and the editors do not always feel compelled to educate the public about the basis for any judicial decision. Oftentimes the columnists or editors are simply hell bent on feeding off public passions and sentiments. When queried about their clearly slanted views, some reporters and editors have simply responded that they have a right to their opinion and infer that we are attempting to abridge or restrict the freedom of the press. In our contacts with the media, we always explain that although everyone is entitled to express their opinions, the media has an obligation to report the facts fully so that the public can formulate their own reasoned opinions about the case. Just as there are restraints upon the court from defending themselves from unfair criticism, there should also be restraints upon the media from disseminating unfair and unjust criticism of the judiciary. We also point out that if the attack is unfounded, it erodes public confidence in the legal system and adversely affects the administration of justice.

DRAFTING A RESPONSE — ITS FORM

Once it has been determined that the criticism is unfair, unjust or unwarranted, the committee must then determine the method of response. Should the response be directly to the authors of the articles, should a letter to the editor be prepared or should it be an op-ed piece? Letters to the editor and op-ed responses have been particularly effective.

Our committee has also responded by appearances on TV news shows

such as NBC's "Today" show.

SUBSTANCE OF THE RESPONSE

Clearly the purpose of the committee's response is not to educate the particular journalist or editor. They already know whether their article was especially one-sided and harsh. The audience we are trying to reach is the public. As a result, we never attack the author. We always reaffirm the media's right to report and editorialize as it sees fit. We couch our response in neutral tones. We establish the response as a way to educate the public about all the facts. We explain evidentiary or procedural rules, which may have resulted in the criticized decision. We underscore our understanding that people frequently disagree with judicial decisions and that the U.S. Constitution protects our right to express that disagreement. With all of that said, the committee can then proceed to explain any troubling aspects of the court's decision; disclose facts which the media has not concerned itself with; explain that a judge does not have the luxury of choosing which cases come before him or her; and that the judge is obligated to follow the law even if the result seems onerous or harsh; and lastly, we attempt to diffuse any unfair or unwarranted public criticism of a judge's decision.

To dispel any notion that ABOTA is merely a group of attorneys trying to protect their own kind, we always identify the background and purpose of ABOTA. We point out that our purpose is not to "fan the fire," but rather to inform the public, not discredit the critics. The fundamental purpose of

our response must be to educate the public and to ensure the dignity of the judicial system.

PAST INVESTIGATIONS AND RESPONSES

Our committee was also requested to investigate claims brought against a rural judge by a disgruntled sheriff's candidate who accused the judge of acting without legal authority; having a trial transcript altered; conspiracy; and obstruction of justice. Our investigation revealed that these charges had no basis. The newspaper articles had noted that the judge had declined to comment on the accusations. In our response to the newspapers, we explained that the Illinois Supreme Court Rules constrained a judge from commenting on or responding to any criticism about a pending case. Inasmuch as the case was still pending, we pointed out that no inferences should be drawn from the fact that the judge had not responded to the criticism leveled against him. Our committee further pointed out certain additional facts that we thought the public should be made aware. Our response also noted that the accuser had plead guilty to the charges when he appeared before the judge.

Our committee was also requested to respond to several newspaper articles pertaining to a highly publicized trial of five off-duty sheriffs who were charged after they were involved in a car chase and a shooting. The trial was venued in Chicago and received daily press coverage. After a bench trial, the judge acquitted the five sheriffs. After

the acquittal, there were several editorial opinions and headline reports criticizing the court's decision to acquit. Our committee chose to respond to six of the articles. All of the articles and editorials suggested that the judge had no factual or legal basis on which to base his decision.

The preparation of our response was made more difficult by the fact that the court had described the defendants as "Bozos." The media had a field day using the "Bozo" remark. In our response, we pointed out that the editorials and news articles did not present a balanced picture of the evidence presented to the court. Our response revealed certain facts to the public, which the media had not reported about, which could have been found by the court to be exculpatory. We explained that rather than condone the defendant's behavior, the court concluded that the prosecution had not proven that the defendants were guilty beyond a reasonable doubt. We pointed out that whether these exculpatory facts were true or not could be debated and that certainly reasonable minds could differ. However, in the final analysis, the court reached a decision, which had legal and factual support. We noted that the court was required to rule only on the evidence presented in the courtroom, not on what was depicted in the media.

Another recent matter concerned a nationally known reporter (also an attorney), who wrote about the conduct of two judges and the Illinois Judicial Inquiry Board. We did not respond to the criticisms. However, we

explained that we were appalled that he had advocated that people vote a straight "No" on the next judicial retention ballot. As an attorney, he should have known that such a suggestion was irresponsible and would harm not only those judges he was personally critical of, but would also harm patient, dignified and competent judges working hard on the bench.

One of the most recent requests our committee has received involved media criticism of a Housing Court judge who refused to order the demolition of a building after a child was injured by a falling brick. Our investigation revealed that the city had failed to serve the building owner with proper notice of the hearing and the court, therefore, refused to grant the city's request. However, the court did order the owner to board up the building; to have scaffolding erected; and to restrict entrance to the building. We responded to the criticism explaining what our investigation had revealed and noting that the court was merely following the law and procedure applicable to the case.

THE FUTURE OF THE COMMITTEE

There is, indeed, a need for such a responsive mechanism for the judiciary. As is apparent from the above, we have never been asked to respond to a popular decision. ■

To request a copy of the publication, "Protocol for Responding to Unfair Criticism of Judges," call the American Board of Trial Advocates at (214) 871-7523.