



## **SAN DIEGO COUNTY BAR ASSOCIATION'S PROCEDURE FOR RESPONDING TO THE UNJUST CRITICISM OF JUDGES**

### **A. Purposes and Functions of Program**

The primary purposes and functions of the program are:

- 1) To deal with errors in reporting or inaccuracies in reporting criticism of judges, courts and/or the administration of justice, as further provided in this policy statement;
- 2) To be available to the news media as a resource for obtaining information concerning judicial activities, court process or other technical or legal information about the administration of justice;
- 3) To encourage broad dissemination of information to the public about noteworthy achievements and improvements within the justice system;
- 4) To suggest means by which judges and lawyers can improve the public image of the legal system; and
- 5) To generally seek a better understanding within the community of the legal system and the role of lawyers and judges.

### **B. Appointment of Response Committee**

At the beginning of his or her term, the SDCBA President shall appoint a five member committee to assist in reviewing the subject criticism and, if necessary, prepare a response. The committee will consist of the President, three retired judges and two SDCBA directors. The Executive Director will be an ex officio member.

### **C. Referral Procedure**

- 1) The task of administering the program is the responsibility of the SDCBA Executive Director in consultation with the SDCBA President or his or her designee.

- 2) All referrals of criticism of judges and courts should be forwarded to the SDCBA Executive Director and/or the President. The referral may be oral or written, but in all cases the referring person must be available to assist in gathering background and factual information and must present written material when requested. All referrals should be undertaken with the specific permission of the judge or court criticized with the understanding that the judge or court also will assist in gathering necessary information for the bar association to evaluate.
- 3) The SDCBA Executive Director or the President's designee, should immediately begin to gather all pertinent background and factual information including a copy of the text (whether in live or print media) of the criticism of any apparent inaccurate or unjustified criticism. The SDCBA shall act as a central coordinator and clearinghouse for this information.
- 4) The Executive Director should immediately notify the President of the SDCBA and the chairperson of the committee who is assigned the overall responsibility for reviewing the subject criticism. All pertinent information shall be provided to the committee members for their immediate review.
- 5) The committee chairperson should promptly investigate the underlying facts, discussing them with other committee members and the judge involved. The President, in consultation with the committee, shall promptly prepare and release the response.
- 6) The SDCBA should identify and enlist knowledgeable attorneys in its area to serve as contacts to assist in monitoring and responding to unjustified judicial criticism.

D. Guidelines to Determine When the Bar Should Respond

- 1) The following are the kinds of cases in which responding to criticism is appropriate, except in unusual circumstances:
  - a) When the commentary or criticism is based in whole or in part on any factual inaccuracies or distortions of fact.
  - b) 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/or the criticism is based in whole or in part on a misunderstanding of either substantive or procedural law or the workings of the judicial system.

- c) When the commentary or criticism is a personal attack regarding the ethics or integrity of a sitting judge based solely on the commentator's disagreement with a particular decision or ruling.
- 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, etc.);
  - 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, etc.);
  - 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 committee.
- 3) The following are the kinds of cases in which response to criticism is NOT

appropriate, except in unusual circumstances:

- a) When the criticism is a fair comment or opinion;
- b) When the feud is between the critic and the judge on a personal level;
- c) When the criticism is vague or the product of innuendo, except when the innuendo is clear;
- d) Where criticism raises issues of judicial ethics appropriate for presentation to the Judicial Council;
- e) When a lengthy investigation to develop the true facts is necessary;
- f) When the response would prejudice a matter at issue in a pending proceeding;
- g) When the controversy 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.

E. The Response

- 1) Timing: To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 48 hours of publication of the criticism or report, especially keeping in mind the deadline(s) of the news media that reported the original criticism. Ideally, a response can be more immediate and occur even before publication, for example, through direct communication with a reporter or editor which may clarify the facts and serve to defuse the situation.
- 2) 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 subject to editing and are frequently viewed as less credible, and pamphlets are too elaborate. Television or radio talk shows may be effective forms of response but should be used more cautiously and sparingly. In some circumstances, press conferences provide an 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 public information officer.

- 3) Drafting Considerations:
- a) The response should be a concise, accurate, “to the point” statement, devoid of emotional, inflammatory or subjective language;
  - b) The statement should be informative and not argumentative or condescending;
  - c) The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
  - d) The statement should be written in lay terms suitable for inclusion in a newspaper story;
  - e) Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
  - f) Where appropriate, the statement should include an explanation of the process involved (e.g., sentencing, bail, temporary restraining order, etc.);
  - g) The statement should *not* attempt to discredit the critic, that is, attack the competence, good faith, motives or associates of the critic;
  - h) The statement should *not* provide evidence that the critic has hit a nerve, causing overreaction;
  - i) The statement should *not* defend the indefensible;
  - j) The committee should consider the cause of the criticism or controversy, which might not be immediately apparent.
- 4) Content of the Response: The following points may be included in a typical response:
- a) Identify the criticism and its source;
  - b) We may frequently disagree with the decisions and actions of public officials, including judges. The federal and state constitutions protect our right to express that disagreement.
  - c) We must remember that judges have no control over what 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 always

loses in every lawsuit.

- d) 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.
- e) Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism.
- f) Avoid taking a position on the merits of the controversy, since to do so will probably eliminate any educational benefit the balance of the points might have for those who agree with the criticism.
- g) The need for independent judges, who will not be influenced by criticism of them or their decisions, requires that the bar remind both lawyers and the public of these facts.
- h) The law has established appellate courts so that decisions of judges may be reviewed and, if appropriate, corrected. Our present judicial system provides for change in the law through legislative action or by constitutional revision.