

# **Response to Criticism of Judges**

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## **Preface: Responding to Criticism of Judges**

American judges do important work that is not always clearly understood or adequately appreciated. The Bar has a special responsibility to ensure that judges, as essential leaders of the legal system, are not only treated fairly and with appropriate dignity, but that misunderstandings of the law and the role of judges are addressed and clarified. Our goal is to develop a responsible dialogue that does not end with the Bar. The legal community must work cooperatively, hand in hand, with civic groups and involved citizens to ensure that the judiciary remains a highly respected institution. Activities recommended in this publication should also be coordinated with the courts themselves, acting through their public information officers. It is only through a fully integrated informed dialogue that inevitable criticism can be transformed into a vehicle for furthering understanding of our justice system.

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. So too, references to criticism of "judges" should include criticism of all judicial officers, whether state or federal. This publication does not limit itself to "unjust" criticism of judges, but is meant to guide appropriate responses to a variety of criticisms. There are, in fact, limited instances where it may be appropriate for the judge concerned to respond directly as well. However, these situations are limited, should occur only after careful consideration of the ethical restrictions on public comment and, therefore, are not assisted by this pamphlet.

This revision owes a tremendous debt to the original Subcommittee on Unjust Criticism of the Bench that prepared the 1986 version of this protocol. Recent events, however, convinced the Lawyers Conference that revision was warranted. We thank the many state and local Bars that responded to our survey concerning activities in this area, and the many reviewers who offered excellent suggestions that we have included wherever possible. We also thank the California Judges Association for sharing their insights into the issues presented. The Lawyers Conference especially thanks Larry Polansky for taking pen to paper and pushing this protocol to completion. Finally, Judicial Division Chair Norma L. Shapiro, who encouraged this work and entrusted the Lawyers Conference with its development, deserves a special thank you, as do the members of the Lawyers Conference subcommittee who reviewed outlines and participated in numerous meetings.

These recommendations were prepared with judges in mind. Judges inevitably will be involved in deciding difficult and unpopular cases. The ethical dilemmas that judges face were considered carefully. Our protocols outlined here are consistent with the American Bar Association's various model provisions governing the conduct of lawyers and judges. We hope that our work will promote appreciation, respect and understanding for the unique role of the judiciary in our government.

Marla N. Greenstein, Chair,

ABA Judicial Division Lawyers Conference  
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**Model Program Outline for State, Local and Territorial Bar Associations:  
Suggested Program for the Appropriate Response to Criticism of Judges and Courts**

**I. Policy Statement**

*A. Why a Plan Is Needed*

The effectiveness of the administration of justice depends in a 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 non-litigants as well as litigants believe that the courts, their procedures and decisions are fair and impartial.

Generally, it is undesirable for a judge to answer criticism of her or his own actions appearing in the news media. This policy has been developed to insure 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.

The risk is apparent that a response by a judge to criticism of her or his own actions may be perceived by the community as "self-serving" and/or as a "defensive" position which fails for lack of credibility. Also, since there invariably is more at stake than an individual judge's ego or feelings, the bar should recognize the negative reflection on the dignity of the administration of justice if a judge should make an intemperate or emotional response to such criticism.

Further, a judge's comment contains the potential of reflecting on pending litigation and may have an undesirable effect on litigants. In addition, an inappropriate response may give encouragement to those who would control the judiciary by intimidation and thus weaken the independence of the judiciary.

Finally, judges subjected to criticism may be prevented from responding by ethical restrictions relating to a judge's ability to engage in public comment, a judge's need to maintain the appearance of impartiality and the impropriety of *ex parte* communications. Therefore, cooperation of lawyers and bar associations is necessary to successfully meet and accurately, quickly and fairly respond to criticism of judges and courts. This model plan implements the American Bar Association Model Code of Professional Responsibility (EC 8-6) and the Model Rules of Professional Conduct (Comment Model Rule 8.2) which entitle adjudicatory officials to the support and the early and accurate response where their official actions are criticized.

*B. When Action in Response to Criticism Should Be Taken by the Bar*

Implementation of this plan is selective. To avoid infringing on the freedom of the press, this plan is designed to affect a response on behalf of the judiciary and courts to criticism that is serious as well as inaccurate or unjustified.

There should be no attempt to prevent criticism, but inaccurate or unjust criticism should be answered through an organized public information program. Such criticism typically results from a lack of understanding of the system – the reason for a decision, a sentence or a courtroom action.

The bar should respond publicly to attacks upon a judge only in the following two instances:

1. 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,
2. any "unwarranted" or "unjust" attack or series of attacks on a judge or court which may adversely affect the administration of justice.

Guidelines to determine when a response to criticism is appropriate in a particular case are provided in Section II.C. of the Bar Association Model Program below.

### *C. Implementation of the Policy and Plan*

Because of the restraints placed on judges both by tradition and by the Code of Judicial Conduct, and the ethical obligations imposed by the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct for lawyers, it is recommended that state, local and territorial bar associations adopt a policy and program to provide appropriate and timely responses to criticism of judges and courts. The following are suggestions for implementation of such a policy and program:

1. Adopt a policy statement that supports the position that judges should generally not respond to criticism and that the bar, state, local and territorial, should, when appropriate, respond to criticism of judges and courts.
2. Adopt a structure and process for receiving, screening and evaluating criticisms of judges and/or courts. (See Sections II.A. and B. for suggested program.)
3. Develop guidelines to determine when the bar association should respond. (See Section II.C. for suggested guidelines.)
4. Since timing is key to responding, provide a method whereby the bar can respond quickly, accurately and with authority. (See Section II.D.)
5. Coordinate state, local and territorial bar association programs to broaden the base of the response. In some cases, it may be appropriate for the state, local and territorial bar to respond. In other cases, only one or the other should respond.

6. Coordinate the program with the appropriate federal, state, local or territorial judiciary and recommend to other local bar associations the implementation of a comparable policy and program.
7. Provide federal, state, local and territorial judges and court officials with copies of the program and encourage them to contact named bar officials to alert them to media criticism which the judge(s) and/or court believe to be deserving of an appropriate bar association response.

## II. Model Program for State and Local Bar Associations

### 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. *Referral Procedure*

Assign the task of administering the program to an appropriate designee, committee and/or contact person.

All referrals of criticism of judges and courts should be forwarded to the appropriate contact person at the state, local and/or territorial bar association headquarters. 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.

The contact person assigned 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.

The contact person then should immediately notify the president of the state, local or territorial bar association and the designee or chairperson of the committee assigned the overall responsibility.

The designee or committee chairperson should promptly investigate the underlying facts, discussing them to the extent possible with other committee members and the judge involved, and then promptly prepare and release the response.

Upon securing approval of the president of the state, local or territorial bar association, the designee or committee chairperson may speak in the name of the association.

### *C. 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 criticism is serious and will most likely have more than a passing or de minimis negative effect in the community;
  - 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
  - c. 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."
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 Inquiry or Disciplinary body;
  - 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.

## D. *The Response*

### 1. Timing.

To be effective, the response must be prompt, but accurate. If at all possible, the response should be made within 24-48 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 more 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 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 if one exists.

### 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 (C.J.C. 2.A., 3, 3.B.7., 3.B.9., 4.A.1., 4.B.; C.P.R., EC 8 - 6).
- e. Lawyers, under the Code of Professional Responsibility and the Model Rules of Professional Conduct, have a duty to defend judges against unjust criticism (EC 8-6; Comment M.R. 8.2).
- 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 organized 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.

5. Recommended Education Programs.

An expanded public education program could be undertaken to familiarize the public with such fundamental concepts as:

- a. The rule of law;
- b. The need to preserve judicial independence and integrity;
- c. The organization and responsibilities of the judicial system; and
- d. The role of the lawyer in society.