

TENNESSEE BAR ASSOCIATION
POLICY ON UNJUST CRITICISM OF JUDGES

ADOPTED BY THE TBA BOARD OF GOVERNORS
ON NOVEMBER 7, 1997

WHEREAS, 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; M.R. 8.2); and

WHEREAS, the need for independent judges who will not be influenced by unjust criticism of them or their decisions requires that the organized bar remind both lawyers and the public of the essential nature of an independent judiciary; and

WHEREAS, as an association of lawyers in the State of Tennessee, the Tennessee Bar Association, through its Board of Governors, has voted to adopt a formal policy addressing the appropriate means for responding to unjust criticism of judges and the appropriate circumstances under which such response shall be made;

NOW, THEREFORE, the Board of Governors of the Tennessee Bar Association adopts the following policy and implementing procedures:

A. Purposes and Functions of Program

The primary purposes and functions of the program are:

(a) To deal with errors in reporting and with inaccurate or unjust criticism of judges, courts and/or the administration of justice, as further provided in this policy statement;

(b) 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;

(c) To encourage broad dissemination of information to the public about noteworthy achievements and improvements within the justice system;

(d) To suggest means by which judges and lawyers can improve the public image of the legal system; and

(e) To generally seek a better understanding within the community of the legal system and the role of lawyers and judges.

B. Referral Procedure. The referral procedure is established as follows:

1. Administration of this program is vested in the Executive Committee. The Executive Director shall have staff responsibility.

2. All referrals of criticism of judges and courts should be forwarded to the Executive Director at the TBA 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 materials, if requested.

3. The Executive Director shall 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.

4. The Executive Director shall then immediately notify the President of the Tennessee Bar Association and the members of the Executive Committee of the criticism. If necessary, a teleconference of the Executive Committee shall be convened to discuss the matter.

5. The Executive Committee shall promptly investigate the underlying facts, determine if a response is appropriate, and promptly prepare the release of the response.

Upon securing approval of the Executive Committee, the President of the association, or his or her designee, may speak in the name of the association.

C. Guidelines to Determine When the Bar Should Respond. The following guidelines shall be used in determining when the association 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 to be "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;

(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, 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 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 overall the 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 Executive 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 judge on a personal level;

(c) When the criticism is vague or the product of innuendo, except when the innuendo is clear;

(d) When there is a likelihood that a complaint against the judge will be presented to the Court of the Judiciary or other appropriate 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.

D. The Response. The response to the criticism shall take the following into consideration:

(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.

(2) *Form of Response.* A letter to the editor is generally the best 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 are more likely to inflame rather than resolve controversy, and should be used with caution and only in the rare cases which would appear to justify a response.

(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, etc.);

(f) Where appropriate, the statement should include an explanation of the process involved (*e.g.*, sentencing, bail, temporary restraining order);

(g) The statement should *not* attempt to discredit the critic or 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 Executive 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, and 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 and the legislature and Congress. In every lawsuit, someone loses.

(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 (EC 8-6, M.R. 8.2).

(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, M.R. 8.2).

(f) The particular criticism or attack is unjust because (*Give the reasons*). *Note: 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. Accordingly, it may be best to omit discussion of why the particular criticism is unjust. This should be decided on a case-by-case basis.*

(g) The need for independent judges, who will not be influenced by unjustified 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 the decisions of judges may be reviewed and corrected. Our present judicial system provides for change in the law through legislative action or by constitutional revision.

Note: This policy and the implementing procedures are adapted from the American Bar Association Model Program on Unjust Criticism of Judges, 1986.