

Guidelines for Fair Response Committee involvement in an issue

Introduction

The following guidelines provide a framework for Minnesota State Bar Association responses to unjust criticism of judges. These proposed guidelines do not attempt to prevent just criticism, but merely seek to address those instances where an organized public information program can promote the public interest through fair commentary on inaccurate or unjust criticism of judges.

Criticism of judges is inevitable given the prominent nature of their role in the administration of justice. However, rules of decorum and law sometimes prevent judges from responding to criticism. If unjust criticism is unanswered, the public may potentially assume that it is valid. Such misplaced assumptions can unfairly and unnecessarily undermine the public's trust in the judiciary. To counter such assumptions the Minnesota State Bar Association proposes the following guide for responding to inaccurate or unjust criticism.

The MSBA'S proposed guidelines are based on the American Bar Association's 1997 blueprint, "Model Program Outline for State, Local and Territorial Bar Association: Suggested Program for the Response to Criticism of Judges and Courts." The provisions of the ABA suggested program may be considered by the MSBA when and if it deem it necessary and appropriate to respond to unjust judicial criticism, but the ABA suggested provisions are not to be construed as binding.

Please note that the term "Judges" is used throughout this document to refer to state and federal administrative, trial and appellate judges, courts and/or the administration of justice.

The Purpose

These guidelines aim to encourage the legal profession to promote public confidence in the administration of justice by fostering public understanding and appreciation of the judicial system. The guidelines also seek to increase public trust and confidence in the legal system and in the role of lawyers and judges therein. Accordingly, these guidelines establish a structure to ensure that the MSBA is available to the news media and the public as a source of information on the legal system.

The Structure

The MSBA shall appoint a Fair Response Committee to oversee the promulgation and dissemination of MSBA responses to unjust judicial criticism. The Committee shall be composed of seven members appointed by the MSBA President. Consideration should be given to members whose practices give them extensive knowledge of the bench and court operations.

The term of office for each committee member shall be three years; initially three members will be appointed for one-year terms; two members for two-year terms; and two members for three-

year terms. Thereafter, as a vacancy occurs, each member appointed by the President to fill such vacancies shall serve a three-year term.

The Committee's Role

The Committee's work will most likely involve considering requests submitted by members of the MSBA seeking a public response to criticism of a judge which the requesting member feels is inaccurate or unjust. These requests may come either from a judge or non-judge MSBA member. When deemed by it to be in the public interest, the Committee or members of the Committee may initiate an informal investigation into a possibly inaccurate or unjust criticism of a judge without a request first being submitted by a MSBA member.

In deciding whether a public response by the MSBA is warranted in any given case, the Committee will ask the judge upon whom the unjust criticism is focused for his or her opinion regarding whether or not a response by the MSBA would serve the public interest. The opinion of the judge upon whom the unjust criticism is focused will be full and carefully considered by the Committee, but it will not preclude the Committee from ultimately taking whatever action it deems to be in the public interest consistent with these guidelines.

Because of the need for quick responses, much of the Committee's work will be conducted electronically via telephone conference calls, e-mail, and fax.

The Investigation

The party requesting an MSBA response to possible unjust criticism will contact the MSBA staff member appointed as Committee liaison. The staff liaison will contact the Committee Chair, who will make the preliminary determination of whether the request falls within these guidelines.

The Chair of the Committee or its staff liaison will inform the Court Information Officer and the judge upon whom the possibly unjust criticism if focused. The fact that a request for a public response has been received and that the Committee has determined that the request falls within these guidelines thus, providing for an informal investigation of the criticism. MSBA staff shall seek the aid of the Court Information Officer and/or the judge being criticized to gather facts necessary to permit the Committee to determine whether the subject criticism is inaccurate or unjust and whether a response is in the public interest.

The Chair or designee may contact the critic directly for input and background prior to finalizing its draft response.

The Response

MSBA Staff liaison will inform the Chair of the investigation findings and provide any supporting documentation. If the Chair determines that the matter still falls within the program guidelines, the Chair will advise the MSBA President of the matter and seek approval for the Committee to prepare and disseminate a response. Where the President has a real or apparent conflict of interest, or is unavailable, the Chair may seek approval from the President-elect.

If approval for a response is granted by the MSBA President (or President-elect as appropriate), a majority of the Committee may still determine after considering the matter that no response is warranted. If a response is to be prepared and disseminated, the Committee will determine on a case-by-case basis who shall draft the response, approve the form and substance of the draft response, and where and by whom the response should be delivered. In making these determinations, the Committee should give such consideration as is warranted to factors such as subject matter expertise, geography, community standing, and availability. Further, the form and manner of making the response should be such that it receives substantially the same exposure and notoriety as that previously afforded the unjust criticism.

In the event that the Committee determines a response by the MSBA is in the public interest, the MSBA President, the Court Information Officer and the judge who is being criticized will be provided with an advance copy of the draft response proposed by the Committee. Any comments or suggestions regarding the substance of the draft response made by the Court Information Officer and/or the judge being criticized, will be fully and carefully considered by the Committee. They will not preclude the Committee from ultimately drafting the response in the form it deems, but will best serve and promote the public interest consistent with these guidelines.

The President should seek coordination with local or specialty bar associations, if feasible, so that any response will be uniform, clear and effective.

Guidelines for Forming a Response

Before deciding to respond to any criticism of a judge, the Committee should consider whether the statement is:

- Untrue, unfair, misinformed and/or unwarranted.
- Serious enough to create a significant impact on the public trust and understanding of the legal system.
- Based on clear lack of understanding of the role of judges and/or the function of the legal system.

The Committee should consider whether:

- Responding will have the undesirable effect of giving added weight and/or visibility to the criticism, prolong the discussion or lower public opinion of the dignity of the court and/or the legal system.
- The response could help educate the public and not appear self-serving.
- The response will be timely.
- The response would provide background necessary for full understanding of a controversy.

Unless exceptional circumstances require it, the MSBA should not respond when the criticism is:

- Fair comment or opinion. A criticism is not unjust or inaccurate merely because the Committee disagrees with the conclusions or opinions of the critic.
- The product of a personal feud between the critic and the judge.
- A vague rumor that would be given credence by discussion.
- Based on issues properly handled by the Board on Judicial Standards or other ethics bodies.
- Part of a political campaign and the MSBA's response may be construed as an endorsement of a candidate.

Disseminating the Response

To be effective, the response must not only be accurate but it must also be timely. If at all possible the response should be made within 24-48 hours of publication or broadcast of the unjust criticism. Even if a response cannot be made within this time frame, it may still be issued if the Committee determines that it would still serve the public interest consistent with these guidelines.

The response should be designed to receive substantially the same exposure and notoriety as the unjust criticism. The MSBA President, the Court Information Officer and the judge being criticized should be given prior notice of the time, place and manner of the publication or broadcast of any response whenever feasible.

Response Options

- Direct communication with reporters and editors is encouraged to clarify facts and present alternative to the critic's position.
- Whenever possible, the response should be timely enough to be part of the initial story or public discussion.
- Letters to the editor and opinion pieces are effective forms of response. They are likely to be printed fully and accurately.
- Press releases are subject to editing, but are effective for conveying background.
- Television or radio talk shows are effective, but can be hard to prepare for because of the wide range of potential topics.
- In high-profile cases, press conferences provide effective means to disseminate a response to a wide audience.

A typical response may point out that:

- Citizens have the constitutional right to express disagreement with public officials – including judges.
- Judges have no control over which cases come before them.
- Judges must follow the law as established by legislative bodies and higher courts.
- One side always loses in every lawsuit that comes to trial.
- Judges are constrained in how they defend themselves against criticism.
- Judges must be independent and not influenced by criticism of them or their decisions.

The responses should:

- Correct inaccuracies, citing facts and relevant authorities where appropriate.
- Be written in lay terms suitable for inclusion in a newspaper or broadcast story.
- Be concise and accurate, devoid of emotional, inflammatory or self-serving language.
- Describe the criticism and its source
- Be informative and not argumentative or condescending.

Where appropriate the response should include:

- The point that some aspects of a case are governed by specific rules and procedures, which give judges no leeway in decision making.
- An explanation of the process involved (e.g., sentencing, bail, temporary restraining order, etc.)

The response should not:

- Defend the indefensible.
- Attempt to discredit the critic by attacking the competence, good faith, motives, or associates of the critic.
- Take a position on the controversy beyond correction of misstated facts.