

Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary



Standing Committee on the American Judicial System





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RAPID RESPONSE TO FAKE NEWS, MISLEADING STATEMENTS, AND UNJUST CRITICISM OF THE JUDICIARY

Bar associations have a special responsibility to ensure that the public holds the judiciary in the highest esteem. Judges are, and should be, highly respected leaders of our legal system. In a democracy, the judicial branch must be a co-equal branch with the executive and legislative branches and must always remain independent and not subject to external pressure from the other branches of government.

Inaccurate, unjustified, and simply false criticisms of judges should be answered promptly and fully. The bar associations must take a leading role in responding to such criticisms. Where possible, we should coordinate the activities recommended in this publication with the courts, especially those that have a public information officer. If that is not possible, we must respond on our own as promptly as possible, especially in today's world of instant communication through social media.

Many of the references in this publication are to state and local bar associations, which are often most aware of criticism of a particular judge. However, many such criticisms become national news. Accordingly, national bar associations, such as the American Bar Association (ABA), must also be prepared to respond. It is our hope that this publication will be used by all bar associations to foster a greater understanding of the role of all judges—state and federal.

This publication covers the unjust criticism of judges and criticism that may reflect a misunderstanding of a judge's role or of the entire judicial system. Any response can be a vehicle to explain to the public the fundamental concepts of the role of judges in our society. However, we must always remember that, in a democratic society, citizens and the media have the right to fairly criticize all public officials, including judges. But, as Justice Sandra Day O'Connor once said, "criticism is fine, but retaliation and intimidation are not."

This pamphlet builds upon more than thirty years of work by ABA entities committed to defending the judiciary from unjust criticism. In 1986, the ABA Judicial Division Lawyers Conference Subcommittee on Unjust Criticism of the Bench prepared the original version of the "Model Program Outline for State and Local Bar Associations: Suggested Program to Meet Inaccurate or Unjust Criticism of Judges and the Courts." Drawing upon that protocol and those used by many state and local bar associations, the Judicial Division and the Special Committee on Judicial Independence revised and renamed the protocol as the "Model Program Outline for State and Local Bar Associations: Suggested Program for the Appropriate Response to Criticism of Judges and Courts," which was approved by the House of Delegates in 1998 as an example of the type of program bar associations should adopt. In 2008, the Standing Committee on Judicial Independence created the original version of this pamphlet, "Rapid Response to Unfair and Unjust Criticism of Judges." As that Standing Committee's successor entity, the members of the Standing Committee on the American Judicial System (SCAJS) concluded that after ten years a further update was warranted based particularly on the advent of social media and the recent rise in what has come to be known as fake news.

In updating the recommendations, we, like our predecessors, kept in mind the ethical dilemmas judges face in deciding difficult and often unpopular cases. The protocols in this pamphlet are consistent with the ABA’s various model rules and other provisions governing the conduct of lawyers and judges. Above all, we hope that “Rapid Response to Fake News, Misleading Statements, and Unjust Criticism of the Judiciary” will assist you in responding rapidly and appropriately when needed.

June 2018

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As a matter of policy, a bar association, as well as members of other constituencies, should be empowered and have in place a mechanism to speak out in defense of judges and the judiciary when either is unjustly criticized, especially when exercising their professional, ethical and constitutional duties, or when such unjust criticism serves to erode the public's trust and confidence in the judicial system. In addition, statements that are materially misleading about the role of judges or the judicial process must be addressed promptly. The standard for review of such statements will be 1) whether the criticism or misleading statement unjustly impugns the integrity of the judge or the judiciary or 2) if response by the bar is necessary to address either a misunderstanding of the judge's role or a misunderstanding of the judicial system.

Because of the extraordinary increase in the use of social media and dissemination of news through online channels, there is now a greater risk than ever before that unjust criticism and misleading statements will quickly spread, making a prompt response essential. Social media has also given rise to what has come to be called "Fake News." This refers to a post or an ad—that can quickly reach millions of readers—that is more than inaccurate—it is simply not true. There are times when such "news" is completely invented and must quickly be countered with a statement proving that it is completely false. Awareness of this problem is a high priority. Organizations must develop processes to quickly identify and respond when there is an attack in the form of fake news against the courts in general, a judicial ruling, or a particular judge.

Members of a bar association and members of other constituencies should have access to a process through which fake news, misleading statements, and unjust criticism can be identified and considered in a timely manner to maximize an effective response. Set forth below are suggested procedures for such a response.

RAPID RESPONSE TO FAKE NEWS, MISLEADING STATEMENTS, AND UNJUST CRITICISM OF THE JUDICIARY

PURPOSE:

To provide a mechanism through which a bar association and members of other constituencies can provide timely responses to the serious, unjust criticisms of judges and the judiciary, to fake news, or to misunderstandings about the role of a judge or the judicial system. The focus of these responses is to provide the public with information to help them better understand the legal issues related to a specific situation, including the role of judges, the application of the law, and the restrictions and responsibilities placed on judges in the canons and rules.

PROCESS:

Prep Work (Have a system in place before attacks are launched):

1. A state and/or local bar should identify and form a rapid response team of knowledgeable and accessible individuals who are authorized to determine whether a response is appropriate and, if so, determine the extent of the response. These individuals should be media savvy and committed to the fairness and

impartiality of the judiciary. It will be helpful if they have strong relationships with members of the state, local, and federal judiciary. A logical group is the bar president, bar public relations staff, and/or other bar leadership. You should tailor this group to meet the needs of your particular state. Ideally, there will be one rapid response team in the state, with other constituents as partners. However, where there is more than one team in a state, every effort should be made to coordinate the response(s) prior to public dissemination. The bar president, with the team, should make the ultimate determination as to whether to respond. Periodic meetings of this group are helpful to keep everyone on message. This group will be responsible for “spotting” attacks on judges in their various forms and, together with the executive director, will receive information of attacks. Therefore, the local judges and members of the bar should have the names of each team.

2. Develop a response kit for use by local bar leaders to include sample Op-Ed pieces, speeches, Letters to the Editor, and guidance for social media posts. Resources from SCAJS and links to other ABA entities that offer resources can be found at www.ambar.org/ProtectOurJudiciary.

Once You Become Aware of Fake News, Misleading Statements, or Unjust Attacks:

1. Consult the judge who is the subject of the attack before releasing any comment/response. The judge may prefer that there be no response. It is important to consider the judge’s opinion.
2. Respond in the same news cycle. Care must be given to ensure that the unjust criticism or misleading statement is not being reinforced by the efforts to respond. Thus, when a judge is attacked, the response, with rare exceptions, **MUST** be in the same news cycle and should not repeat the negative message of the attacker. We cannot stress enough the importance of a prompt response. Of course, thoughtfulness, accuracy, and good communication with involved parties are not to be sacrificed for speed. A careful assessment, using the guidelines of whether a response is warranted, must be made.
3. Develop a coherent message using such tactics as speaking in sound bites. Time must be devoted to developing a clear and concise message that is simple to understand, persuasive, not defensive, and is written in lay terms. Once the message is established, priority needs to be given to make sure those delivering the message stay on message. Where appropriate, advice and counsel also may be solicited from the affected court’s public information officer.
4. Develop the form and manner of the response so that it will receive prompt exposure commensurate with the criticism. This is usually achieved by using the same media outlet as the attack. The following are possible options for response to attacks:

No response. The matter presented may contain justified criticism, may be beyond the scope of the Association policy, or may be criticism of the merits of the case. The matter may be too political or create a conflict with the interests of the Association. After consulting with the judge who is the subject of the unjust criticism as suggested above, you might find that the judge prefers not to have the matter debated in a public forum.

Social Media: These days, virtually all organizations have a website. Most have a Facebook page or Twitter account, and some also have a presence on other social media platforms. Therefore, any response should be prominently posted on the organization's website and its social media platforms. In addition to the brief responses that are feasible via posts or “tweets,” the organization should consider directing the reader to the more expansive response on the organization's website.

Using social media is a very rapid mechanism for a response and is widely available to the public. According to the ABA’s 2016 Legal Technology Survey Report, the majority of lawyers and law firms now use social media. Facebook reports that there are 2.20 billion monthly active users and approximately 1.45 billion daily active users as of March 31, 2018. For the first quarter of 2018, Twitter reported approximately 69 million monthly active users in the United States and an additional 267 million active users worldwide. A social media response is absolutely required in order to achieve maximum public access to any response to fake news, misleading statements, and unjust criticism.

Letter. In cases where the criticism is determined to be unjust, a letter can be sent to the party disseminating the unjust criticism explaining why the Association believes the criticism is unjust or the statement is misleading.

Letter to the Editor. In cases where the criticism is determined to be unjust, a letter to the editor briefly explaining the reasons why the criticism was determined to be unjust, and any additional explanation that would help the public better understand the particular situation could be sent to the appropriate media outlets. A phone call or email to the reporter or editor who published a misleading statement or who initiated or encouraged an attack may also be appropriate and helpful.

Op-Ed or Editorial. In some cases where the criticism is determined to be unjust, a longer, more in-depth explanation might be in order. An Op-Ed piece or editorial may be prepared and distributed to the appropriate media outlets to help the public better understand the particular situation and how that criticism impugns the integrity of an individual judge and/or the legal system.

News Conference. In more extreme cases where the criticism is determined to be unjust, a news conference can be scheduled during which the unjust criticism can be explained to assist the public in better understanding the reasons why the criticism is unjust and how that criticism impugns the integrity of an individual judge and/or system. This may be especially necessary if fake news is being widely disseminated.

Guidelines to Determine Whether to Respond:

1. Except in unusual circumstances, the following are the kinds of cases in which responding to criticism is appropriate:
 - a. When the criticism is materially inaccurate, the inaccuracy should be a substantial part of the criticism so the response does not appear “nitpicking;”
 - b. When the criticism displays a lack of understanding of the legal system and/or the role of the judge in the judicial process; and/or
 - c. When the criticism is serious and will most likely have more than a passing or *de minimis* negative effect in the community.
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);
 - 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);
 - 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; and/or
 - k. Whether the timing of the response is especially important and can be best met by the rapid response team.
3. Except in unusual circumstances, the following are the kinds of cases in which response to criticism MAY NOT be appropriate:
- a. When the criticism is a fair comment or opinion;
 - b. When the criticism reflects animosity or a feud between the critic and the judge on a personal level;
 - c. When the criticism is vague or the product of innuendo;
 - d. Where criticism raises issues of judicial ethics appropriate for presentation to the judicial disciplinary body;
 - e. When a lengthy investigation to develop the true facts is necessary;
 - f. When the response would reasonably be expected to affect or prejudice a matter at issue in a pending proceeding;
 - g. When the criticism is insignificant;
 - h. When the criticism arises during a political campaign and a response may be construed as an endorsement of a particular candidate for judicial office; and/or
 - i. When the response would defend the indefensible.

Recommended Educational Programs:

To help the public more easily recognize fake news, misleading statements, and unjust criticism, and have greater confidence in and understanding of the judicial system, consider seeking opportunities to educate the public about fundamental concepts such as:

- (a) The rule of law, including separation of powers and judicial independence;
- (b) The importance of preserving fair and impartial courts;
- (c) The organization of the judicial system and basics of the legal process;
- (d) The role of the judge and accountability through appeals and discipline; and
- (e) Methods of judicial selection and qualifications that candidates for judicial office should possess.

