

OREGON STATE BAR

RESPONSE TO UNJUST CRITICISM OF THE JUDICIARY

A. Purposes and Functions of Program

- To deal with errors in reporting and with inaccurate or unjust criticism of judges, courts, and/or the administration of justice;
- To establish the Oregon State Bar as a resource for the news media in obtaining information concerning judicial activities, court processes, or other technical information about the administration of justice;
- To encourage broad dissemination of information to the public about noteworthy achievements and improvements within the judicial system;
- To involve judges and lawyers in OSB media relations.

B. Referral Procedure

- All referrals of criticism of judges and courts should be forwarded to the OSB Director of Media Relations.
- The Media Relations Director shall gather all pertinent background information related to the criticism and obtain permission to respond from the specific judge or court criticized.
- The Media Relations Director shall notify the chairperson of the Judicial Administration Committee of the referral. The committee chairperson or designee should assist the Media Relations Director in preparing a releasing a response.

C. Guidelines to Determine When the Bar Should Respond

In general, a response by the OSB is appropriate:

- When the criticism is serious and likely to have more than a passing or de minimis negative effect in the community;
- When the criticism displays a lack of understanding of the legal system or the role of the judge; and,
- When the criticism is materially inaccurate.

Factors to consider in determining whether a response should be made and/or determining the type of response include:

- (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 timing of the response is especially important and can be best met by the OSB.

An OSB 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) When there is a likelihood that a complaint against the judge will be presented to the appropriate Judicial Inquiry or disciplinary body;

- (e) When a lengthy investigation to develop the true facts is necessary;
- (f) When the controversy is insignificant.

D. The Response

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.

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 such a response.

Drafting Considerations.

- The response should be a concise and accurate statement, devoid of emotional, inflammatory or subjective language;
- The statement should be informative and not argumentative or condescending;
- The statement should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- The statement should be written in lay terms suitable for inclusion in a newspaper story;
- Where appropriate, the statement should include the point that the judge had no control or discretion (e.g., decision required by state law);
- Where appropriate, the statement should include an explanation of the process involved (e.g., sentencing, bail, temporary restraining order);
- The statement should not attempt to discredit the critic, that is, attack the competence, good faith, motives, or associates of the critic;
- The statement should not provide evidence that the critic has hit a nerve, causing overreaction.

Content of the Response.

The following points may be included in a typical response:

- Identification of the criticism and its source.
- 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.
- 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.
- 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).
- 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).
- The particular criticism or attack is unjust because (give reasons).
- 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.
- The law has established appellate courts so that 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.