

Adopted: November 3, 2006

NEBRASKA STATE BAR ASSOCIATION POLICY FOR RESPONDING TO UNJUST CRITICISM

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 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.

Therefore, cooperation of lawyers and the Nebraska State Bar Association is necessary to successfully meet and accurately, quickly and fairly respond appropriately to inaccurate or unjust criticism of judges and courts. This plan implements Rule 8.2, Comment [3] of the Nebraska Rules of Professional Conduct which "encourages lawyers to "defend lawyers and judges unjustly criticized."

B. *When Action in Response to Inaccurate or Unfair Criticism Should be Taken by the Bar.*

Implementation of this plan is selective, and is designed to effect a response to criticism of the judiciary and courts that is serious as well as inaccurate or unjustified.

There should be no attempt to prevent just criticism, but inaccurate or unjust criticism should be answered and prevented 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 may respond publicly to attacks upon a judge if:

1. Any unwarranted or unjust attack on a judge occurs in a pending case, regardless of the source of the attack;
2. Any unwarranted or unjust attack or series of attacks on a judge or court occurs which may damage the reputation of such judge or court;
3. Any unwarranted or unjust attack or attacks occur on the judiciary as a group, the judicial system, or the management or operation of the courts.

The Bar should exercise caution in responding to criticism of judges in light of the need for the Bar to maintain the public trust and confidence. For example, the bar may respond to errors or inaccuracies in reporting. And likewise, the bar may state that a response is not yet timely or appropriate.

Prior to responding to criticism of a judge, the Bar should also consider the response in light of the role and activities of the Judicial Qualification Commission and the Judicial Ethics Committee. The Bar should not respond to criticism if that response may reasonably be construed as an attempt to influence a decision by either group to review action taken by a judge or under review by either of them.

II. Responding to Unjust Criticism

A. *Implementing Program*

1. The Nebraska State Bar Association has determined that the President of the Nebraska State Bar is the most appropriate person to act on behalf of the Bar and shall be responsible for preparing responses to unjust criticism of judges and courts. Where the President is unavailable or has a real or apparent conflict of interest in responding to unjust criticism, the President-Elect or immediate past President is authorized to respond to such unjust criticism.

Any member of the judiciary or lawyer may initiate a request to the Bar President to respond to unjust criticism. No response should be undertaken without first conducting a confidential conference with the judge or court criticized. The Bar President will give great deference to the decision of the judge or court criticized that no response should be made. The judge or court criticized may assist in gathering necessary information for the President and the President's Designee to prepare an appropriate response. The President may appoint a representative to assist the President in preparing a response.

2. The function of the Designee would be to assist the Bar President in preparing responses to unjust criticism. This assistance may include research, interviews and preparation of responses to unjust criticism for the Bar president's editing, approval and signature.

B. *The Guidelines*

1. The following are examples of the kinds of cases in which responding to criticism may be appropriate, depending upon the circumstances:
 - a) When the criticism is serious and will most likely have more than a passing or *de minimus* 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;
2. The following are examples of the kinds of cases in which response to criticism is not appropriate, except in unusual circumstances.
 - a) When there is a likelihood that a complaint against the judge will be presented to the Commission on Judicial Qualifications.
 - b) When the response would prejudice a matter at issue in a pending proceeding;
3. The bar should not take a position with regard to the retention of a particular judge, but may respond to inaccurate and/or unjust criticism of such judge.

C. *The Response*

1. *Timing.* The response should be timely, deliberate and accurate.

2. *Drafting Considerations.*

- a) The response should be a concise, accurate, statement, devoid of emotional, inflammatory or subjective language;
- b) The response should be informative and not argumentative or condescending;
- c) The response should include a correction of the inaccuracies, citing facts and relevant authorities where appropriate;
- d) The response shall consider the possibility of confidential information not publicly disclosed, and the effect of the same;
- e) Where appropriate, the response should include an explanation of the process involved (e.g., sentencing, bail, confidential information or evidence, temporary restraining order);
- f) The statement should not attempt to discredit the critic, that is, attack the competence, good faith, motives, or associates of the critic;

D. *Policy Approval*

- 1. The policy shall be presented to the Executive Council of the Nebraska State Bar Association and to the House of Delegates of the Nebraska State Bar Association for its review and approval
The policy should be distributed on a regular basis to the state and federal judiciary, local and special interest bar associations once adopted

Effective this 3rd day of November, 2006.

APPENDIX A – SUGGESTED OUTLINE FOR A
RESPONSE TO THE UNJUST CRITICISM OF A
JUDGE.

Content of the Response. The following points may be included in
a typical response:

- a) Identify the criticism and its source.
- b) Some may frequently disagree with the decisions and actions of public officials, including judges. While Federal and State constitutions protect our right to express that disagreement, judicial decisions are not based upon popular opinion, but depend on reasoned interpretations of the law and relevant facts.
- c) Remember that judges have no control over what cases come before them. They must decide each and all of those cases. Judges must follow the law as enacted by the State Legislature and as interpreted 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.

Lawyers, under the Rule 8.2, Comment [3] of the Nebraska Rules of Professional Conduct have a duty to defend judges against unjust criticism.

e) Nebraska has established appellate courts so that decisions of judges may be reviewed and if appropriate, corrected. Our present legal system provides for change in the law through legislative action or by constitutional revision.