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Dear Attorney Berenson:

I write in response to the Justices' invitation to comment on the April 30, 2008 recommendations of the Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct.

On my own behalf and on behalf of all the District Court's judges I commend all eleven members of the Committee for their thoughtful and expeditious work. I am particularly grateful to the two District Court representatives, Regional Administrative Judge Paul F. LoConto and Hon. James H. Wexler for their insight and guidance in this matter.

This important issue of significant recent concern to the judiciary is also of interest to the public, the media and the Bar. I have, therefore, encouraged all the judges of the District Court to review, consider and discuss the Committee's report and proposals. That undertaking was facilitated greatly by the clarity and conciseness of the excellent majority report and by the well articulated concerns about larger policy issues raised by Judge Blitzman and Professor Kaufman in their separate statements.

There appears to be widespread agreement that the current version of Canon 3B(9) does not provide sufficient guidance to judges and that the Canon should be amended to permit a written memorandum of decision or order that is entered on the docket of a case and based solely on the facts in the record. The harder question is whether a judge should be permitted to supplement the court record with a memorandum *subsequently*, even in response to public criticism, explaining what his or her reasons were at the time the decision was made for taking a particular judicial action.

I appreciate the objections to doing so that have been raised, particularly by Judge Blitzman, Professor Kaufman, and Cynthia Gray's letter to the Boston Globe. There is risk that a subsequently-issued memorandum may be prepared too quickly, under public pressure to

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respond, and before a transcript can be obtained, reviewed and adequately considered. It may be difficult after the fact, particularly under public criticism triggered by subsequent events, to avoid being defensive and to limit oneself to one's original reasoning and to take care not to expand the facts in evidence. Including any mention of subsequent events may appear improper or at least self-serving, while omitting all such references may be attacked as uncaring. In a high-profile matter such a memorandum will inevitably be called the judge's "defense" of his or her actions, a characterization with which any judge would be uncomfortable. As Professor Kaufman notes, the memorandum may well be immediately and widely disseminated by modern technology and every word scrutinized under quite different standards than any jurist would apply. I also agree with the concern, straightforwardly discussed by the Committee majority, that amending the Canon to permit public comment is likely to result in some public criticism of judges who do not do so.

I completely agree with the suggestion that, where explaining a decision seems appropriate, in an ideal world it is preferable to do so at the time of decision. But given the huge volume of cases that trial judges deal with, often that is simply impossible, particularly in the District Court, whose judges and magistrates handled more than 809,000 matters in FY 2008.

In the end, I favor the proposed changes to Canon 3B(9), and I think that they have the support of most District Court judges. As the majority of the Committee concluded, I believe that judges can and should be trusted to issue such subsequent memoranda sparingly and with discretion, and when they do, observing the limitations of the Canon and composing them with prudence, good sense, and sound judgment. I believe that policy is preferable to the enforced silence of the current Canon.

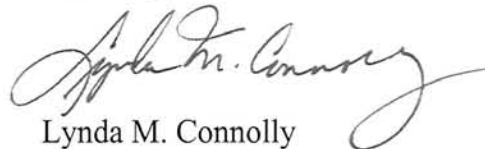
It is also my hope that in the District Court the "media response team" that each department is assembling at the request of Chief Justice Mulligan will be a source of multiple perspectives, wise counsel and practical assistance for District Court judges when they are confronted with such situations.

I have one drafting suggestion, based on a concern expressed in the third-from-last paragraph of Professor Kaufman's statement. If the Canon is amended to permit subsequent memoranda to explain the judge's rationale at the time of the original decision, in order to avoid any uncertainty it might be desirable to clarify that this is not intended to prevent a judge from filing a memorandum amending his or her thinking about an earlier decision based on a subsequent change of mind or supplemental rationale, provided the judge clearly labels it as such.

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Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynda M. Connolly". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Lynda M. Connolly
Chief Justice of the District Court