

Comments on the Report of
the Ad Hoc Advisory Committee
to Study Canon 3B(9)
of the Code of Judicial Conduct

I respectfully disagree with the proposed revision to the commentary to Canon 3B(9) that would allow a judge “at any time” to “supplement the court record by a written memorandum explaining his or her reasons for judicial action.” While the intent may be to attempt to increase public understanding of the judiciary, the change will in fact be counterproductive and create the appearance that judges are inviting manipulation by politicians and the press, undermining their independence. I have little to add to my letter to the *Boston Globe* quoted by Professor Andrew Kaufman and Judge Jay Blitzman in their persuasive analyses of the report.

There are many defendants who wonder why a judge set their bail at a level they could not meet, and prosecuting attorneys who would like explanations for why their bail suggestions were rejected. There are tenants who do not understand why a judge evicted them from their homes, and landlords who are puzzled why their tenants were given a break by a judge. There are parents whose children were taken from them without what they consider a satisfactory explanation, and social workers who wonder how they could have convinced a judge that children should have been removed from their parents. These are the members of the public that judges are chosen to serve. Yet the proposed change to Canon 3B(9) was not motivated by a desire to give those litigants any recourse. Instead, because the changes were proposed in response to highly-publicized criticism by politicians and the press of a judge’s decision, the proposed change appears to cede to politicians and the press the choice of what decisions deserve explanations.

The current rule is simple: if a judge explains the decision on the record when made (or within a short period thereafter), the judge can produce that explanation later when criticized. The explanation does not have to be long or in writing; the judge may simply note which of the applicable factors he or she considered relevant in making the decision, briefly memorializing the judge’s reasoning for the benefit of the parties and the public. Such explanations also help demonstrate that judges are not dispensing justice in an assembly-line fashion even in a high volume court. If a judge puts the interests of the litigants in understanding their decisions first, public understanding of the proceedings will follow, and the proposed revision of Canon 3B(9) is unnecessary.

If a judge does not explain his or her decision and the judge is later criticized, it is not the “enforced silence” imposed by Canon 3B(9) that is to blame if the public does not understand the decision, but the judge’s initial failure not to fulfill the judicial responsibility to explain the decision to the parties. If judges fail to explain their decisions to the litigants, they should not be allowed to save face later by unconvincing explanations that will appear more like public relations tactics to curry favor with politicians and the press than legitimate exercises of judicial duties.

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The code of judicial conduct does not just establish the standards for discipline of judges but also reflects the values of the judiciary. It should not include concessions to the press, which will not be satisfied by anything less than sit-down interviews with judges on command, and to politicians, who will not be satisfied by anything less than resignations by judges who failed to rule in a politically expedient way.

It is unfortunate when politicians attempt to score points by criticizing judges and when the press supports those efforts. Rather than remedy that situation, the proposed change to Canon 3B(9) plays into the hands of those who attempt to misrepresent the judicial role by inviting judges to join the fray rather than carry out their responsibilities with dignity.

Cynthia Gray, Director
Center for Judicial Ethics
American Judicature Society
3304 N. Broadway, #190
Chicago, IL 60657
773-248-6005
cgray@ajs.org