16 McKays Drive
Rockport, MA 01966
(978) 546-3400
www.masspublishers.org

August 20, 2008

Barbara Berenson, Esq.
Administrative Attorney
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston MA 02108

BY MAIL AND E-MAIL

Re: Report of the Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct.

Dear Attorney Berenson:

Attached please find the comments of the Massachusetts Newspaper Publishers Association filed in support of the recommendations of the Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct.

Sincerely,

Robert J. Ambrogi, Esq.
Executive Director

COMMONWEALTH OF MASSACHUSETTS
BEFORE THE SUPREME JUDICIAL COURT

In the Matter of

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

COMMENTS OF THE MASSACHUSETTS NEWSPAPER PUBLISHERS ASSOCIATION

August 20, 2008

Introduction

The Massachusetts Newspaper Publishers Association submits these comments in response to the Report of the Ad Hoc Advisory Committee to Study Canon 3B(9) of the Code of Judicial Conduct. We appreciate the opportunity to be heard on this important issue.

The MNPA is a voluntary, unincorporated association of Massachusetts newspaper publishers, editors and executives. Its purpose is to support a free, vigorous and diverse press, economically sound and independent of government control, in which each newspaper has the right to serve the public interest as it sees the public interest.

We urge the Court to adopt the Advisory Committee's recommendations to revise Canon 3B(9). We believe that the proposed revisions would better serve both the public and the judiciary.

Discussion

A. Canon 3B(9) Hinders Public Trust in the Judiciary.

Lack of public understanding is one of the three top reasons that the public lacks trust and confidence in the judiciary. That was the conclusion reached by the more than 500 representatives of the bench, bar and public who convened in 1999 for the National Conference on Public Trust and Confidence in the Judicial System. They were brought together to study the issue by a coalition of legal and civic organizations led by the American Bar Association, the Conference of Chief Justices, the Conference of State Court Administrators, the League of Women Voters and the National Center for State Courts. The conference produced the 2000 report, *National Action Plan: A Guide for State and National Organizations*,[1] which recommended six core strategies for addressing this lack of trust, two of which were:

- Involve the judiciary in educating the public; reduce judicial isolation.
- Improve media understanding of the system.

As these strategies suggest, public understanding and media understanding go hand-in-hand. The National Center for State Courts has written that "the mass media are the primary conduits of the information through which the public learns about and evaluates the quality of justice administered in local courts. … A 1999 national survey found that 60 percent of the public 'regularly' gets information about the courts from electronic media and 50 percent from print media." [2]

---

[1] National Action Plan: A Guide for State and National Organizations, National Center for State Courts (2000), http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf.
[2] Best Practices in Building Public Trust and Confidence: Working with the Media, National Center for State Courts, http://www.ncsconline.org/projects_Initiatives/PTC/PublicTrustNews6.htm.

Nearly a decade later, one of the greatest obstacles to public understanding of the courts remains the lack of communication between judges and journalists. Judges fear journalists and journalists fear judges. As retired Massachusetts Superior Court Judge Hiller Zobel once said about judges' fear of speaking to reporters, "The attitude of some judges is like that of [former Ohio State football] coach Woody Hayes, who said about the forward pass that three things can happen, and two of them are bad." [3]

While many factors contribute to this gap in communications between judges and journalists, there can be no question that one central factor is Canon 3B(9) of the Code of Judicial Conduct. As the Advisory Committee found, the canon does not provide sufficient guidance to judges. Perhaps for fear of overstepping the canon's boundary, judges shy away from even approaching it. Rather than strive to be as open to journalists as the canon will allow, they avoid them altogether. For their part, journalists find judges unapproachable and the canon incomprehensible. As U.S. District Judge Nancy Gertner recently observed in a Boston Globe article, journalists often misread judges' silence as arrogance or cowardice.

To the extent that Canon 3B(9) is a factor in causing this tenuous relationship, it is because it provides insufficient clarity for either judges or the public. The Advisory Committee recognized this. Its recommended revisions aim to achieve greater clarity. While we agree with the Committee that the canon could never be drafted to address every eventuality, we also agree that the proposed revision succeeds in achieving greater clarity. Even better, in achieving this greater clarity, it expands, at least slightly, the allowable scope of judicial comment.

B. Speech during Judicial Proceedings Serves Public and Judiciary.

Of the various revisions proposed by the Advisory Committee, the one most likely to enhance public understanding of the judiciary is that which would allow a judge to explain the rationale for a ruling at any time. The judge would be permitted to provide an explanation, even well after issuing the ruling, by entering a memorandum of decision or order on the case docket.

As the committee notes, speaking from the bench and through memoranda is the traditional way for judges to communicate with parties and with the public. But judges often feel hamstrung when a ruling comes into the spotlight after the fact. The existing canon is unclear about what judges may do in this situation. The Advisory Committee's proposal would clarify this. While it would still prohibit a judge from making public comments about a pending or impending case, it would allow comments in the form of formal entries in the case docket. As the proposed commentary explains:

> "[A] judge, at any time, may supplement the court record by a written memorandum explaining his or her reasons for judicial action. For example, to

[3] McLaughlin, James, Secret Justice: Judicial Speech, Reporters Committee for Freedom of the Press (2004), http://www.rcfp.org/secretjustice/judicialspeech/index.html.

> educate the public, if he or she deems it appropriate, a judge may choose to issue a written memorandum in order to articulate in greater detail the rationale for the judge's action at the time that action was taken, but the general obligation not to consider ex parte communications still applies. … Canon 2 does not prohibit a memorandum of decision from being issued, even in response to public criticism, when that memorandum is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated."

The proposed amendments would also allow judges to make public statements about pending cases in other contexts. The proposed commentary explains:

> "A judge may, consistent with this section, make public statements about a pending or impending case in the course of his or her official duties. 'In the course of his or her official duties' includes statements made by a judge in the performance of his or her administrative duties. In addition, in making public comments outside the course of his or her official duties, such as when speaking to a member of the press or the general public, a judge may, consistent with this section, explain what may be learned from the public record in a case, including pleadings, documentary evidence, and the tape recording or stenographic record of proceedings held in open court."

These amendments serve the dual purpose of protecting judges who come under public scrutiny and protecting the public's right to be informed and knowledgeable about the judicial process. While some critics believe that the proposed rule is too open-ended in allowing judges to comment on the record of a case at any time, we agree with the majority of the members of the Advisory Committee when they say in their report:

> "[S]uch speech is never the type of public comment on pending and impending cases designed to be regulated by this canon, because it appears unworkable to formulate a precise time frame when issuance of a written memorandum appropriately should become prohibited public comment, and because nothing in the canon abrogates jurisdictional rules that may constrain a judge's ability to enter a post-judgment written memorandum on the docket of a case."

It is worth noting that nothing in the proposed canon would *require* a judge to comment. But if a judge's ruling comes under public scrutiny, both the judge and the public are better served by a more thorough explanation of the ruling. This is particularly true in the trial courts, where judges often must make rulings verbally from the bench or in brief orders without detailed explanations. If judges were to provide detailed memoranda explaining each such ruling, justice would slow to a snail's pace. Allowing a judge to supplement such a ruling at a later date, if the public or the press seek more information, enables a judge to go about the business at hand without fear of later being muzzled.

Another criticism of the proposed canon is that a judge who opts not to issue a supplemental memorandum might be the victim of a negative inference. In our view, the

benefit both to judges and to the public from this proposed canon far outweighs any such concern. Better to have the right of speech and not exercise it than not to have the right in the first place. The Advisory Committee report says it well: "The prospect of public criticism of judges who decline to take advantage of the new rule appears to the Committee to pose far less a problem than erosion of support for and respect of the judiciary generated by enforced silence."

The Committee believes that judges, in deciding whether and when to issue a supplemental memorandum, should be trusted to apply the prudence, good sense, and sound judgment that we expect them to apply in other aspects of decision-making. In short, the question of whether it is wise to issue a supplemental memorandum to explain a criticized ruling is now left to the judge’s sound discretion, not an ethical rule.

C. Allowing Response to Criticism Better Informs Public Discussion.

The MNPA supports the Advisory Committee's proposal to add a new paragraph (d) in order to allow a judge to comment publicly in response to public criticism of his or her conduct on the bench. As the Advisory Committee notes, the American Bar Association amended its Model Code of Judicial Conduct in 2007 to add similar language.

The MNPA believes strongly that public debate, to be fully informed, should include all sides of an issue. When a judge's conduct becomes the focus of public debate, it is unfair to the public and unfair to the judge to prohibit his or her input. As the commentary explains, this amendment is concerned with news reporting about a judge's behavior as opposed to the substance of a judge's rulings. This proposed amendment could serve only to enhance and ensure greater fairness in reporting on issues involving judicial conduct and therefore enhance and better inform the public's discussion of the issues.

D. A Broader Education Exemption Broadens Public Understanding.

The MNPA supports the Advisory Committee's recommendation that Canon 3B(9)(b) be amended to broaden the scope of the exemption allowing judges to comment about cases for education purposes. While the present rule limits such comment to legal education programs and materials, the amendment would expand that to also include scholarly presentations and related materials, learned treatises, academic journals and bar publications. As the Committee notes, this brings Canon 3B(9)(b) into harmony with Canon 4B. More importantly, it provides judges with greater clarity about their involvement in programs and activities designed to education the broader populace about judging and jurisprudence.

Conclusion

No line could ever be drawn to map precisely the border between the public's interest in being fully informed and the judiciary's interest in protecting the integrity of the judicial process. The Advisory Committee's proposed revisions to Canon 3B(9) would bring about greater public understanding of the courts and the judiciary while in no way encroaching on their integrity. If lack of understanding is a major reason for the public's lack of trust, then these revisions, by promoting better understanding, would build greater public trust. For these reasons, the MNPA respectfully urges the Supreme Judicial Court to adopt the Advisory Committee's proposals.

Respectfully Submitted,

Robert J. Ambrogi, Esq.
MNPA Executive Director