

Call To Action



National Center
for State Courts

Williamsburg, Virginia

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*Statement of the
National Summit
On Improving
Judicial Selection*

Expanded Edition
with Commentary

Call to Action

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The *Call To Action* was issued by the participants in the National Summit on Improving Judicial Selection, held on December 8-9, 2000 in Chicago, Illinois. This new edition of the *Call To Action* provides a commentary that introduces the four sections of the *Call To Action* and provides background on the 20 recommendations. The commentary is by the listed authors.

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From Roger K. Warren

The participants in the Summit on Improving Judicial Selection, held in December of 2000, recommended 20 concrete, practical steps for consideration by states that elect some or all of their judges. The target audience included members of state judicial, legislative and executive branches, as well as groups and individuals concerned with judicial fairness, impartiality, and accountability. The *Call To Action* was initially drafted to be concise. A more than basic level of familiarity with judicial selection issues on the part of the reader was assumed.

It was later recognized, however, that the wider audience included groups, officials, and individuals interested in but not fully versed in the issues surrounding judicial selection. The commentary offered in this expanded version of the *Call To Action* is still brief and to the point, but explains for each recommendation the problem being addressed and the rationale for why the recommended action will be effective. Examples and other background information also accompany each recommendation. An introduction is provided to each of the four sections into which the recommendations are organized. We hope that this expanded version of the *Call To Action* stimulates renewed efforts by groups already engaged in supporting judicial fairness, impartiality, and accountability and persuades other groups to join in those efforts.

Roger K. Warren
President, National Center for State Courts

 **Call To Action****Statement of the National Summit on Improving Judicial Selection**

The National Summit on Improving Judicial Selection was convened under the leadership of Texas Supreme Court Chief Justice Thomas R. Phillips and Texas Senator Rodney Ellis for the purpose of discussing how to best improve judicial selection processes, focusing on those states in which judicial selection is subject to popular election. Ninety-five persons attended the Summit in Chicago, Illinois on December 8-9, 2000. Participants included teams of judicial, legislative, and other leaders selected by the chief justices in the seventeen most populous states with judicial elections, together with invited representatives from national organizations that are among the leading proponents of judicial election reform.

The participants discussed options for reform in four key areas:

- Partisan elections and terms of elective office
- Judicial election campaign conduct
- Voter awareness and participation in judicial elections
- Campaign finance in judicial election campaigns

The Summit proceedings culminated in this Call To Action. The twenty recommendations set forth below were endorsed by an overwhelming majority of judicial and legislative leaders and other Summit participants, but several participants expressed dissent to some, and one participant to all, of the recommendations. No individual statements of concurrence or dissent will be set forth. The recommendations have not been endorsed by the Conference of Chief Justices, or any other particular organization.

Introduction

Eighty-seven percent of state appellate and trial judges are selected through direct or retention election. But judicial elections differ in many ways from elections for other offices. Ethics canons prohibit judicial candidates from making campaign promises, and limit what judicial candidates can say on their own behalf. The position they seek requires that decisions be made based on the facts presented and the applicable law in specific cases. Judicial candidates cannot reward their supporters, nor, if elected, work with those supporters to advance shared objectives. Finally, because judicial candidates do not run on platforms, judicial races generally attract little media attention, affording the public scant information by which to weigh the candidates' qualifications.

Yet judicial campaigns are becoming more like campaigns for other offices, not less. Judicial candidates are frequently required to hire campaign consultants and raise large sums of money for paid advertising to communicate their qualifications and experience to the voters. The increased recognition of the judiciary's policy-making role has resulted in massive independent campaign activity by organized groups, sometimes from outside the jurisdiction. All this makes judges appear like ordinary politicians to many voters.

As currently conducted in many states, judicial election campaigns pose a substantial threat to judicial independence and impartiality, and undermine public trust in the judicial system. Unregulated issue advertisements and independent expenditures by special interests present a particularly grave and immediate threat. Many observers have concluded that moving to a wholly appointed judiciary is the best answer to these problems. But movement away from systems providing for contested election of judges has not occurred in most states. Too little attention has been given to incremental changes in the judicial election process to address some of the most serious threats to judicial independence and impartiality, and to appreciably enhance public trust in the courts. For example, the Conference of Chief Justices previously adopted a resolution in support of amendments, since adopted, to the American Bar Association's (ABA) Model Code of Judicial Conduct with regard to judicial campaign finance. And an ABA Task Force [has recommended] public funding of [at least high court] judicial elections.

We are aware of the difficulties inherent in regulating election campaigns, even those involving the judiciary. But we reject the notion that nothing can be done. We believe that norms can be established, through both positive law and informal standards that will both aid candidates and their supporters and enhance public confidence in the administration of justice. While some of the following recommendation require statutory or constitutional change, most can be implemented through action by state courts, bar associations, or private groups.

We therefore recommend that all states with elected judges consider the following initiatives to improve their judicial elections.

The Recommendations

JUDICIAL ELECTION STRUCTURE

- 1** All judicial elections, whether direct or retention, should be conducted in a nonpartisan manner.
- 2** States with relatively short judicial terms of office should consider increasing the length of those terms. Term limits, whatever their merits for representative positions, are not appropriate for judicial office.
- 3** All judges appointed to fill a vacant judicial position should serve a substantial period in office before initial election. After initial election, all judges should serve a full term before a second election.

CAMPAIGN CONDUCT

- 4** Educational programs on state election laws, judicial canons, and sanctions for violations should be conducted for all judicial candidates, together with their campaign staff, consultants, and interested family members. The Legislature or Judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.
- 5** “Hotlines” should be established by the Legislature, the Judiciary, or the appropriate judicial discipline body to respond expeditiously to questions about campaign conduct, campaign finance, judicial ethics, or related issues. A judge, candidate, campaign worker or contributor who adheres to the advice provided by this procedure should be accorded a prima facie defense to any subsequent legal action or disciplinary procedure.
- 6** Non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns. Such groups should include respected and diverse individuals representing state and local bar associations and other credible community organizations. These monitoring groups should take all appropriate means to secure voluntary compliance with high standards of conduct, exceeding those mandated by law. For example, they should be willing, if requested, to conduct advance review of paid advertisements to ensure accuracy and fairness. They should offer mediation and arbitration procedures for campaign disputes. They should develop processes for informing the public about the degree of cooperation and compliance they receive from the campaigns. They should endeavor to secure cooperation in all their endeavors from independent advocacy groups as well as from candidates and political parties. Finally, if necessary, they should be available to comment publicly on the conduct of candidates, political parties or outside groups.
- 7** Canons of judicial conduct and state laws regarding judicial campaign activity should be reexamined to assure that they promote fair elections while safeguarding the right to free speech. To advance this process, one or more organizations committed to judicial integrity, impartiality, and independence should convene a Symposium on Judicial Campaign Conduct and the First Amendment composed of distinguished scholars, lawyers and judges to consider these issues. In addition, the ABA should consider revising the provisions of the Model Code of Judicial Conduct regarding inappropriate activity by judicial candidates.

- 8 Procedures should be studied for resolving professional discipline complaints arising from campaign conduct before the election. Expedited procedures cannot come at the expense, however, of limiting the due process rights of the parties involved.
- 9 State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Such guides should provide information that will be useful to voters in comparing the candidates.
- 10 Congress should provide a free federal mailing frank to any voters' guide sponsored by a state or local government.
- 11 Bar associations, either alone or working with a larger and balanced group of concerned citizens and organizations, should conduct evaluations of judges. Evaluation results should be disseminated as appropriate.
- 12 The judiciary should consider establishing independent and objective judicial performance evaluation processes with appropriate safeguards. Participation in these evaluations should include members of the bar and community. Such evaluations have been used in states with retention elections. Evaluation results should be disseminated as appropriate.
- 13 Media outlets should broadcast debates between judicial candidates, and should sponsor such debates if other appropriate groups are not doing so.
- 14 The judiciary, the bar, and other interested groups should devise ongoing programs to educate the public about the judicial process. Special attention should be given to informing educators, students and media representatives about the judicial process. Judges should increase their efforts to explain the judicial role to the public. Where permitted by law, court should be held in venues other than the courthouse, particularly in schools. When feasible, appellate courts should conduct occasional sessions away from their regular sites.
- 15 Courts should use their websites to explain the judicial role to the public. Courts should make as much public information available online as possible, consistent with legitimate privacy concerns. In particular, court dockets and court opinion should be published online as contemporaneously as is consistent with accuracy.

CAMPAIGN
FINANCE

- 16** States in which candidates compete for judicial positions should consider adopting public funding for at least some judicial elections. Even in states that reject public funding for representative officials, the nature of the judicial function makes public funding particularly appropriate for judicial elections. Any public funding system should be sufficiently generous to encourage participating candidates to forego all other sources of campaign funds. The system should be designed to discourage frivolous candidates and to restrict overall spending while allowing appropriate response to independent expenditures.
- 17** States should adopt systems for disclosing campaign contributions and expenditures that provide timely and ready access to relevant information without being unreasonably burdensome.
- 18** By statute or judicial conduct code provisions, states should set appropriate limits on the size of campaign contributions to judicial campaigns.
- 19** States should consider adoption of the 1999 amendments to the ABA Model Code of Judicial Conduct respecting judicial campaign finance, as appropriate in each jurisdiction.
- 20** Some activities of special interest groups in recent judicial elections, particularly those groups located outside the state where the election is being held, have been pernicious. The Symposium on Judicial Campaign Conduct and the First Amendment called for in number 7 above should also include discussion of creative ways, consistent with the right of free speech, in which state rules as to contribution limits and financial disclosure can be applied to outside groups and individuals as well as candidates and political parties.

1

SECTION

Judicial Election Structure

Nationally, 87 percent of all state judges face an election. States use four basic forms of judicial selection: partisan election, nonpartisan election, retention election, and appointment. Some or all judges face elections in 39 states.

Judicial Election Structure

Some or all judges face elections in 39 states. Nationally, 87 percent of all state judges face an election. The states use four basic forms of judicial selection (partisan election, nonpartisan election, retention election, and appointment).

In a **partisan election** of judges, candidates run in party primaries and are listed on the ballot as candidates of one of the political parties. Candidates in a **nonpartisan election** of judges run on the ballot without the party label. In practice, the distinction between partisan and nonpartisan election systems may be in name only. Michigan and Ohio, for example, have nonpartisan elections in the sense that the names of judicial candidates appear on the ballot without the party label, but the candidates are chosen in party primaries or conventions, and the parties are heavily involved in judicial campaigns. This has also been the case in Idaho for recent supreme court elections.

Other states follow a system of **retention elections**. Typically, judges are selected by the governor from a list of prospective judges pre-

pared by a commission that recruits and screens judicial nominees. After a fixed period of time, the judge must run in a retention election to be retained in office. The incumbent judge does not have an opposing candidate; rather voters are asked to vote positively or negatively as to whether that judge should remain in office. In most states with retention elections, the judge is retained if he or she receives a majority of the vote, but in Illinois, judges must receive a 60 percent favorable vote to remain in office.

In **appointment** systems, the governor, sometimes subject to confirmation by the state senate, most often appoints judges. The legislature makes appointments in South Carolina and Virginia. Actually, in South Carolina there is a Judicial Merit Selection Commission that first screens candidates for judgeships. The commission then submits to the General Assembly of South Carolina the names and qualifications of three candidates for judgeships. The General Assembly then meets in joint session for the election of judges and to become a judge, a candidate must receive

Judicial Selection Systems in the United States

Note: Some states use more than one selection system, depending on the type of court or geographical area. These states are shown in color. States listed in the partisan column have such elections for at least one court level. Similarly, states in the column nonpartisan elections column have no partisan election but use non-partisan elections for at least one court level. A state by state summary of selection systems is at www.ajs.org/jjs/

Elections			
Partisan	Non-Partisan	Retention Only	Appointment Only
Alabama	Arkansas	Alaska	Connecticut*
Idaho	Arizona	Colorado	Delaware
Illinois	California	Iowa	Hawaii
Indiana	Florida	Maryland	Massachusetts
Kansas	Georgia	Nebraska	Maine*
Louisiana	Kentucky	Utah	New Hampshire
Michigan	Minnesota	Wyoming	New Jersey
Missouri	Mississippi		Rhode Island
New Mexico	Montana		South Carolina*
New York	Nevada		Vermont*
Ohio	North Carolina		Virginia
Pennsylvania	North Dakota		
Tennessee	Oklahoma		
Texas	Oregon		
West Virginia	South Dakota		
	Washington		
	Wisconsin		

* Probate judges are elected in Connecticut, Maine, and Vermont. Probate, family and limited jurisdiction court judges are elected in South Carolina.

a majority vote of the joint session. To be retained in office, judges must then be reappointed by the legislature.

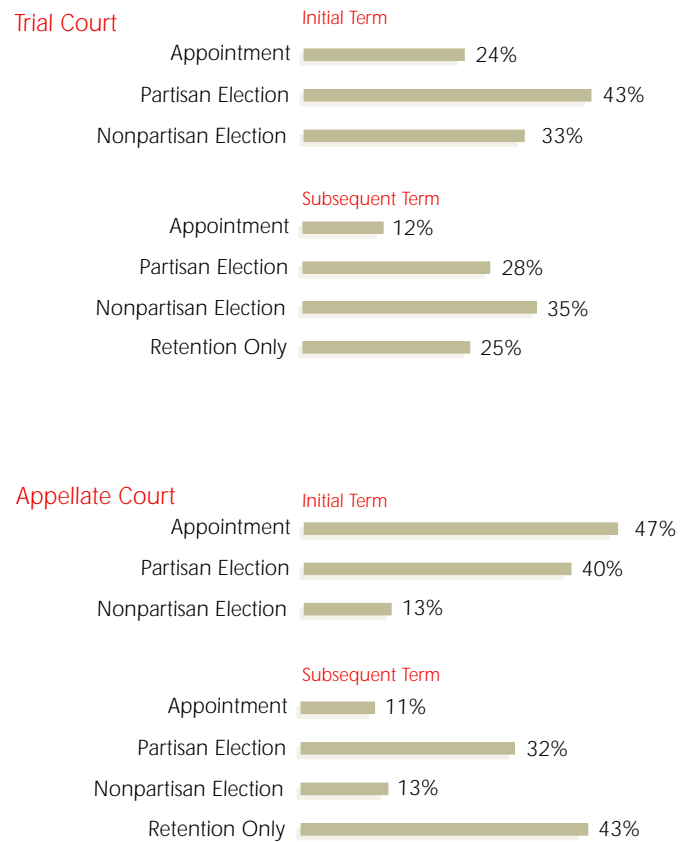
In reality, most states have hybrid systems of selection where several different types of selection systems operate depending on the level of court, the region of the state, whether a mid-term vacancy is involved, or whether it is initial selection versus retention of an incumbent judge. Missouri was the first state that adopted a system of appointment by the governor based on recommendations from nominating commissions followed by retention elections. Because of that, the nominating commission/retention election system is sometimes called the Missouri Plan (others call it merit selection). Yet, even Missouri maintains a hybrid system of selection because, outside of four of the larger Missouri counties, its trial court judges are selected in partisan elections.

Other hybrid systems were forged as states combined features of two or more selection methods. In Illinois, for example, the supreme court rather than the governor or legislature initially appoints all judges to fill unexpired terms. The appointed judge must contest a partisan election to secure his or her first full term but thereafter is subject to retention election only for subsequent terms. Each state's selection system tends to reflect the political and social dynamics unique to that state's politics. And different systems of selection have been popular at different points in American history. As a result, one explanation for the selection system in a state simply has to do with the era when a state's constitution was adopted.

The proportion of state judges facing elections has hardly changed over the last 100 years. What has changed is the form of election used. Non-partisan and retention elections have replaced partisan ones. One-third of the appellate bench and 10 percent of the trial bench currently

face retention elections only. Finally, it is notable that state court judges usually reach the bench in a very different manner than federal judges. Federal judges are nominated by the President and approved by the U.S. Senate for lifetime terms of office, a practice followed by only six states.

Percentage of State Judges Appointed or Elected



Source: Roy A. Schotland, *Summit on Improving Judicial Selection* Introduction: Personal Views, *Loyola of Los Angeles Law Review*, Vol. 34 (2001), 1365, (1998 figures).

1

Recommendation

All judicial elections, whether direct or retention, should be conducted in a non-partisan manner.

Problem

In partisan election systems, judicial candidates are nominees of a political party and run on the ballot with a party label, a process often more competitive than other selection systems. In partisan judicial elections, often one or both parties become active participants, all too often running advertisements more negative than candidates (especially judicial candidates) would run themselves. Such ads and other campaign techniques blur the distinction between judicial and political branches of government.¹ And the parties sometimes expect a high degree of loyalty from their judicial nominees. In Michigan in 1976, the Democratic chief justice was denied renomination by his party because the Supreme Court of Michigan had decided a state redistricting case favorable to Republicans.² As the political parties have become more ideologically divided, campaigns, including judicial campaigns, are becoming more bitter and harder fought. Issues that are ideological “hot buttons” such as abortion and capital punishment are used to mobilize the activists of both political parties.

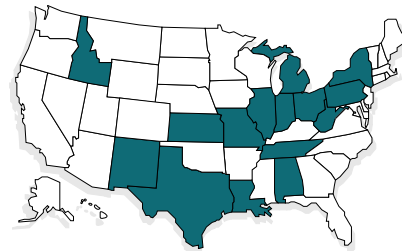
¹ Examples of negative ads from the 2000 campaign can be found in Deborah Goldberg, Craig Holmon and Samantha Sanchez, *The New Politics of Judicial Elections*. Washington, DC: Justice at Stake Campaign (2002) www.brennancenter.org/resources/resources_books.html.

² Scott D. Wiener, “Popular Justice: State Judicial Elections and Procedural Due Process.” *Harvard Civil Rights-Civil Liberties Law Review* Vol. 31 p. 196 (1996).

Rationale

Nonpartisanship in judicial races will reduce the competitiveness of those races and thus the need for large campaign contributions. It will also reduce dependence on interest groups and parties and lead to less negative campaigning. Finally, it should reduce the ideological differences among judicial candidates while still leaving voters sufficient differences to choose from. These gains may incur a cost by depriving voters of what many observers believe to be the single most pertinent cue to use in sizing up judicial candidates: their party affiliation.

The Sixteen States with Partisan Elections



Note: In Idaho, Michigan and Ohio, judicial candidates appear on the general election ballot without party labels, but their selection and campaigns are otherwise partisan.

Background

There are pros and cons in the comparison of partisan and nonpartisan elections for judges. A century ago 25 states had partisan elections, and none had nonpartisan (until 1888, ballots in all states were provided by parties). Today, in 16 states some judges face partisan elections, while only nine states have all judges in partisan elections. In 17 states, some judges face nonpartisan elections, and in 11, all do. The keys to nonpartisan elections are (a) how candidates are selected, (b) whether candidates can declare a party affiliation, and (c) whether candidates can seek and use party endorsement.

Voters report using the party label (or party endorsements) as a “cue” to voting in judicial elections. However, party affiliation often is a crude indicator of judicial philosophy, and highly qualified judicial candidates can be defeated simply because in a particular election year, they bear the wrong party label. In Houston, Texas, after Republican straight ticket voting led to the defeat of 19 Democratic judges and Republican victories in 41 of 42 contested judicial races, one law school dean commented, “[I]f Bozo the Clown had been running as a Republican against any Democrat, he would have had a chance.”³

Two states switched from partisan to nonpartisan elections in recent years. In North Carolina, superior court races were made nonpartisan in 1996, district court elections in 2000 and appellate justices in 2002. In Arkansas, the public voted in November 2000 to make all judicial elections nonpartisan.

³ Stephen B. Bright & Patrick J. Keenan. “Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases.” *Boston University Law Review* Vol. 75, p. 780 (1995).

How do you think judges should be selected in your state?

	Judicial Selection	
	Appellate	Trial
Merit Selection Followed by Election	52%	40%
Nonpartisan Popular Election	19	30
Partisan Popular Election	7	13
Appointment by Governor with Legislative Confirmation	10	5
Appointment by Governor without Legislative Confirmation	8	8
Legislative Appointment or Election	2	2
Don't Know/No Answer	2	2

Note: Figures represent the percent of survey respondents choosing each selection method.

Source: Greenberg Quinlan Rosner Research, Inc. and American Viewpoint, Inc., National Surveys of American Voters and State Judges, conducted for the Justice at Stake Campaign, February 2002 (reports on both surveys are available at www.justiceatstake.org).

2

Recommendation

States with relatively short judicial terms of office should consider increasing the length of those terms. Term limits, whatever their merits for representative positions, are not appropriate for judicial office.

Problem

Frequent judicial campaigns exacerbate the problems often associated with judicial elections. Judges with short terms must attend continuously to their political future, notably to campaign fundraising, deflecting time and attention from their judicial responsibilities. Voters in states with short judicial terms lack an adequate record of decisions and conduct on which to decide their vote. Term limits create another kind of problem, since knowledge and experience in judging is not accumulated.

“Ohio should change the length of term of office for all judges to at least eight years [currently six years]... Longer terms would achieve the appropriate balance between independence and accountability, reduce the frequency of fundraising and increase the number of qualified potential candidates.”

Ohio Chief Justice Thomas J. Moyer
Speech to the Ohio State Bar Association
on Campaign Reform, May 16, 2002

Rationale

First, the adoption of longer terms would reduce the number of campaigns and thus the prevalence of large campaign contributions and negative judicial campaigns. Longer terms contribute to the independence of the judiciary by creating a distance between potential influence by lawyers or litigants who are involved in cases before a judge. Second, participation in judicial races might be improved if voters were presented with shorter and less confusing ballots. In states with longer terms, the judicial sections of ballots become less crowded as races are spread over time. Third, judges would have a more extensive judicial record and, with longer terms, greater independence in their decision making. And fourth, longer terms would increase experience on the bench and job security for judges, enhancing the likelihood that highly qualified lawyers would leave their practices to seek a judgeship.

Background

For reasons cited above and more, the Task Force of Citizens for Independent Courts recommended “judicial terms of office of adequate length.” Terms of at least eight years were recommended.⁴

Only one state has ever considered term limits for judges. In 1996, a proposal for term limits was divided into two amendments to the state’s constitution, one for judges and one for other elected officials. Term limits for judges were rejected by a vote of nearly 2-1 but approved for other, political, officials.⁵

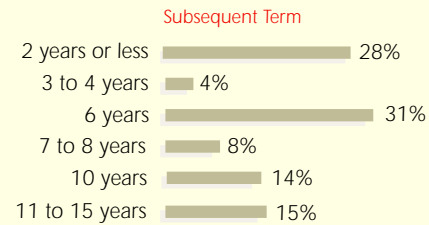
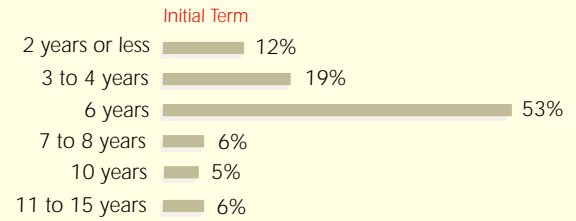
⁴ Citizens for Independent Courts. *Uncertain Justice: Politics and America’s Courts*. New York: Century Foundation Press, pp. 90-91 (2000).

⁵ Roy Schotland. “Term Lengths and Term Limits,” paper prepared for the Summit on Improving Judicial Selection, December 8-9 2000.

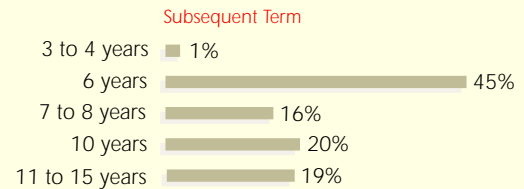
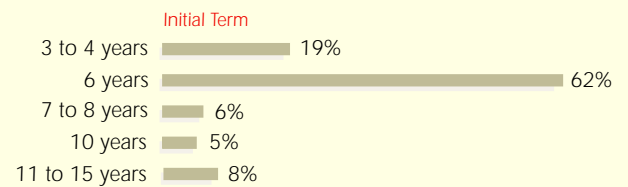


Term limits of six years are most common for state judges.

Trial Court



Appellate Court



3

Recommendation

All judges appointed to fill a vacant judicial position should serve a substantial period in office before initial election. After initial election, all judges should serve a full term before a second election.

Problem

In all elective systems, a majority of judges initially reach the bench by appointment to fill a vacancy caused by resignation, retirement, or death. An appointed judge often is required to run for office before a record of accomplishment on the bench can be created. Indeed, there is some evidence that appointed judges running in their first election after appointment are the most vulnerable of any judicial incumbent.⁶ It is not unusual that a judge appointed to an interim vacancy would within two years time have to mount two full election campaigns. The prospect of undertaking a period of such intense campaign activity immediately upon assuming office may discourage qualified candidates from seeking or accepting a judicial appointment.

⁶ Anthony Champagne, "The Selection and Retention of Judges in Texas," *Southwestern Law Journal* Vol. 40, p. 66 (1986).

Rationale

The importance of initial appointments in judicial selection is underestimated. Due to deaths, retirements, and resignations, more than half of all judges in most states initially reach the bench through gubernatorial appointment to fill an interim vacancy.⁷

Eliminating the requirement of election after an interim appointment to complete a term would reduce the number of judicial elections. This in turn means less time devoted to raising campaign funds and campaigning, and more time spent on the bench. Lengthening initial terms is also likely to encourage more lawyers to become judges.

⁷ Citizens for Independent Courts, *Uncertain Justice: Politics and America's Courts*, New York: Century Foundation Press, p. 92 (2000).

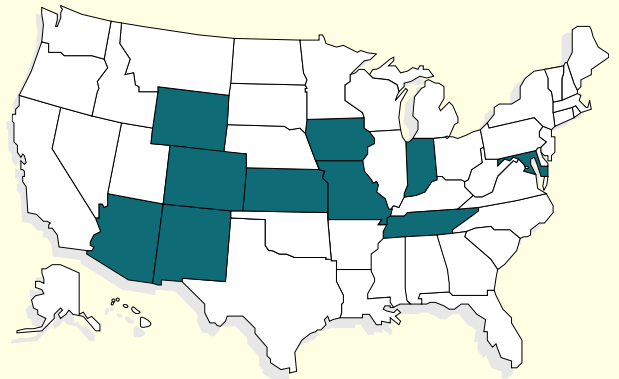
Background

It is common that a judge will have to run for election to retain that seat soon after their appointment. If that appointed judge wins the election, frequently it is not for a full term in office, but only for the remaining time in the judicial term. An appellate judge might retire, for example, after serving three years of a six-year term. The governor will then appoint a judge to the retired judge's seat and the appointed judge will have to run in the next election—in this example, a year after appointment. If the appointed judge wins the election, it is not for a full six-year term, but is for only the remaining two years in the six-year term. Thus, after being appointed and then elected, the judge will have to stand for election twice to secure a full six-year term.

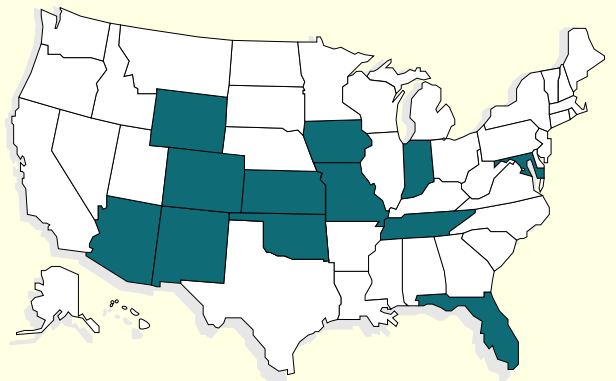


States Where Judges Serve Initial Terms of 2 Years or Less

Trial Judges - 10 states



Appellate Judges - 12 states



2

SECTION

Campaign Conduct

Most state court judges run for election, about one-third as political party candidates. Does that make judges similar to legislators, governors, and state treasurers? And, if judges are different in important respects, should they be held to specific standards of campaign conduct consistent with the role of a judge?

Judicial Elections are Different

Judicial elections are different because judges have unique responsibilities. The judiciary “represents no man, no majority, no people. It represents the written law of the land . . . it holds the balance, and weighs the right between man and man, between rich and the poor, between the weak and the powerful.”⁸ Officers of the political branches of government may make promises about how they will decide disputes, and they are expected to represent the interests of constituents. Decisions made by officers of the political branches may be based on loyalty to party, friends, interest groups, voters, or the officials’ perceptions of the public interest. Decisions within the political branches do not have to be based on reason and law.

Judicial decisions, however, must be based on the application of the law to the facts presented in a case and must be made only after hearing the evidence presented by opposing parties. Thus, judges cannot make promises about their future decisions since that would be contrary to the requirement of reasoned and impartial judgment based on law as applied to the facts

in each case. And judges cannot represent any interest group, constituent, party, or friend because such representation is contrary to the requirement of judicial impartiality and independence in decision making.

Restrictions have been placed on the way judges are elected so that judges conform to expected behavior on the bench. Absent those restrictions, there may be problems where judges behave more like those in the political branches, prejudice cases by promising outcomes, or show partiality toward one side in cases coming before the court. And, even if the judge was impartial as a decision maker, if she or he showed partiality as a candidate it would be detrimental to the appearance of fairness in decision making. The appearance of fairness is, of course, important in that litigants (and society in general) expect fair outcomes as well as a process that appears fair and impartial. The courts depend on the public’s confidence that they are fair. One way to insure fairness and impartiality is through the Canons of Judicial Conduct.

⁸ Quoted in David B. Rottman and Roy Schotland. “What Makes Judicial Elections Unique?” *Loyola of Los Angeles Law Review* Vol. 34, p1369 (2001). Edward Ryan, a delegate to the Wisconsin constitutional convention and later chief justice of the Wisconsin Supreme Court, made that statement in 1846.

Several states have developed Campaign Conduct Committees. Georgia established a three person special committee through its Judicial Qualification Commission (JQC), the official body responsible for judicial discipline. The committee is comprised of one private attorney one judge, and one “lay person;” the JQC’s director serves as an ex-officio member. This committee may seek to correct conduct but only has the power to issue statements on a candidate’s behavior after a complaint or through the committee’s own initiative.

The Alabama Supreme Court in 1998 and 2000 appointed a Judicial Campaign Oversight Committee comprised of private citizens including nonlawyers.

In 2002, Louisiana and Mississippi announced the establishment of Judicial Campaign Oversight Committees. Louisiana Chief Justice Pascal E. Calogero, Jr. stated:

“...the purpose of this committee is to serve as a resource for judicial candidates, to assist in educating judges and judicial candidates about ethical campaign conduct, and to help deter unethical judicial campaign conduct. The public will benefit from the creation of a Judicial Campaign Oversight Committee since it will help judges and candidates comply with the high standards of ethical conduct required by the Louisiana Code of Judicial Conduct.”

The Canons and the ABA Model Code

The 1990 American Bar Association Model Code of Judicial Conduct has been adopted in some form in every state that elects judges. Previous model judicial conduct codes were issued in 1924 and 1972. Provisions generally mandate that judges and judicial candidates must refrain from political activity that is inappropriate to the judicial office. Some provisions of the code, for example, require candidates to abstain from publicly endorsing or opposing candidates for public office, appearing in advertisements with other candidates for public office, engaging in personal solicitation of campaign funds, and raising funds with nonjudicial candidates. All states also prohibit candidates from making pledges or promises of conduct in office, other than faithful and impartial performance of judicial duties. States

often prohibit judicial candidates from making statements that seem to commit to a position regarding cases likely to come before the court, and often knowing misrepresentations of such things as judicial candidate qualifications are prohibited. Some codes prohibit campaign communications that are knowing or reckless falsehoods or that are deceiving or misleading.⁹

Violation of these provisions has led to disciplinary actions against some judicial candidates and judges (even removal from office), and no doubt other candidates have avoided certain campaign conduct because of the threat of sanctions. These canons also provide important behavioral guidelines for the appropriate conduct of judicial campaigns. With guidelines in place, how are they to be enforced?

⁹ Richard A. Dove. "Judicial Campaign Conduct: Rules, Education, and Enforcement." *Loyola of Los Angeles Law Review* Vol. 34 (2001).

Official Enforcement

One way to enforce appropriate judicial campaign conduct is through official campaign conduct committees. Georgia, Nevada, and South Dakota have well-established official committees. New committees were established in Louisiana and Mississippi in 2002. Such committees can educate candidates about appropriate judicial campaign behavior, can respond to candidate requests for advice about the ethics of campaign advertisements, and can take the initiative to discourage or stop inappropriate campaign conduct. Generally, however, official enforcement of canon provisions is rare. All in all, ethical judicial campaign behavior is primarily a result of the professional norms of the candidates.

Official conduct committees do have durability—unlike unofficial committees (discussed next), they are less dependent on individual initiative to keep the organization functioning. And, official committees have greater resources. Only official committees can formally sanction candidates who violate ethical rules. Because the committees are official bodies, however, they are more limited in their processes than are unofficial bodies.¹⁰

¹⁰ Barbara Reed and Roy Schotland. "Judicial Campaign Conduct Committees." *Indiana Law Review* Vol. 35 (2002).

Unofficial Campaign Committees

Unofficial committees currently tend to be sponsored by state or local bar associations. Such committees operate in at least 18 localities in five states, and most are sponsored by a bar association. Unofficial committees may have greater credibility than official committees because they can be composed of a diverse membership of respected community leaders. While they cannot formally sanction perceived misbehavior,

they perform key functions in promoting appropriate campaign conduct such as educating judicial candidates, advising candidates on the appropriateness of advertisements, helping opposing candidates reach agreements about campaign behavior, and criticizing inappropriate conduct by candidates.

New Challenges

Judicial elections are changing. They are coming to sound like elections for political office. Interest groups invest heavily in trying to elect the candidates they support, resulting in a great deal of money being spent in many judicial elections. And sometimes campaign advertisements tout candidates for judicial offices or engage in negative campaigns in the same manner as political advertisements for legislative or executive offices.

At the same time, the constitutionality of the canons themselves has been subject to judicial scrutiny. In regulating judicial campaigns, sometimes the canons come up against First Amendment claims by individual candidates who believe their free speech rights are violated be-

cause of canon restrictions. Recently, the U.S. Supreme Court struck down (in a 5-4 decision) a provision of the Minnesota code that prohibited judicial candidates from announcing their views on disputed legal or political issues. But it is important to note that the decision was limited to that particular “announce clause” in the code. The court’s decision appears to leave intact the presumption that the judicial role, and therefore judicial elections, is different from elections for the political branches. (See adjacent page: *Republican Party of Minnesota v. White*.)



Limiting a Judicial Candidates' Speech Violates First Amendment

Republican Party of
Minnesota v. White,
June 2002

In a 5-4 opinion, the U.S. Supreme Court found a Minnesota judicial conduct rule barring judicial candidates from stating their views on disputed legal or political issues violates the First Amendment. At issue was the so-called “announce clause” of Canon 5 of the Minnesota Code of Judicial Conduct, a rule issued in 1974 and patterned after the ABA’s Model Code of Judicial Conduct. The challenged restriction states that a candidate for a judicial office shall not “announce his or her views on disputed legal or political issues.” A similar restriction has been adopted by a majority of the . . . states that have elected judiciaries.

An unsuccessful judicial candidate, the state Republican Party, and other groups alleged that the rule violates the First Amendment’s free speech guarantee. The district court upheld the restriction but construed the clause narrowly to apply only to issues likely to come before the court. The Eighth Circuit affirmed and adopted an additional restriction, reading the clause to permit general discussions of case law and judicial philosophy.

The Supreme Court determined that, regardless of what might not be prohibited, the announce clause is an impermissible content-based limitation that burdens “a category of speech that is ‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for public office.” As such, it is subject to strict scrutiny, the court said.

Justice John Paul Stevens dissented, joined by Justices Souter, Ginsburg, and Breyer. Stevens faulted the majority for “obscuring the fundamental distinction between campaigns for the judiciary and the political branches,” thereby creating “the false impression that the standards for the election of political candidates apply equally to candidates for judicial office.”

The dissent by Ginsburg reflected similar views. “I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons.”

Excerpt from *Law Week*
July 2, 2002.

4

Recommendation

Educational programs on state election laws, judicial canons, and sanctions for violations should be conducted for all judicial candidates, together with their campaign staff, consultants, and interested family members. The legislature or judiciary, as appropriate, should mandate attendance at such programs and ensure that they are adequately funded.

.....

Problem

Judicial election law is complex and obscure. There are few academic or practitioner experts. The first U.S. Supreme Court decision on the topic, issued in June 2002, clarified the law in some respects but left considerable uncertainty in its wake.

The law's complexity and current uncertainty place burdens on first time candidates and incumbent judges alike. First time judicial candidates are subject to ethical expectations different from those governing the practice of law. Incumbent candidates need active guidance on how to campaign ethically and effectively. As judicial campaigns become more competitive, judicial candidates increasingly draw upon consultants with prior experience in the legislative and executive branch election arena.

.....

Rationale

“... [L]awyers and judges often face different ethical obligations.”¹¹ Training in the ethical requirements of judges may be useful to judicial challengers who as lawyers are unfamiliar with the differing ethical obligations to which judges are subject. Judicial election law is in a state of flux in the aftermath of the U.S. Supreme Court decision in *Republican Party of Minnesota v. White* (See page 25). In light of the uncertainty, incumbent judges (along with those involved in their judicial campaigns) are likely to benefit from refresher courses on the legal and ethical requirements of judicial candidates. Whether mandatory or voluntary, educational seminars and candidate forums are an important step in understanding the requirements of judicial campaign conduct. They also help attendees gain familiarity with the very unique requirements of judicial campaigns.

¹¹ David Cleveland and Jason Masimore. “The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, and other Judicial Figures.” *Georgetown Journal of Legal Ethics* Vol. 14, p. 1038 (2001).

States Providing Education to Judicial Candidates and Staff

■ Washington

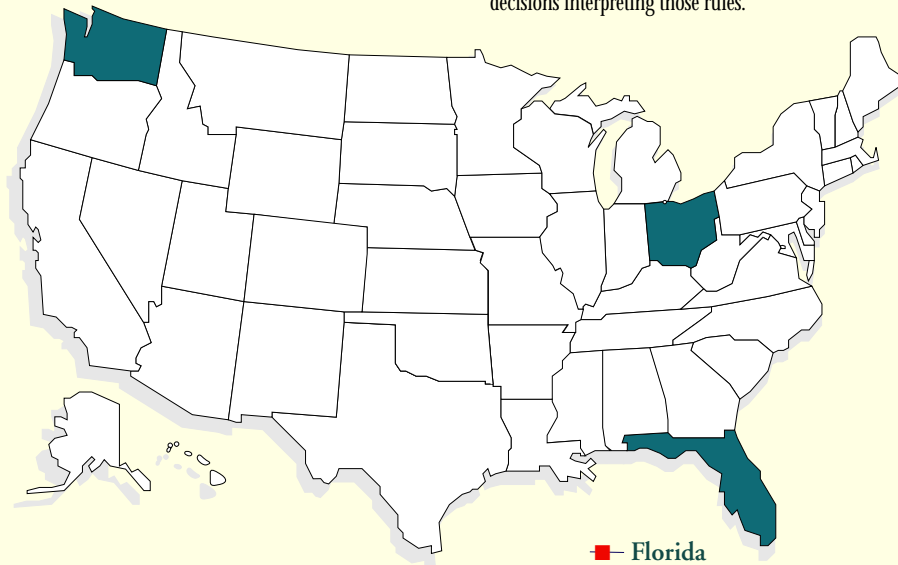
In 2000, the Washington State Judicial Ethics Committee hosted two campaign forums for judicial candidates and members of their campaign committees. Candidates were not required to attend, but the forums did provide an opportunity for candidates and staff to learn more about the applicable rules for judicial candidates.¹²

¹² Material on Ohio and Washington is derived from: Richard A. Dove. "Judicial Campaign Conduct: Rules, Education, and Enforcement." *Loyola of Los Angeles Law Review* Vol. 34, p. 1456 (2001).

■ Ohio

Since 1995, the Supreme Court of Ohio requires as part of its Code of Judicial Conduct that all judicial candidates, including incumbent judges, attend a free two-hour campaign practices seminar. Judicial candidates are urged to bring their campaign chairs and treasurers. Conduct and finance rules unique to judicial campaigns are examined, along with campaign finance reporting requirements.

Those who attend receive a handbook containing judicial conduct rules, advisory opinions, and court decisions interpreting those rules.



■ Florida

In Florida, in 1998 and 2000, the Judicial Ethics Advisory Committee conducted campaign conduct forums for candidates and campaign consultants in every circuit in the state with a contested judicial election. Fifteen forums were held in 1998 and 16 in 2000.

5

Recommendation

“Hotlines” should be established by the legislature, the judiciary, or the appropriate judicial discipline body to respond expeditiously to questions about campaign conduct, campaign finance, judicial ethics, or related issues. A judge, candidate, campaign worker, or contributor who adheres to the advice provided by this procedure should be accorded a prima facie defense to any subsequent legal action or disciplinary procedure.

Problem

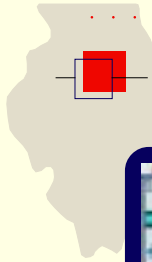
Highly competitive and fast-paced judicial campaigns mean that judicial candidates and those associated with judicial candidates require quick advice on the appropriateness of campaign tactics. Speedy advice is particularly important in the wake of the U.S. Supreme Court’s June 2002 decision in the *White* case (see page 25). There will be considerable uncertainty about appropriate campaign conduct until the implications of that decision become clear.

Existing mechanisms for providing such advice make it too cumbersome to respond in a timely manner to queries. In addition, recipients of the advice cannot rely upon it as authoritative. The problem is illustrated by the example of recent efforts in Michigan. The Michigan Bar created regional panels to investigate allegations of “false, misleading, unfair, unethical, or illegal statements” and to comment on campaign conduct or refer the matter for disciplinary action because “there was no prompt way to address allegedly improper campaign tactics...[A]n ‘aggrieved’ candidate could only file a complaint [and] the investigations...took considerable time... Even if a candidate violated ethics rules during the campaign, many times no discipline was ultimately imposed.”¹³

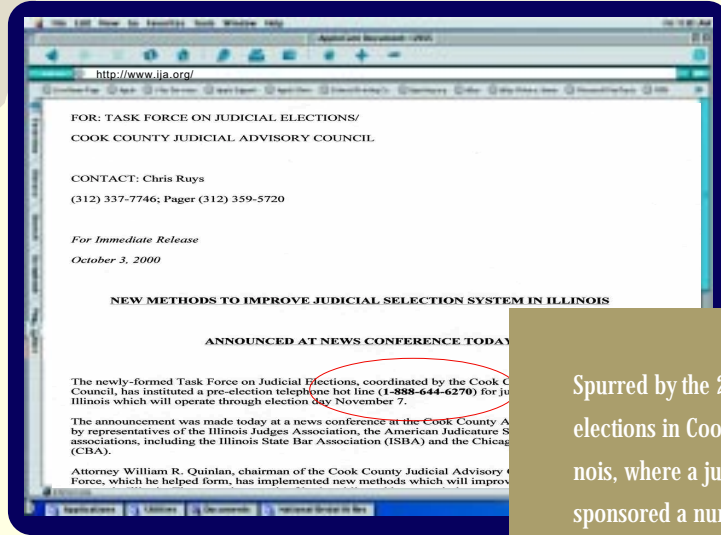
Rationale

Potential campaign improprieties can be prevented if candidates and their advisers have access to a rapid and reliable source of guidance. “Hotline” advice is particularly effective when the advice it provides is a prima facie defense to any charges of misconduct in any subsequent legal or disciplinary action. Not only can such advice steer candidates away from inappropriate conduct, but it also may avoid more time-consuming and costly grievance procedures.

¹³ Barbara Reed and Roy Schotland. “Judicial Campaign Conduct Committees.” *Indiana Law Review* Vol. 35, p. 787(2002).



Cook County, Illinois Established Hotline



<http://www.ija.org/>

Spurred by the 2000 primary elections in Cook County, Illinois, where a judicial candidate sponsored a number of misleading and negative campaign ads, the Judicial Advisory Council's Task Force for Illinois Judicial Elections established a hotline where volunteer attorneys advise candidates on ethical dilemmas that may arise during campaigns. Experts answer questions posed to the hotline's toll free number within 24 hours. The service is limited to the candidates themselves.

6

Recommendation

Non-governmental monitoring groups should be established to encourage fair and ethical judicial campaigns. Such groups should include respected and diverse individuals representing state and local bar associations and other credible community organizations. These monitoring groups should take all appropriate means to secure voluntary compliance with high standards of conduct, exceeding those mandated by law.

Non-governmental monitoring groups should be willing to:

- Conduct advance review of paid advertisements to ensure accuracy and fairness
- Offer mediation and arbitration procedures for campaign disputes
- Develop processes for informing the public about the degree of cooperation and compliance they receive from the campaigns
 - Endeavor to secure cooperation in all their endeavors from independent advocacy groups as well as from candidates and political parties
 - Be available to comment publicly on the conduct of candidates, political parties, or outside groups


Problem

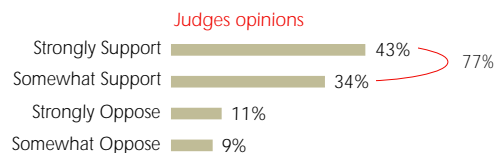
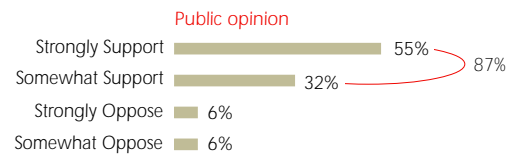
Official governmental campaign monitoring committees are poorly equipped to intervene during the course of an election to let the public know when a judicial candidate has acted inappropriately. Such official groups may lack public credibility and be slow in their response, and they cannot speak directly to the public because in doing so they might violate the free speech rights of the candidates.


Rationale

An unofficial group can meet a candidate's inappropriate speech with more speech, letting the public know that a candidate has overstepped the boundaries within which judicial campaigns should be conducted. Such groups have their own First Amendment right to free speech, which is not afforded to official government bodies.

Non-governmental groups can act proactively. They need not await a formal complaint. Unofficial groups are flexible and, especially, perhaps, if they include nonlawyer members, have greater credibility with the public. An unofficial group would be able to establish higher standards than those set forth by the judicial canon of ethics.

—  — “Independent citizen boards should be established to inform the public about misleading or inaccurate advertising in judicial campaigns.” Do you support or oppose that idea?



 Source: Justice at Stake Campaign surveys, see page 15.

Background

Non-governmental campaign conduct committees take several forms. Some are organized solely by a bar association and others by a coalition of public groups. Some bar association-sponsored committees include lay members, while others do not. Campaign conduct committees can also be local or statewide in their coverage.

There is evidence that the public supports non-governmental conduct committees. In late 2001, randomly selected judges and members of the public were asked if they supported the statement, “Independent citizen boards should be established to inform the public about misleading or inaccurate advertising in judicial campaigns.” As seen in the adjacent table, 87 percent of the general public and 77 percent of judges expressed support for creating citizen boards.

About 20 Local Campaign Conduct Committees Exist in Five States

In 1985, the county bar president in Columbus, Ohio, initiated an oversight committee of lawyers and non-lawyers. The committee succeeded in stopping one advertisement that stated, “Elect Judge X” although X had never been a judge, and another ad that attacked a candidate for having represented a particular criminal defendant. The committee chairman was the local Catholic bishop, formerly a lawyer. The committee, known locally as the “Bishop’s Committee,” still exists, with 11 members appointed by the county bar president (with consent of the bar’s board of governors). Of the 11 members, three must be non-law-

yers and not more than five may be from one political party. Cleveland and Youngstown have recently begun similar efforts.

In 2002, New York and Ohio moved dramatically to build on a few well-established committees. In New York, each of the four committee members serves for three years. An effort is made to appoint lawyers with a background in professional ethics or judicial campaigns. In March 2001, New York’s Administrative Board of the Courts adopted a policy of official encouragement to campaign conduct committees. The board formally “endorsed the establishment and maintenance by statewide and local bar associations of judicial election campaign practices committees that, as part of the bar associations’ process of evaluating candidates for judicial office, request candidates to provide written commitments that they will campaign in accordance with the requirements of the Code . . . applicable case law and ethics opinions.” New committees were quickly established.

Other venerable committees can be found in San Mateo County, California, which has had a judicial campaign conduct committee since 1980, and in Santa Clara County, California, and King County (Seattle) Washington. Bar associations in six Florida counties have active committees (Broward, Escambia-Santa Rosa, Miami, Orange, Palm Beach, and Volusia).

American Bar Association

House of Delegates

Resolution 113 (2002)

FURTHER RESOLVED,

that the ABA

encourages state,

local, and

territorial bar

associations in states

and territories that

conduct judicial

elections to establish

judicial campaign

conduct committees

to promote honesty

and integrity in

judicial campaigns.

7

Recommendation

Canons of judicial conduct and state laws regarding judicial campaign activity should be reexamined to assure that they promote fair elections while safeguarding the right to free speech. To advance this process, one or more organizations committed to judicial integrity, impartiality, and independence should convene a Symposium on Judicial Campaign Conduct and the First Amendment composed of distinguished scholars, lawyers and judges to consider these issues. In addition, the ABA should consider revising the provisions of the Model Code of Judicial Conduct regarding inappropriate activity by judicial candidates.

The Symposium on Judicial Campaign Conduct and the First Amendment was held on November 9-11, 2001. Based on the briefing papers and proceedings, the steering committee of chief justices issued the following (and other) recommendations in their report *The Way Forward: Lessons from the National Symposium on Judicial Campaign Conduct*.¹⁴

¹⁴ The full report is at www.in.gov/judiciary/supreme/docs.

1. Judicial campaign conduct by candidates can be constrained. Some current provisions aimed at such constraint may warrant reconsideration. Therefore, we urge the Conference of Chief Justices to work with the American Bar Association to reexamine Canon 5 in light of the recent court decisions, and in light of the papers produced by scholars for this Symposium.
We find that the need to prevent unrestrained judicial campaign conduct is a compelling public interest; that the necessity of restraint is strongest where the statements commit or appear to commit a candidate with respect to cases or controversies that are likely to come before the courts; that the necessity does not extend to speech that is merely undignified or misleading; and that the terms of the Canon should draw lines between proscribed and permitted speech as clearly as possible.
2. Any court that must decide a case involving constraints on judicial campaign conduct should take into account both that the foremost duty of a legal system is to render justice with due process and that our courts have the unique responsibility of impartial decision-making based on the rule of law. America's system of justice depends on state and federal courts that possess and appear to possess the ability, integrity, impartiality, and public confidence that are indispensable to rendering justice.
3. Courts in deciding cases or formulating Canon provisions, and legislatures, bar associations, disciplinary bodies, and others who become involved in formulating or applying constraints on judicial campaign conduct, should take into account the purpose for such constraints, and should take special care to avoid applying constraints to conduct that may be distasteful but whose restraint is not necessary to achieve the desired purpose.

The Way Forward concluded —

By “meeting speech with more speech” and by providing voters with additional information, we will enhance First Amendment values and protect the ability of state courts to render justice. If we fail to meet the challenge that is posed by recent developments in judicial elections, we risk severe erosion of the role of state courts in the American system of justice, and of the rule of law.

In mid-2002 the American Bar Association convened a Working Group on the First Amendment and Judicial Campaigns to examine the current provisions of Canon 5 in light of the U.S. Supreme Court's decision in *Republican Party of Minnesota v. White* (see page 25). The Working Group's recommended revisions will be submitted to the ABA Standing Committee on Ethics and Professional Responsibility.

Symposium on Judicial Campaign Conduct and the First Amendment

- Indiana Chief Justice Randall Shepard chaired the Symposium under the general direction of a steering committee consisting of Chief Justices Shirley Abrahamson of Wisconsin, Norman Fletcher of Georgia, Thomas Moyer of Ohio, Thomas Phillips of Texas, and Judge (and former Chief Justice) William Ray Price of the Missouri Supreme Court.

Attending the Symposium were seventy-five participants—eight state chief justices, other judges, legislators, law professors and other constitutional law experts, lawyers, political scientists, and others concerned with the relevant First Amendment issues. Participants represented a broad spectrum of views and interests revolving around judicial campaign conduct and the First Amendment.



8

Recommendation

Procedures should be studied for resolving professional discipline complaints arising from campaign conduct before the election. Expedited procedures cannot come at the expense, however, of limiting the due process rights of the parties involved.

.....

Problem

Timely decisions are difficult to achieve when a complaint arises during a judicial election campaign. The procedures followed by traditional judicial and lawyer discipline operate at a more deliberative pace. Special procedures are needed that provide the necessary due process protections and reach a conclusion in a timely manner. Otherwise, the resolution of complaints is not available to voters as they decide how to vote. It is also possible that a post-election disciplinary action against a successful candidate might result in the judge's removal from office.

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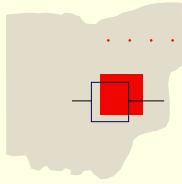
Rationale

Governmental bodies organized to monitor candidate conduct during a campaign can resolve complaints expeditiously. This enables voters to take into account the merits of the complaint when deciding how to vote.

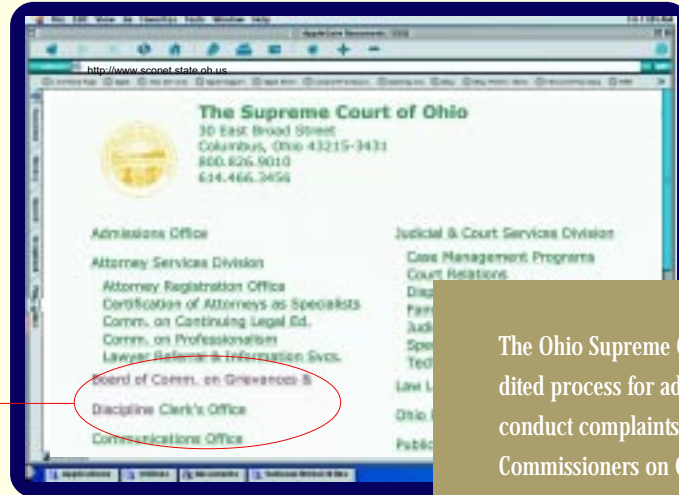
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Example

Several states (Georgia, Nevada, South Dakota, and, since mid-2002, Louisiana and Mississippi) have established official, governmental campaign conduct committees to encourage ethical campaigning and, where appropriate, to take steps to correct or speak out against inappropriate conduct. Several committees feature expedited procedures for resolving complaints before the election where feasible.



Ohio Board of Grievances and Discipline



<http://www.sconet.state.oh.us>

The Ohio Supreme Court adopted an expedited process for adjudicating campaign conduct complaints through its Board of Commissioners on Grievances and Discipline. Once a complaint is filed, the secretary of the board reviews the complaint and determines if it is facially valid. If approved, the complaint goes before a three-person committee of the board – comprised of two attorneys and one public citizen – that conducts a hearing within five days of appointment. If the committee finds clear and convincing evidence that a violation occurred, it is reported to the supreme court with a recommendation that the complaint be heard on an expedited basis. The supreme court does not actually hear the case, but instead, within five days it appoints a three-person board to review the report and determine if there has been a violation. If there has, disciplinary sanctions are imposed against the offending party. The candidate retains the option to appeal to the Ohio Supreme Court.

3

SECTION

Voter Awareness

Fewer people cast votes for judges than for other types of elected officials, and those who do often are frustrated by the limited amount of information available about the candidates.

The Missing Voter

Fewer people cast votes for judges than for other types of elected officials, and those who do often are frustrated by the limited amount of information available about the candidates. Voters in metropolitan areas may confront long lists of judicial candidates; many fail to complete the lengthy judicial section of their ballot. For example, a voter in the 1994 elections in Harris County, Texas, was asked to choose among 140 candidates for 83 judgeships, covering nine separate courts.¹⁵

Voter “roll-off,” the proportion of voters who cast ballots for “top-of-the-ticket”

racers—like those for governor—but fail to vote in any judicial election, varies by election system type. Roll-off rates during the 1990s ranged from 15 to 25 percent in retention elections (Florida), 33 to 42 percent in non-partisan elections (Washington State), and 8 to 14 percent in partisan elections (Texas).¹⁶

¹⁵ Charles H. Sheldon and Linda S. Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman WA: Washington State University Press, pp.237-249 (1997).

¹⁶ Charles H. Sheldon and Linda S. Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman WA: Washington State University Press, pp.63, 83, 143 (1997). Straight-party votes are more responsible for the low roll-off in partisan elections than any excitement generated by contested, hard-fought campaigns.

Symptoms and Causes

Low voter turnout is a symptom of the limited amount and unsatisfactory nature of the information available to the public about judges and the role of the judiciary. It may also reflect the limited importance that the public attributes to the work of the judicial branch of government. The judiciary appears to have a small attentive public, one that accumulates information about how the courts work or about individual judges.

A task force established by Washington State captured the dilemma judicial elections present nationwide:

“In most of our population centers and rapidly-growing rural areas, voters are less and less likely to have knowledge of [judicial] candidates... Voter frustration seems due partly to unfamiliarity with how the judicial system works and what judges do, and partly to the lack of information about the qualifications, experience, and performance of judicial candidates.”¹⁷

¹⁷ Walsh Commission. *The People Shall Judge*. Olympia WA: Office of Administrator for the Courts, p.12 (1996).

Research studies indeed find that the American public is not very knowledgeable about the role assigned to the judicial branch or to judges. Many Americans are unable to answer basic questions regarding the difference between federal and state courts, the constitutional responsibilities of an independent judicial branch of government, and even the manner in which judges are selected in their state. Knowledge is important since those claiming knowledge about the courts are the most likely to vote in judicial elections.

Many potential voters lack relevant information to inform their choice. In the 2001 survey, one-half of the public felt inadequately informed about judicial candidates. Political scientists describe judicial elections as low-information contests. Ordinary citizens possess little information directly relevant to casting

their votes. Most information reaching potential voters comes from electronic and print media, which only sporadically presents information about the judicial branch and of which the public tends to be skeptical. In a 1999 survey, one-half of the public agreed with the statement, “The media’s portrayal of courts is mostly accurate.” However, only one person in eight “*strongly* agreed” with that statement, while one in five “*strongly* disagreed.”¹⁸

Fictional representations of judges and courts on television and in movies compete with news media-generated images. In recent years, “reality-based programs” like “Judge Judy” have

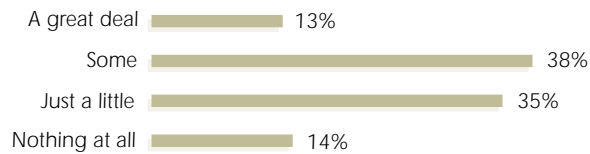
thrived, offering another source of information or misinformation on the judicial process.

Personally acquired information about how the courts work tends to be sporadic in nature. Nearly one-half of all Americans have had direct experience with the courts at some point in their lives. About one adult in four, for example, has served as a jury member. Research suggests, however, that media-driven images tend over time to drown out what was learned through direct court experience.¹⁹

¹⁸ How the Public Views the State Courts: A 1999 National Survey by The Heart Corporation and the National Center for State Courts. Available at: www.ncsc.dni.us/PTC/results/nms4.htm.

¹⁹ Susan Olson and D. Huth. “Explaining Public Attitudes Toward Local Courts.” *Justice System Journal* Vol. 20 (1998).

“Thinking back to the last time there was an election for judges in your state, how much information would you say you had about the candidates in those elections?”



Source: Justice at Stake Campaign surveys, see page 15.

How Voters Choose Judges

Despite the obstacles, voters are motivated to make informed choices. They seek and use whatever information they can glean about the candidates, if only from the ballot itself.

The name of a candidate is one of the few cues available to most voters. A name can identify the candidate's gender and can be used to infer a person's ethnicity or even political associations. Having a name in common with, say, a local television personality can translate into votes (or perhaps lost votes) for a judicial candidate given the scarcity of other informa-

tion. The connections that name similarity can make in the voters' mind can be rather capricious (see Texas in the adjacent page).

Ballots can convey additional useful information to voters. The ballots in some states indicate the political party affiliation of judicial candidates, which voters use to reach conclusions about a candidate's political and social views. In some states, incumbent candidates are identified, providing a criterion that might influence a voter's choice.

The Challenge

Judicial elections rarely grab and hold the public's attention. Low information feeds low voting rates in judicial elections and *vice versa*. Breaking this cycle is a key to improving judicial elections. Elections are a unique opportunity to provide the public with the information it wants and needs in order to cast meaningful votes in judicial elections.

Low voter participation in judicial elections is troubling. It limits the degree to which elections keep the judiciary accountable to the public and threatens judicial independence, rendering

judges vulnerable to single-issue groups that may turn out their supporters in retaliation for a decision they dislike.

“Never is there more potential for judicial accountability being distorted and judicial independence being jeopardized than when a judge is campaigned against because of a stand on a single issue or even in a single case.”

American Bar Association, Task Force on Lawyer's political contributions (Part II), 1998.

The Lack of Voter Awareness

A sign of limited public awareness of the judicial branch is the difficulty voters experience in identifying the names of sitting judges, whether trial or appellate, local or statewide. Even if a name is recognized, members of the public have

great difficulty associating an individual with a particular court and even greater difficulty in calling up pertinent information about a candidate for a judicial seat.



Alabama

In the 2000 Alabama elections, the candidates for five Supreme Court seats outspent all other states. However, 90 percent of the voters could not name a single candidate except in the chief justice's race.²⁰



New York

One survey of New York voters found that 75 percent of voters could not recall the names of judicial candidates they had voted for minutes earlier.²¹



Ohio

The Cleveland Bar Association asked voters to name three judicial candidates for whom they had just voted, and only 5 percent of voters could do so. One week after the election, only 8 percent of voters in Ohio could name one of the candidates for chief justice of the Ohio Supreme Court.²²



Texas

The lack of voter awareness of judicial candidates is widespread. A Texas study found that when voters were asked to identify the "public office" held by the judge who had by far, the highest name recognition of all judges, voters responded "disk jockey." That judge shared the name of the most popular disk jockey in the area and that name recognition allowed the judge to stay in office long after all other Democratic judges had either been defeated or changed party affiliations to the Republican party.²³

²⁰ Roy Schottland. "Financing Judicial Elections 2001: Change and Challenge." *Michigan State University Detroit College of Law Review* 1, 6 note 27 (2001).

²¹ Mark Behrens and Cary Silverman. "The Case for Adopting Appointive Judicial Selection Systems for State Court Judges." *Cornell Journal of Law and Public Policy* Vol. 11, p. 290 (2002).

²² David Barnhizer. "On the Make": Campaign Funding and the Corrupting of the American Judiciary." *Catholic University Law Review* Vol. 50, p. 361, 406 (2001).

²³ Anthony Champagne & Greg Thielemann. "Awareness of Trial Court Judges." *Judicature* Vol. 75, p. 271-76 (1991).

9

Recommendation

State and local governments should prepare and disseminate judicial candidate voter guides by print and electronic means to all registered voters before any judicial election at no cost to judicial candidates. Such guides should provide information that will be useful to voters in comparing the candidates.

Problem

In most localities, even the most attentive and motivated citizen is unable to learn about the qualifications of judicial candidates, or even their names, from the news media. Comparisons among candidates are very difficult.

Helping voters be informed has obvious value. Thus far, however, only five states and one city have taken steps to help voters be informed. Providing voters with information is particularly important for “down-ballot” candidates, like—but by no means limited to—judicial candidates. Without such information, voters either fail to vote for these offices, or vote on such shallow “clues” as mere name familiarity, presumed ethnicity or gender, clues that are often misleading.

Rationale

Voters’ guides are used, valued, and seen as neither confusing nor biased.²⁴ Voters’ guides reduce the “roll off” rate by which fewer voters cast a ballot for the “low information” judicial races at the end of the ballot.

²⁴ Peter Brien, “Voter Pamphlets: The Next Best Step in Election Reform,” *Journal of Legislation* Vol. 28, p. 100-7 (2002).

Example

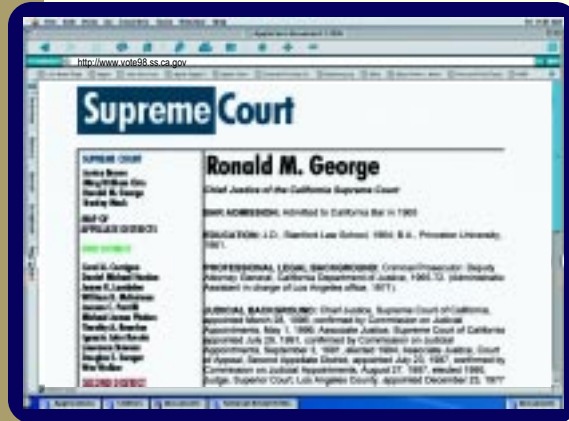
States such as Alaska, California, Oregon, and Washington, along with New York City, publish and mail voters’ pamphlets to registered voters prior to elections. Typically, these pamphlets provide biographical information on all candidates along with a candidate statement and qualifications for the office. Utah produces a voters’ guide that is distributed as a newspaper insert.

Voters in Washington State, a pioneer in the use of voters’ guides, were asked to rate (a) the importance of various information sources and (b) whether they used those sources. Voters’ guides were rated as both the most important and frequently used source.²⁵

²⁵ Charles H. Sheldon and Linda S. Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman WA: Washington State University Press, pp. 61-62 (1997).

California Secretary of State's Judicial Information Site

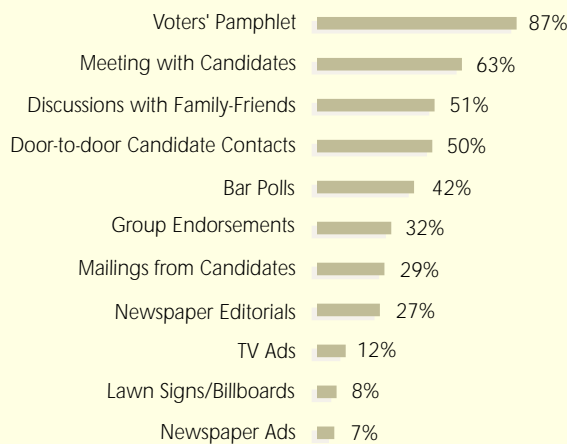
The Internet adds a new dimension to voters' guides. California's judicial information site provides a diagram of all California appellate courts and all candidates for each court. Clicking on the candidate's name accesses a resume of the candidate's background and qualifications.



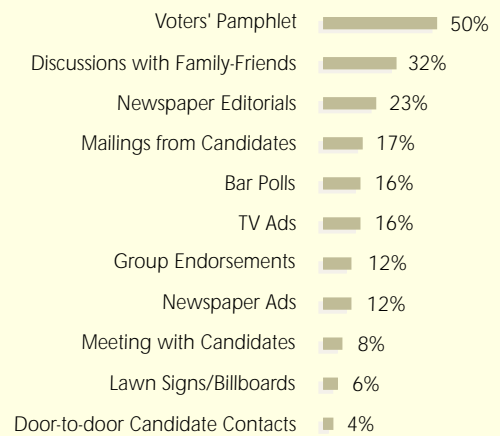
<http://www.vote98.ss.ca.gov>

Voter Information Sources in Judicial Elections, Washington State, 1994

Information sources viewed as "important"



Information sources were "actually used"



Source: Charles H. Sheldon and Linda S. Maule. *Choosing Justice: The Recruitment of State and Federal Judges*. Pullman WA: Washington State University Press (1997).

10

Recommendation

Congress should provide a free federal mailing frank to any voters' guide sponsored by a state or local government.

.....

Problem

Voters' guides, prescribed in the previous recommendation, obviously have a cost to produce and mail. Cost inhibits state and local implementation of voters' guides. One state, California, allows counties to charge candidates for insertions. But in populous Los Angeles, where a candidate for a trial court judgeship must pay \$49,000, or \$98,000 to be in both the English and Spanish voters' guides, such costs operate like a poll tax against candidates.²⁶

²⁶ Peter Brian, "Voter Pamphlets: The Next Best Step in Election Reform," *Journal of Legislation* (2002).

.....

Rationale

The cost of producing voters' guides could be cut by as much as one-third if Congress would give the postage "frank" to any state or local government that sends out such a guide, eliminating postage costs. The frank would promote participation in all, not merely judicial, elections and limit federal government or postal service involvement to ensuring that the publisher is a state or local government.

.....

Background

Voters' guides currently are distributed by mail in four states. All four states use the nonprofit bulk rate of the U.S. Postal Service to distribute copies to all households in the state. The congressional frank is currently used for mail:

1. sent by a member of the U.S. Congress (but not explicit campaign material);
2. sent by an executive department or independent establishment of the government of the United States. Administrative agencies can mail for free information that citizens request or in-

formation that they are statutorily required to distribute to the public;

3. from or to a blind person; and
4. from certain military individuals in certain positions.

The cost of extending the frank to state and local elections would be kept low if the frank was limited to candidate material, excluding the often voluminous treatments of ballot propositions.

Origin of the Franking Commission



"Franked mail—Official mail sent without postage prepayment by members and members-elect of Congress, the Vice President, and other authorized individuals. Mail must relate to the mailer's official business, activities, and duties. The mailpiece bears a written signature, printed facsimile signature, or other required marking instead of a postage stamp."



²⁷ Committee on House Administration (<http://www.house.gov/cha/franking/franking.html>).

The Congressional frank dates back to the English House of Commons in the 17th century. On November 8, 1775, The American Continental Congress authorized franking privileges to its members as a means of informing their constituents. The first U.S. Congress enacted a franking law in 1789. The franking privilege has remained a necessary and valuable tool of our representative government for more than 200 years.

For the next 150 years, the franking statutes were broadened and limited depending on the mood of the country. During the 19th century, Franking privileges were abolished and then reinstated on several different occasions.

During the first half of the 20th century, little was done to modify franking regulations. The General Counsel of the Postal Department (now USPS) would advise Members, on an individual request basis, if a particular mailing was "frankable." The problems and controversies that developed in the next few years could be traced to two basic flaws in the 1895 franking law. First, there were no standards for determining whether or not mail matter should be sent under the frank; Members franked almost anything as "official business." The second flaw was the absence of one authority with clear responsibility for regulating use of the frank.

With public outcry mounting, the first major revision of the franking law since the 18th century was enacted in 1973. Clear principles for official mailings were created and specific types of mail matter were prohibited. The House Commission on Congressional Mailing Standards was created and authorized to hear and decide cases concerning abuse of franking privilege.²⁷

11

Recommendation

Bar associations, either alone or working with a larger and balanced group of concerned citizens and organizations, should conduct evaluations of judges. Evaluation results should be disseminated as appropriate.

Problem

Voters' pamphlets and other widely distributed sources of candidate information usually provide voters with useful information about the backgrounds of candidates, but they do not provide much information on judicial character and on behavior as a judge. A full evaluation needs to incorporate the experiences of attorneys and others present in the courtroom to take into consideration how a judge behaves in the courtroom.

Rationale

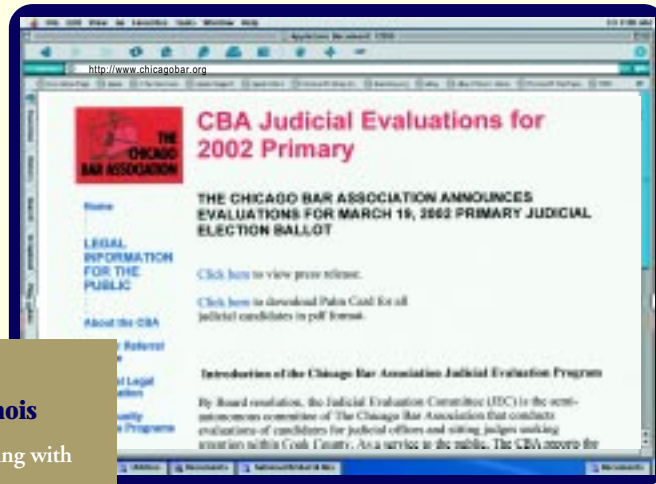
Evaluations of judges can incorporate the experience of people with direct knowledge of a judge's work using a wide range of criteria. Bar associations and other groups can use that information to formulate their recommendation on a candidate. Information can be provided to voters for all judicial candidates in retention elections and for incumbent judges in other election systems. Evaluations from committees representing diverse elements within the community are likely to carry particular weight.

Examples

Chicago, IL The Chicago Bar Association has conducted judicial evaluations since 1976. Non-lawyers have been included in the process since 2000. Currently the Judicial Evaluation Committee consists of both practicing legal professionals and non-lawyer civic leaders such as school principals, medical doctors, and business leaders. These citizens, acting with the Bar Association conduct extensive evaluations of judicial candidates in the areas of: integrity, legal knowledge, legal ability, professional experience, judicial temperament, diligence, and punctuality. Once their research is complete, the Committee holds a hearing and then votes to rate individual candidates. Candidates are given a rating of **Highly Qualified, Qualified, or Not Recommended**. These recommendations are then made available to the public via a series of press releases, Internet postings and newsletters.

Cleveland, OH A collaborative bar and civic organization evaluation program was established in July 2002 in Cuyahoga County, OH (Cleveland). The Citizens League of Greater Cleveland joined forces with three bar associations to set standards for evaluation and publish their ratings together. Given the large number of judicial elections in the Cleveland area—34 in the November 2002 elections—the ratings should prove a valuable asset in assisting voters to make informed choices. The Citizens League Star Rating System weighs the candidates and the issues and makes recommendations to members and citizens using a four-star rating scale. In each race, one candidate is designated by the term "PREFERRED" as the best qualified in that race.

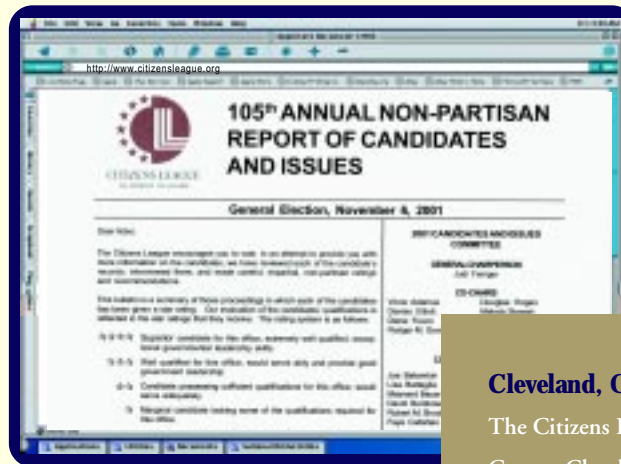
 **Judicial Evaluations Conducted: Two Local Programs**



Chicago, Illinois

... citizens, acting with the Bar Association conduct extensive evaluations of judicial candidates in the areas of: integrity, legal knowledge, legal ability, professional experience, judicial temperament, diligence, and punctuality.

<http://www.chicagobar.org>



Cleveland, Ohio

The Citizens League of Greater Cleveland joined forces with three bar associations to set standards for evaluation and publish their ratings together.

<http://www.citizensleague.org>

12

Recommendation

The judiciary should consider establishing independent and objective judicial performance evaluation processes with appropriate safeguards. Participation in these evaluations should include members of the bar and community. Such evaluations have been used in states with retention elections. Evaluation results should be disseminated as appropriate.

Problem

Performance evaluations by any particular group inevitably will be weighed by the voters' view of that group. In an effort to provide voters with adequate information several states have passed legislation creating independent committees to conduct evaluations of judges and disseminate that information to the public to use as an aid during the voting process.

Rationale

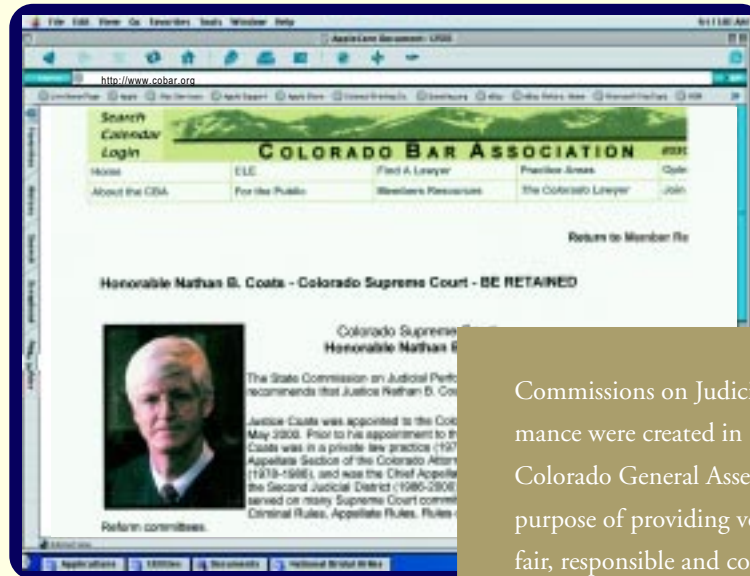
Official bodies can produce and widely disseminate unbiased, broadly based evaluations of judges. Such bodies are more permanent and more ambitious in scope than efforts by bar associations and other civic organizations.

Official performance evaluations are conducted in Alaska, Arizona, Colorado, New Mexico, Tennessee, and Utah, in connection with their retention elections. The evaluating body is established by state statute or court order and the funding is from the state. Elected officials (and judges) usually appoint the evaluation committee members. These official committees rely extensively, but not exclusively, on surveys of attorneys and others who have had business before the judge being evaluated. Evaluation criteria include integrity, legal knowledge, communication skills, preparedness, attentiveness, proceedings control, managerial skills, punctuality, professional service, public service, and effectiveness in working with other judges.

— “Evaluation Commissions assist voters in evaluating the performance of judges, facilitate self-improvement, assist in identifying needed judicial education programs, and otherwise promote judicial independence while fostering public accountability of the judiciary.”

— *Arizona statute*

Judicial Performance Evaluations in Colorado



<http://www.cobar.org>

Commissions on Judicial Performance were created in 1988 by the Colorado General Assembly for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. Each evaluation includes a narrative profile with the recommendation stated as “retain”, “do not retain”, or “no opinion”. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The Commission uses the following criteria to evaluate judicial candidates:

Commissions on Judicial Performance were created in 1988 by the Colorado General Assembly for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. Each evaluation includes a narrative profile with the recommendation stated as “retain”, “do not retain”, or “no opinion”. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers.

Recommendation

Media outlets should broadcast debates between judicial candidates, and should sponsor such debates if other appropriate groups are not doing so.

Problem

Voters have few opportunities to assess the merits of judicial candidates. The most powerful information source is often a 15 to 30 second television or radio ad sponsored by, for, or against a candidate. There is an unrealized potential for high quality information from debates to displace the more simplistic images and claims made in paid advertisements.

Rationale

Television or radio debates offer a forum in which judicial candidates can present themselves in the round. Views can be expressed at length and differentiated from other candidates, but within a preset, refereed format. Broadcasting judicial debates is likely to increase the knowledge of the electorate as a whole and would thereby lessen the need for and effect of misleading campaign advertisements.

Diverse Groups Sponsor Local Judicial Candidate Debates

- The *We the People/Wisconsin* project has sponsored debates broadcast on public radio and network and public television between Supreme Court candidates in every race since 1992.
- In the 2002 judicial election cycle, the League of Women Voters of Ohio sponsored debates between candidates that will be broadcast on the Ohio News Network.
- In 2000, the local League of Women Voters group sponsored a debate between candidates for the Beverly Hills Municipal Court.
- A local cable company taped a debate between candidates for the Los Angeles County Superior Court in 1998.

Candidate Debates

Some question the viability of judicial candidate debates because the limits imposed by the Canons will result in a mundane and boring exchange or that no sharp differences will emerge to hold viewer or listener attention. The following approved debate questions suggest that such limits can be overcome, and that benefits exist from an exchange among candidates on the fundamental issues without violating the Canons.

Debate questions in King Co., Washington

- Do you believe the composition of juries adequately and fairly reflects society at large? Why or why not? If not, what can we do to change this?
- What are the pros and cons of using drivers license registration as a source of jurors?
- What criteria would you use for deciding whether to impose or affirm sentences outside of standard ranges?
- What do you believe are the causes of the high rates of minority incarceration?
- Do you feel the war on drugs has been effective or ineffective?
- Would you favor or oppose a system in which all sentencing decisions were routinely reported in local newspapers, indexed by the name of the judge?

Approved debate questions in Minnesota

- Is racial profiling a problem in Hennepin County, and if so, how should the community and the judiciary respond to it?
- Hennepin County District Court recently approved the creation of a domestic violence docket, a specialized calendar in which misdemeanor arraignments and orders for protection will occur on a separate calendar in front of particular judges assigned to this calendar. What are your thoughts on this specialized calendar?
- If you observed a party in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?

14

Recommendation

The Judiciary, the bar, and other interested groups should devise ongoing programs to educate the public about the judicial process. Special attention should be given informing educators, students and media representatives about the judicial process. Judges should increase their efforts to explain the judicial role to the public. Where permitted by law, court should be held in venues other than the courthouse, particularly in schools. When feasible, appellate courts should conduct occasional sessions away from their regular sites.

.....

Problem

Voters in judicial elections generally lack a context in which to evaluate judicial candidates and judicial campaigning. Few people have a clear understanding of the role of the judicial branch or the specific reasons that judges, when campaigning, need to adhere to a higher standard of conduct than other elected officials. The low level of knowledge often applies to journalists and others the public rely upon to explain public affairs.

.....

Rationale

A majority of voters express an interest in learning more about the justice system and judges are their preferred source of such information. A 1998 survey found that 61 percent of the public would like to learn more about the justice system and that 75 percent of those interested in learning more would like to learn from judges or retired judges.²⁸

²⁸ M/A/R/C Research. Perceptions of the U.S. Justice System: A Report to the American Bar Association. (1999). www.abanet.org/media/perception/perceptions.pdf.

Colorado Supreme Court Visits Local High School Systems

Twice every year, Colorado's Supreme Court and Court of Appeals go "on the road," visiting high schools throughout Colorado to hear oral arguments. In preparation for these visits, workshops are held for teachers; students are provided notebooks containing legal briefs, background information, and resource material; speakers from local bar associations address students on the judicial process, law, and relevant cases; and school-sponsored mock court sessions are often held. After oral arguments, the Court and the opposing attorneys discuss the cases and field questions from the audience. Following the program, a cross-section of students are invited to meet informally with the judges or justices over lunch.

Student reaction indicates that first-hand court experience is invaluable to learning. Most striking was how much the students learned by 'unlearning' popular stereotypes of the judicial system. For instance, students expected the judges to be disinterested, but found them engaged by the arguments. Students also expected the arguments to focus on the facts, but discovered that the focus of appellate courts is on rules of law. Finally, much to the surprise of the students, the lawyers were very much like "regular people."

Program: "Courts in the Classroom"
Contact: Karen Salaz, 1-800-888-0001

11th Judicial Circuit of Florida Expands Teacher Education and Creates Local Justice Teaching Institute

The Eleventh Judicial Circuit of Florida has implemented a local initiative patterned after the Florida Supreme Court's Justice Teaching Institute. The local Institutes are day-long seminars offered for teachers two or three times each year. Workshops, panel discussions, case-studies, and role-playing activities are utilized to familiarize the teachers with such topics as technology and the Internet; society and the law; mediation; trial practice/mock trials; the use of the Court as a community resource; and ethics, public trust, and confidence in the justice system. The local JTI makes extensive use of judges, lawyers, and community leaders from both local and state levels, and always features an address by a current or former Supreme Court Justice. The 11th Circuit has recently modified the local JTI to include a session for at-risk students.

The effect of this local JTI, is to expand the "pyramid-approach" of the state JTI, increasing the number of teachers exposed to advanced legal instruction at the "pinnacle," and thereby expanding the number of students exposed to enhanced instruction at the "base." The goal of the local program is "[e]mpowering our youth with the values of responsibility, civility, communication and respect as members of the community."²⁹

Program: Local Initiatives/Justice Teaching Institute
Contact: Nan Markowitz, 305-375-4679

²⁹ The Public Trust
Vol. 1, Summer
(2002). Available at:
http://www.ncsconline.org/Projects_Initiatives/PTC/PublicTrustNews1.htm

15

Recommendation

Courts should use their websites to explain the judicial role to the public. Courts should make as much public information available online as possible, consistent with legitimate privacy concerns. In particular, court dockets and court opinion should be published online as contemporaneously as is consistent with accuracy.

Problem

Traditional methods of disseminating basic information on the role of the courts do not effectively reach a large audience. Courts cannot afford to lag behind other public institutions in using the Internet as a viable informational and educational service. In addition, courts have not fully harnessed the current possibilities offered by the Web to inform and provide service interactively.

Rationale

Court websites offer a new vehicle through which the courts can become better connected to the public. The cost to the courts and the public to exploit the Internet as a dissemination instrument is relatively low, and continues to decrease.

Examples

Indiana Many states use the Internet as a means of distributing traditional educational materials. The Indiana Supreme Court began early to use the Web itself as part of the curriculum. Indiana offers webcasts, with case summaries, of all oral arguments before the Supreme Court and for selected cases before the Court of Appeals and Tax Court. Indiana enhances its broad webcasting activities through its focused “Featured Cases” program. The “Featured Cases” program couples innovative webcasting with comprehensive legal and educational materials. Materials accompanying featured webcasts include: case summary, briefs of petition and reply, associated lesson plans, and case dispositions. Recent “Featured Cases” have focused on interesting and critical legal concepts like: due process, right to trial by jury, construction of legal arguments, statutes of limitations, and medical malpractice.

Illinois State supreme courts also use the Web to make their dockets and opinions available online. In Illinois, a website visitor can enter the docket number, case number, party names, or any other case-specific information in order to search for a particular case. The public may also subscribe to receive e-mail notification when new opinions are posted to the Illinois Court’s website.

Notable State Web Sites



Indiana

Indiana enhances its broad webcasting activities through its focused “Featured Cases” program. Recent “Featured Cases” have focused on interesting and critical legal concepts like: due process, right to trial by jury, construction of legal arguments, . . .

<http://www.in.gov>



Illinois

In Illinois, a website visitor can enter the docket number, case number, party names, or any other case-specific information in order to search for a particular case.

<http://www.state.il.us>

4

SECTION

Campaign Finance

Low budget judicial campaigns are increasingly a thing of the past. Multi-million dollar campaigns for a state supreme court seat are becoming the norm in many states.

The Cost of Judicial Campaigns

Low budget judicial campaigns are increasingly a thing of the past. Multimillion dollar campaigns for a state supreme court seat are becoming the norm in many states. Campaign costs escalate as judicial campaigns become more similar to those for officials in the political branches of govern-

ment—the executive and legislative. Modern judicial campaigns heavily rely on television advertising, and media costs, along with increased competitiveness, have vastly increased the amounts of money in judicial races.

The Rising Tide

In 2000, state supreme court candidates raised \$45 million, setting records in 10 of the 20 states that held supreme court elections. The cost of state supreme court elections in 2000 was a 61 percent increase over the previous state supreme court fundraising record, set in 1998. On average, in the 2000 judicial elections, state supreme court candidates who raised money raised roughly \$400,000 and 16 state supreme court candidates raised more than \$1 million.³⁰ Dramatic changes

in campaign costs have occurred in several individual states. Four of the key supreme court battleground states in 2000 were Alabama, Illinois, Michigan, and Ohio. In Alabama, supreme court candidates raised an average of \$1.2 million; in Michigan, \$750,000; and in Illinois and Ohio, more than \$640,000.³¹

³⁰ Roy Schotland, "Financing Judicial Election, 2000: Change and Challenge," *Michigan State University—Detroit College of Law Review* Vol. 1, p. 2 (2001).

³¹ Deborah Goldberg, Craig Holman and Samantha Sanchez, *The New Politics of Judicial Elections*. Washington DC: Justice at Stake Campaign, pp.7-8 (2002).

Non-Candidate Expenditures

More and more money also is being spent independently of judicial candidates' campaign treasuries. Non-candidate spending in judicial races in 2000 in just Alabama, Michigan, Ohio, Mississippi, and Illinois was estimated to be at least \$16,000,000.³²

At one time it was unusual for interest groups or political parties to spend much in independent expenditures benefiting judicial candidates. Now large independent expenditures are commonplace in several states. And often these independent expenditures do not directly endorse a candidate. Instead, advocacy ads are used that free the interest group from campaign disclosure laws. Additionally, independent campaigns run by parties and interest groups are free from the strictures of the Canons of Judicial Ethics and

from traditional notions of judicial campaigning that avoid discussion of legal issues and negative advertising. As a result, the ads from independent groups or political parties tend to be far harsher than candidate ads. One study of judicial television ads in four states in the 2000 elections found that more than 80 percent of interest group-sponsored ads attacked judicial candidates; whereas, only 27 percent of political party-sponsored ads and 18 percent of candidate-sponsored ads did so.³³

There also are concerns about the sources of judicial campaign money. Much of the money in judicial campaigns comes from parties to litigation, lawyers with cases before the court, or interest groups with interest in litigation outcomes.

³² Roy Schotland, "Financing Judicial Election, 2000: Change and Challenge," *Michigan State University—Detroit College of Law Review* Vol. 1, p. 3 (2001).

³³ Deborah Goldberg, Craig Holman and Samantha Sanchez, *The New Politics of Judicial Elections*. Washington DC: Justice at Stake Campaign, p.17 (2002).

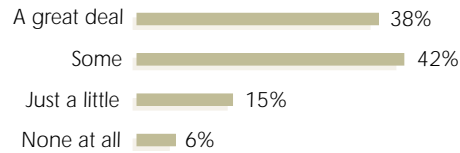
A Concerned Public

These trends in the cost and financing of judicial elections threaten the appearance of fairness in judicial decisionmaking. In the public mind, the fundraising activities of judges and judicial candidates cannot be isolated from judicial de-

cisions. A 2001 national survey, for example, found that 8 of 10 persons believe that campaign contributions made to judges have a great deal or some influence on judges' decisions.

How much influence do you think campaign contributions made to judges have on their decisions?

(asked of registered voters)



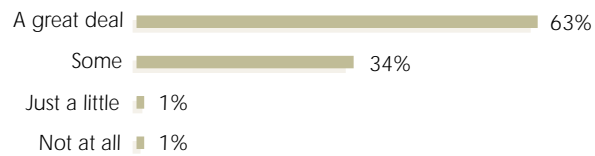
Are you under any pressure to raise money for your campaign during election years?

(asked of judges facing election)



If yes, how much pressure are you under to raise money for your campaign during election years?

(asked of supreme court justices facing election)



Source: Justice at Stake Campaign surveys, see page 15.

16

Recommendation

States in which candidates compete for judicial positions should consider adopting public funding for at least some judicial elections. Even in states that reject public funding for representative officials, the nature of the judicial function makes public funding particularly appropriate for judicial elections. Any public funding system should be sufficiently generous to encourage participating candidates to forego all other sources of campaign funds. The system should be designed to discourage frivolous candidates and to restrict overall spending while allowing appropriate response to independent expenditures.

Problem

The cost of judicial campaigns is increasing, and the bulk of the money for judicial campaigns comes from lawyers, litigants, or other groups with interest in litigation outcomes. The result is a strong appearance of impropriety—a widely held view that campaign money buys judicial decisions.

Rationale

Public funding seems uniquely appropriate to judicial elections. Judges are impartial decision-makers rather than representatives of constituencies and political interests. The rationale for public funding has been expressed in this way:

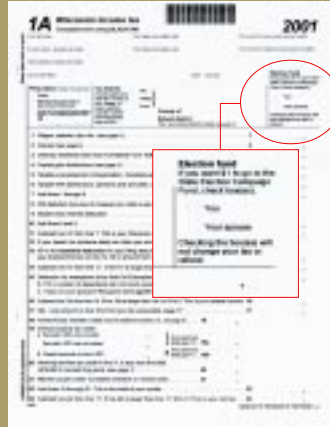
“For states that remain wedded to partisan or non-partisan judicial elections, the potential advantages of underwriting judicial campaigns with public funds are relatively clear. The more money judges receive from public sources, the less they will have to raise from private groups and individuals who are interested in the outcomes of cases the judges decide, which will reduce the potential for campaign contributions to influence judicial behavior and address the public perception that such influence occurs.”³⁴

³⁴ Charles Gardner Geyh, “Publicly Financed Judicial Elections: An Overview,” *Loyola of Los Angeles Law Review* Vol. 34, p. 1471 (2001).

The Wisconsin Experience

“Although several states have ostensibly provided for publicly financed judicial elections, only Wisconsin has made a significant move in that direction with partial funding for supreme court candidates. Under the Wisconsin system, a Wisconsin Election Campaign Fund has been created with revenues generated by a \$1 state tax return check-off. Eight percent of that fund is earmarked for grants to supreme court candidates in years when there is a supreme court election.

To be eligible to receive public funds, supreme court candidates must be opposed and must have raised contributions totaling slightly less than \$11,000, in increments of \$100 or less. The maximum public grant available for a supreme court candidate is \$97,031, which represents 45 percent of a \$215,625 spending limit that, together with specified contribution limits, candidates must agree to honor in exchange for accepting public funds. In the event that a grant recipient is opposed by a candidate who has not accepted public funds and has not agreed to comply with spending and contribution limits voluntarily, the grant recipient is relieved of the duty to abide by spending and contribution limits.”³⁵

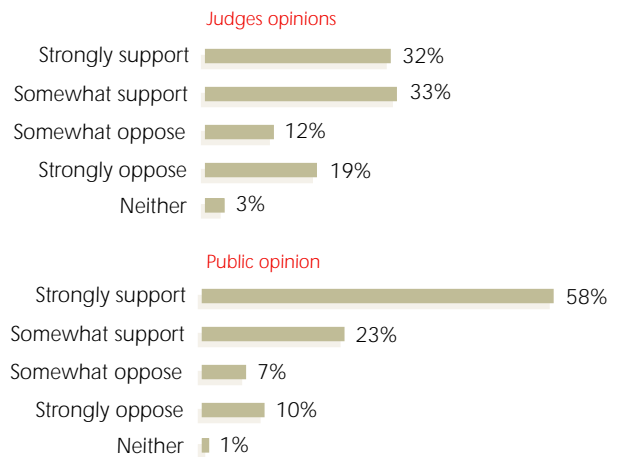


³⁵ Charles Gardner Geyh, “Publicly Financed Judicial Elections: An Overview,” *Loyola of Los Angeles Law Review* Vol. 34, p. 1476 (2001).

North Carolina’s New System

Beginning in 2004, North Carolina will provide what is intended to be full public financing for candidates in the general election for court of appeals and supreme court who accept fundraising and spending limits. Funding would be provided by an optional \$50 increase in the privilege license fee for lawyers and an optional \$1 designation on the state income tax form. To be eligible for public financing, the candidate must raise at least 350 qualifying contributions. Candidates for the supreme court will receive slightly over \$200,000 in public funds and candidates for the courts of appeals will receive \$137,500.

Do you support publicly financed election funds, where spending is limited to the amount they receive from the fund?



Source: Justice at Stake Campaign surveys, see page 15.

17

Recommendation

States should adopt systems for disclosing campaign contributions and expenditures that provide timely and ready access to relevant information without being unreasonably burdensome.

Problem

Voters are deprived of valuable information if a judicial candidate's funding sources are not made public. Yet, in most states it is difficult to identify the names and affiliations of campaign contributors. States often maintain a system for disclosing campaign contributions and expenditures that involves paper filings at a central location. A judicial candidate will send contribution and expenditure papers to the appropriate state agency and those interested in examining the documents must do so at the agency, often located in the state capitol, or pay significant copying expenses.

In the late 1980s, after traveling over 200 miles to the central depository, one scholar found the contribution and expenditure data in his state in considerable disarray with missing papers and disorganized files. The paper reporting system was so cluttered and disorganized that he finally obtained the data from journalists.³⁶

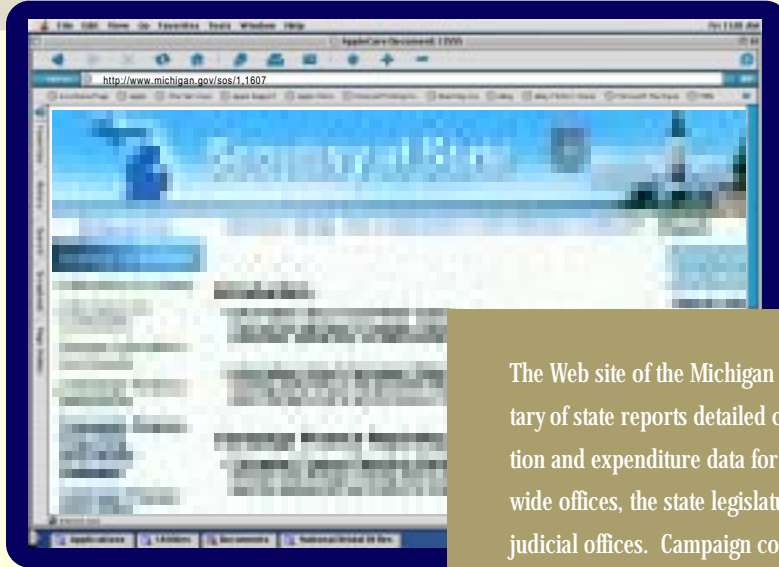
³⁶ See Anthony Champagne, "Campaign Contributions in Texas Supreme Court Races," *Crime, Law & Social Change*, Vol. 17 (1992).

Rationale

The Internet allows for rapid filings and easy access to contribution and expenditure data. With such a computerized system, it is possible to perform numerous searches, including those for late contributions, political action committees, political party committees, candidate committees, and general searches by contributions and expenditures. An Internet search, for example, might organize contributions by date with the amount listed and the name, address, and occupation of the contributor.



Michigan Campaign Finance Reporting - Electronic Filing and Public Disclosure



<http://www.michigan.gov>

The Web site of the Michigan secretary of state reports detailed contribution and expenditure data for state-wide offices, the state legislature, and judicial offices. Campaign committees can file information electronically, although most information still is keyed from original campaign committee statements. Contribution and expenditure data is also available for independent political action committees and party committees as well as for the candidates' campaign committees. Data filed electronically is available within 24 hours of receipt of the report by the bureau of elections. If paper reports are received, the bureau's goal is to key enter the data within two days.

18

Recommendation

By statute or judicial conduct code provision, states should set appropriate limits on the size of judicial campaign contributions.

.....

Problem

The cost of judicial elections has increased as the judiciary increasingly is viewed as a means to political or social ends. The bulk of campaign contributions comes from groups interested in the outcomes of litigation and from lawyers.

.....

Background

Judicial campaign contribution limits can be imposed by state statute. It is also possible for state supreme courts to establish these limits under their judicial rule-making authority for judicial codes of conduct.

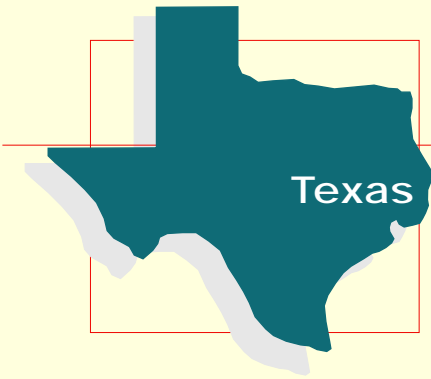
However imposed, restrictions on judicial campaign contributions must be appropriate. Restrictions that are too severe, for example, may drive campaign contributions away from the candidates' campaign committees and to the treasuries of independent political action committees. Such independent expenditures are no longer in the candidate's control and may not be subject to contribution disclosure laws or to judicial canons governing campaigns. The result is that there will be less transparency in campaign expenditures and even more negative campaign tactics. To be appropriate, campaign contribution limits also must consider the size of the voting population that a judge must reach in his/her campaign.

.....

Rationale

Campaign contribution limits are constitutional (although campaign expenditure limits create constitutional problems in their enforcement). And although 11 states have no campaign contribution limits, 39 states restrict campaign contributions in judicial races in some way. Such restrictions on judicial campaign contributions are designed to remedy the appearance of impropriety that is created by large contributions, especially from lawyers or interests who have a stake in litigation outcome.

Effective contribution limits must contend with efforts to evade the law, such as multiple contributions being made by the same family. Contributions limits must not simply be imposed on individuals; political action committees also have to be regulated. Contributions from law firms must be considered in developing contribution limits. Firms that represent businesses and insurance companies, for example, tend to be quite large, and they tend to support judicial candidates opposed by plaintiffs' lawyers, who tend to be in small firms. Without considering the size of law firms – often major contributors in judicial races – large firms and the candidates they support might receive a substantial advantage from the imposition of campaign contribution limits.



First State To Fully Regulate Judicial Campaign Contributions

In 1995, Texas became the first state to pass a law limiting campaign contributions specifically targeting judicial elections. The law, known as the *Judicial Campaign Fairness Act*, has considerably more flexibility than limits in other states. The Texas law has several key components:

- Prohibits candidates or judges from accepting contributions except during a specified election period.
- Restricts individual contributors to a limit per election (a primary, run-off primary, and general election are each considered separate elections) for statewide judicial offices. There is a \$5,000 limit per election for judicial districts with a population greater than 1 million, \$2,500 for districts with a population between 250,000 and 1 million, and \$1,000 for judicial districts with a population less than 250,000.
- Once the combined contributions of a law firm reach six times the limit imposed on individuals, a judicial candidate cannot accept more than \$50 from all other lawyers/members of that firm for that election.
- Contributions from political action committees are also limited. For example, a statewide judicial candidate can take a total of \$300,000 from PACs.
- Encourages voluntary expenditure limits by allowing candidates to note compliance on their campaign literature.³⁷

³⁷ Healy Law Offices. *The Texas Candidates Guide to Campaign Law and American Judicature Society*. "Judicial Selection in the States: Texas" at www.ajs/js/.

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Recommendation

States should consider adoption of the 1999 amendments to the ABA Model Code of Judicial Conduct respecting judicial campaign finance, as appropriate in each jurisdiction.

Problem

As judicial elections become more competitive, the cost of a successful campaign continues to grow at an alarming rate. In 2000, state supreme court candidates raised \$45.6 million—a 61 percent increase over 1998, and double the amount they raised in 1994. Where does all this money come from? Judges receive contributions from a wide variety of sources, but one group that consistently donates large amounts to judicial candidates is lawyers. In fact, one study conducted over 11 years suggests that in 11 states, lawyers' donations accounted for 29 percent of the total funds raised by judicial candidates.³⁸

Consequently, judges are faced with the difficult question of how to successfully raise money while avoiding any appearance of impropriety. The fear is that judges will become dependant on fundraising for their own self preservation, and lawyers will make contributions in an attempt to tip the scales of justice in their favor.

³⁸ Deborah Goldberg, Craig Holman and Samantha Sanchez. *The New Politics of Judicial Election*. Washington DC: Justice at Stake Campaign, p. 9 (2002).

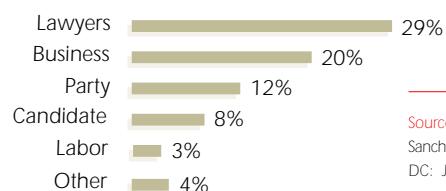
Rationale

To help alleviate this tension, in 1999, the ABA amended the Code of Judicial Conduct to provide specific provisions which judicial candidates must follow when receiving contributions from lawyers. The provisions include:

- A prohibition on judges appointing attorneys to positions when the attorney has contributed above a certain dollar amount to the judge's campaign.
- A requirement that judges be disqualified from cases when they learn that one of the attorneys before them has made campaign contributions in excess of a set amount.
- A regulation requiring judges to refrain from political activity while in office.
- A rule requiring judicial disclosure of all sources of campaign contributions.

States are being urged to adopt these guidelines for the purpose of helping alleviate the tension between campaign fundraising and an impartial bench, while at the same time serving as a framework to guide judicial campaign reform.

■ Sources of contributions to supreme court candidates, 1989-2000



Note: At time of the study, roughly 24% of contribution sources were not yet identified.

Source: Deborah Goldberg, Craig Holman and Samantha Sanchez. *The New Politics of Judicial Elections*. Washington DC: Justice at Stake Campaign, pp.7-8 (2002).

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Recommendation

Some activities of special interest groups in recent judicial elections, particularly those groups located outside the state where the election is being held, have been pernicious. The Symposium on Judicial Campaign Conduct and the First Amendment called for in recommendation seven above, should also include discussion of creative ways, consistent with the right of free speech, in which state rules as to contribution limits and financial disclosure can be applied to outside groups and individuals as well as candidates and political parties.

The Symposium on Judicial Campaign Conduct and the First Amendment was held on November 9-11, 2001. Based on the proceedings, the steering committee of chief justices issued the following recommendation in their report, *The Way Forward* (see Recommendation 4):

Judicial campaign conduct by non-candidates is not subject to similar constraints because of values of free speech and free association embodied in the First Amendment. However, we believe that there is a compelling public interest in narrowly tailored disclosure to assure that when major campaign efforts are mounted with large sums of money, the public is informed as to the identity of the large contributors. To be clear: we encourage the broadest possible participation by all manner of interest groups in the judicial election process. The problem we address is the confusion that unattributed advertisements sow. Voters need the information [that] disclosure provides to intelligently evaluate claims and counterclaims made by participants other than the candidates themselves, and to distinguish the views of such participants, which tend to promote candidates as likely to behave a certain way if elected.

Further, without such disclosure, the efforts to prevent excessive campaign contributions that are

made in many states' statutes, and that are the subject of 1999 amendments to the Model Code of Judicial Conduct, could be evaded. . .

We stress that the variety of campaign spending practices experienced in different jurisdictions calls for different spending levels to "trigger" disclosure requirements. Also, on the question of what trigger levels will protect constitutional values of free association and unchilled speech, advice should be secured from practitioners, the public, and scholars who are expert on campaign finance law, and all of whom represent a diversity of views. Taking into account such advice and the differences among jurisdictions (their size, history, and political culture), we recommend state legislation or court rules providing that if an effort (or associated efforts) in a judicial campaign involves spending more than a prescribed dollar amount . . .

Should states require that all political advertisements in judicial elections clearly state who is paying for the ad?

	Judges Opinion	Public Opinion
Strongly support	84%	71%
Somewhat support	11	17
Somewhat oppose	1	7
Strongly oppose	1	3
Neither	3	2

Source: Justice at Stake Campaign surveys, see page 15.



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