

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
STANDING COMMITTEE ON ELECTION LAW
STATE AND LOCAL GOVERNMENT LAW SECTION
COALITION FOR JUSTICE
NEW YORK COUNTY LAWYERS ASSOCIATION
SECTION OF FAMILY LAW
OHIO STATE BAR ASSOCIATION
TORT AND INSURANCE PRACTICE SECTION
GENERAL PRACTICE, SOLO, AND SMALL FIRM SECTION**

RECOMMENDATION

1 RESOLVED, that the American Bar Association encourages dissemination of
2 information in judicial elections that advances the public's knowledge about the justice
3 system and urges all participants in judicial campaigns to conduct themselves with
4 honesty and integrity so as not to undermine public trust and confidence in the justice
5 system;

6 FURTHER RESOLVED, that the ABA encourages the study of judicial campaigns to
7 determine the impact of campaign spending and advertising on the public's knowledge
8 about and trust and confidence in the justice system;

9 FURTHER RESOLVED, that, in order to further the public's knowledge about and trust
10 and confidence in the justice system the ABA encourages state, local and territorial bar
11 associations in states and territories that conduct judicial elections to establish judicial
12 campaign conduct committees to promote honesty and integrity in judicial campaigns.

REPORT

Background

As the national representative of the legal profession, the American Bar Association is committed to broad goals to improve the American system of justice and public support for the rule of law. Accomplishment of these goals requires a justice system that is supported by the general population and a judiciary that is independent, efficient and accountable. One of the primary purposes of the ABA is support for the judicial system. Part of that support is a long-standing dedication to judicial independence, and a diligence in examining all aspects of judicial selection, including the impact of money on judicial elections. In 1997 the ABA created a Task Force on Lawyers' Political Contributions to examine lawyers' contributions to the campaigns of government officials, judges and judicial candidates. At the Annual Meeting in August 1999, the report and recommendations of the Ad Hoc Committee on Judicial Campaign Finance were presented to and adopted by the ABA House of Delegates. The recommendations modify the ABA Model Code of Judicial Conduct. In addition, the Standing Committee on Judicial Independence has undertaken a number of initiatives focusing on judicial selection. At the 2000 Annual Meeting the Standing Committee presented to the House of Delegates a set of standards on state judicial selection. These standards, which were adopted by the House of Delegates, propose a system for reviewing the qualifications of judicial candidates, regardless of whether a state employs a merit selection system or judicial elections. The Standing Committee recently completed the first comprehensive, national study of public financing of judicial elections. The findings and recommendations of the Standing Committee were presented to and adopted by the ABA House of Delegates at the 2001 Midyear Meeting.

In addition to various policy initiatives, the Standing Committee on Judicial Independence has worked closely with state, local and territorial bar associations across the country to provide information, resources and assistance on issues affecting state judiciaries. The Standing Committee, in conjunction with the Judicial Division, developed a model response to unwarranted criticism of judges. In anticipation of the 2002 election cycle, the Standing Committee distributed a resource kit for bar leaders to aid bar associations in responding to judicial election issues. The concepts outlined in this recommendation are designed to further the ABA's support for the efforts of state, local and territorial bar associations to address judicial selection in their localities.

Judicial Elections

Over the past decade, the tone and tenor of state judicial election campaigns have changed dramatically. Long gone are the days of yard signs and simple leaflets. Today, in the states that use elections to select their state court judges, campaign costs have risen exponentially, television advertising has become a predominant feature in many campaigns, and special interest groups (generally referring to organizations with a particular focus that participate in the electoral process) have begun to actively campaign for or against specific candidates. Now more than ever, special interest groups are playing an active role in judicial elections. There are a number of factors that contribute to this increased interest in who is selected for the state courts, but a predominant factor

has been the belief that our legal landscape can be reshaped by focusing on who is represented on state courts. Over the last decade or so, the courts of many states have garnered a great deal of attention for decisions in cases affecting issues such as tort reform, school funding, and environmental rights, to name a few. This attention has brought with it the desire by many special interest groups to increase their investments in legal reform initiatives. This increased attention to the composition of state courts has been manifested in greater participation in judicial campaigns by these special interest groups. Many state judicial campaigns now involve extensive media advertising, including television advertising, run by candidates and other interested groups.

The 1980s and 1990s saw escalating competition in the funding of judicial elections. The 1998 Report of the ABA Task Force on Lawyers' Political Contributions details the rising costs of judicial campaigns and the proportion of campaign contributions made by lawyers, which range from 10 percent to over 75 percent of all funds collected by judicial candidates in different states. At the same time, other groups, ranging from corporations to unions to the medical profession, joined the effort to elect judges who would be favorable to their interests. The resulting tug-of-war over the bench is an increasing source of concern for the public, the bar, and the judiciary. Recent national surveys have found that 76 percent of American voters, and 26 percent of state judges, believe that campaign contributions to judges have at least some influence on judicial decisions. Voters and judges are even more concerned about the efforts of special interest groups to influence judicial elections: 84 percent of voters and 79 percent of judges express concern about special interest groups buying advertising to influence judicial elections.¹

In years past, state judicial elections garnered very little attention and very little funding. The explosion of money in judicial campaigns over the past decade has had a dramatic impact on the public's trust and confidence in the judiciary. The ABA Standing Committee on Judicial Independence, in its 2001 Report on Public Financing of Judicial Campaigns, documented the escalating costs of judicial elections and its impact on candidates, the system and the public. States that traditionally played host to low-cost, low-publicity judicial campaigns now experience campaigns that cost millions of dollars and draw national attention. These high costs are usually due to extensive television advertising, which is run by candidates, political parties and special interest groups. These advertisements bring judicial candidacies to a much wider audience and, often, the tone and tenor of the ads have a direct impact on the public's perception of the judiciary.

The impact of negative judicial advertisements on the public's trust and confidence in the judiciary remains troubling. In addition, the dramatic growth in campaign costs gives rise to a greater concern on the part of the public that judicial candidates are beholden to those people or groups who contribute to the candidate's campaign. The public, more and more, is questioning the interests and motives of campaign donors, which leads to a lack of trust and confidence in the judiciary generally. A 1995 report by the Citizens'

¹ National Surveys of American Voters and State Judges, conducted for the Justice at Stake Campaign by Greenberg Quinlan Rosner Research and American Viewpoint. Surveys of voters conducted by telephone, October 30 through November 7, 2001. Survey of state judges conducted by mail, November 5, 2001 to January 2, 2002.

Committee on Judicial Elections, a committee appointed by the Chief Justice of the Ohio Supreme Court, found that nine out of ten Ohioans believe judicial decisions are influenced by contributions to political campaigns. In 1998 the Pennsylvania Supreme Court issued a Report of the Special Commission to Limit Campaign Expenditures. This report found that 59 percent of Pennsylvania registered voters thought too much was spent on judicial campaigns. After being informed of amounts actually spent on the campaigns, 81 percent responded that too much was spent on judicial campaigns. Eighty-eight percent of Pennsylvania voters believed that judges' decisions were influenced at least some of the time by campaign contributions and 37 percent of voters thought it was most or all of the time. A June 1999 survey conducted by the Texas Supreme Court and the Texas State Bar, which surveyed judges, attorneys, and court personnel, found that almost half the judges in Texas believe that campaign contributions significantly influence judicial decisions. Seventy-nine percent of the lawyers surveyed believed the campaign contributions affected the decisions of judges. A corresponding public survey found that 83 percent of the public think judges are already unduly influenced by campaign contributions.

The dramatic rise in judicial campaign costs over the past decade is evidence of more active participation by a variety of groups to campaign on behalf of, or against, particular judicial candidates to advance particular philosophies about the role of the courts in our system of government. This increased interest in the ideological composition of state courts did not happen overnight, nor did it occur in a vacuum. The role that judicial ideology should play in the selection process has been debated since the founding of our country. Participation by special interest groups in elections, in part, stems from a concern about the current legal landscape. A number of factors have led to dramatic changes in the role of state courts in our system of government. Cases have been brought before state courts that address very controversial topics, from tort reform, to criminal sentencing, to school funding, to environmental rights. These issues have significant impact on the states and on their individual and corporate citizens. Some special interest groups have determined that there is a benefit to having their perspectives represented on the state courts.

There is, to a great extent, a chain reaction. By taking a more aggressive role, or greater interest, in judicial campaigns, political parties, special interest groups and others drive up the cost of judicial campaigns dramatically, especially if there is a greater reliance on television advertising to deliver, and respond to, particular messages. At the core of the issue is the common belief that we must have a judiciary that is impartial and that provides equal justice to all citizens. Participants in judicial campaigns, from the candidates themselves, to the bar, to special interest groups, while working within the current structure of the elective system, can look to this common interest of an impartial judiciary as a common connection between all their interests.

It is important to recognize that the public's trust and confidence in our justice system directly impact whether the judiciary is perceived to be impartial. It is the perception of impropriety, even without any connection to actual impropriety, that can be so damaging to the public's trust in our justice system. And, as has been shown by numerous surveys and polls, including those illustrated above, the public to a great extent is questioning the

role money plays in judicial elections. By encouraging campaign conduct that enhances the public's knowledge about and trust and confidence in the justice system, all parties involved in the election of judges can work towards the common goal of an impartial judiciary.

Impact of Advertising

The advent of television advertising in judicial elections is not an entirely positive phenomenon. While it is true that television advertising provides a candidate with a conduit to reach a much wider audience than traditional campaign practices might allow, it is also true that television advertising requires a judicial candidate to craft messages in a format not always best suited for a judicial campaign. Additionally, negative attack ads are increasing in use. The large majority of advertisements that were run by interest groups during the 2000 election cycle negatively attacked a judicial candidate. In an analysis of advertisements run in 75 major media markets during the 2000 election, Professor Anthony Champagne identified the major themes of most judicial advertisements. He found that crime control, civil justice and family values were the leading themes used in judicial television ads.² One principle he identified in his analysis was that the advertisements almost always “provided signals to voters about the candidates’ judicial philosophies.”³

Analysts of the campaign advertisements of the 2000 judicial elections found, “[m]ore than any other phenomenon, the aggressively negative tone of television ads sponsored by independent groups defines the new style of judicial campaigns.”⁴ Participation by special interest groups in state judicial campaigns will likely increase. Now is the time to take an in-depth look at how this advertising impacts state judiciaries as well as how it impacts the public's trust and confidence in the justice system.

Overtly negative campaign ads in judicial elections are damaging to the judiciary in a variety of ways. At a time when the public's trust and confidence in the judicial system is at risk, negative judicial campaigns serve only to intensify the public's distrust by reinforcing the belief that state judges are not impartial. The rising cost of campaigns, combined with the messages of many negative ads only provide more fodder in the public's debate about whether our state court judges are beholden to campaign contributors instead of the rule of law. Furthermore, negative campaign advertising may decrease voter turnout. In writing about the effects of advertising, Shanto Iyengar defines one way that advertising impacts the attitudes of voters. He suggests that voters become more cynical when exposed to negative advertising and this increased cynicism may lead to lower voter turnout.⁵ Ballot drop-off for judicial races is already at dangerous levels. If negative advertising truly turns off more judicial voters, there will be an even greater impact at the voting booth. Lack of resources to find objective information on judicial candidates, negative advertisements distorting a candidate's record or character, and the

² Anthony Champagne, *Television Ads in Judicial Elections*, 35 IND. L. REV. (forthcoming 2002).

³ *Id*

⁴ Deborah Goldberg and Craig Holman, *The New Politics of Judicial Elections*. Justice at Stake Campaign, February 2002, pg. 4.

⁵ Shanto Iyengar, *The Effects of Media-Based Campaigns on Candidate and Voter Behavior: Implications for Judicial Elections*, 35 IND. L. REV. (forthcoming 2002).

impact of escalating campaign costs should serve as an alarm to all who are concerned about the independence of our state judiciaries. Accordingly, the American Bar Association's Standing Committee on Judicial Independence and Standing Committee on Election Law ("Standing Committees") propose encouraging the study of judicial campaigns to determine the impact of campaign spending and advertising on the public's knowledge about and trust and confidence in the justice system.

Campaign Conduct Committees

The American Bar Association, along with state, local and territorial bar associations, have long put the preservation of judicial independence at the forefront of their association priorities. State, local and territorial bar associations have often served as a resource for the public by providing evaluations of judicial candidates, responding to unwarranted criticism of judges and disseminating information about the role of the judiciary in our system of government.

Given the bar's position within the community, bar associations are uniquely qualified to lead the way in fostering innovative efforts to stem the influence of campaign contributions and negative campaign advertising. Bar associations traditionally have served as an information source, rating the qualifications of judicial candidates and promoting a greater understanding about what judges do. State and local bar associations have already begun to build on this reputation by creating judicial campaign conduct committees. In order to bring these good works to a wider audience, the Standing Committees encourage the continuation and further development of campaign conduct committees.

The changing nature of judicial campaigns, coupled with recent uncertainty as to the extent states can regulate judicial campaign speech, highlights the need for a more systematic, comprehensive approach to informing the public, and judicial candidates, about the appropriate tone and tenor for judicial campaigns. The concept of judicial campaign conduct committees provides a vehicle for bar associations to begin crafting a more comprehensive mechanism for distributing information.

Over the past decade, a number of judicial campaign conduct committees have been established, either through state supreme courts, a local bar association or as part of a state's judicial disciplinary body. These judicial campaign conduct committees are designed to achieve a variety of objectives, including educating judicial candidates about various campaign and ethical requirements, reviewing campaign materials for conformance with ethical codes, fielding complaints during the campaign regarding judicial campaign advertising, and responding to factual misstatements or attack ads.

Campaign conduct committees could undertake a number of initiatives designed to improve public trust and confidence in the judiciary, to provide a tempering voice amid the myriad campaign advertisements, and provide clear guidance to judicial candidates and others regarding campaign and ethics requirements. Judicial candidates, political parties, and special interest groups all participate in the judicial election process and provide the public with a variety of competing messages about the qualifications of judicial candidates. An independent, credible body such as a campaign conduct

committee could serve as a guidepost for voters wading through candidate information. By proactively providing information to voters on how to evaluate the qualifications of a judicial candidate, the campaign conduct committees provide a tool to voters to confidently assess the information they receive during the election cycle. Campaign conduct committees can speak out in response to misleading or factually incorrect advertising. Campaign conduct committees also can provide candidates and other participants in the election process with guidelines about ethical and campaign requirements. Bar associations have long been leaders in promoting the role of the judiciary and the importance of judicial independence. Campaign conduct committees are one more resource bars can provide to continue the work they do each day to promote the benefits of an impartial and accountable judiciary.

Two basic types of campaign conduct committees currently exist in the states. Alabama, Florida, Georgia, Louisiana, Mississippi, Nevada and South Dakota have official bodies. These are bodies administered by a state supreme court, a state disciplinary body or a mandatory bar association. Unofficial or voluntary bodies exist at the local level only in California, New York, Ohio and Washington. These voluntary bodies are usually administered by bar associations.⁶ In addition, the New York State Bar is working with the Administrative Office of the Courts and local bar associations to encourage formation of conduct committees across the state.

In determining how campaign conduct committees might best serve the needs of the public as well as judicial candidates, there are a number of factors to consider, not the least of which is how campaign conduct committees coincide with official state disciplinary agencies. A few states have set up campaign conduct committees under the auspices of the state disciplinary body. Given the current uncertainty of constitutional law regarding judicial campaign speech, states should be cognizant of the tension between the disciplinary nature of the committee and the candidate's First Amendment rights. Voluntary or unofficial bodies have been established by a number of states. These types of campaign conduct committees have no formal enforcement mechanism and are not designed to undertake resolving official complaints against judicial candidates during an election. Whether a state chooses to administer a campaign conduct through a state disciplinary agency or not, it is important that candidates and others involved in the election process have an agency to provide fair and accurate resolution of campaign complaints. It is also vital that the agency designated to receive and review complaints has an established mechanism for responding rapidly to complaints filed within the weeks prior to judicial election. Additionally, regardless of whether a campaign conduct committee is organized as an official state body or as a voluntary committee, the campaign conduct committee must also be prepared to administer its work rapidly within the weeks prior to the judicial election.

States may determine that it is more feasible to create a statewide campaign conduct committee, which would provide for greater uniformity in disseminating information as well as greater resources for administering the work of the committee. Other states may

⁶ Barbara Reed and Roy Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. (forthcoming 2002).

decide that it is unfeasible for one committee to efficiently handle all the judicial campaigns in the state and that local or regional committees would be the most beneficial way to establish campaign conduct committees.

In addition, when considering how to structure these committees, a primary consideration should be ensuring the independent nature of this body. The best way to provide credibility would be to equally divide membership on the committee between lawyer and non-lawyer members. Additionally, uniform procedures and rules for the committee should be established and made public.

Campaign conduct committees should disseminate to every judicial candidate, as well as that candidate's campaign committee, materials regarding candidate filing procedures, candidate duties and responsibilities under the applicable standards of judicial conduct, examples of acceptable and unacceptable judicial campaign advertising or conduct, campaign finance regulations, and the rules and procedures of the campaign conduct committee. Ideally, the campaign conduct committee should distribute these materials during a candidate forum where candidates would have the opportunity to ask questions and discuss the materials. If this is not financially or logistically feasible, the materials should be distributed in written and electronic form and possibly made available through the bar association's website.

The Standing Committees understand that the unique needs of each state and/or city will be the ultimate guide for determining how to establish and administer campaign conduct committees. Whether official or voluntary, statewide or local, there are a variety of models to guide bar associations and the Standing Committees are dedicated to assisting bar associations in the design of appropriate campaign conduct committees and stands ready to provide information and assistance. Details as to the exact structure of the committee are best left to the administering bar association, which is best able to assess the unique needs of its locality.

Conclusion

Currently, judicial elections exist, in some form or another, in thirty-nine states. The election process encourages and relies upon participation by a number of groups in order to distribute information, and debate views and concepts. Therefore, the selection system, in and of itself, demands active participation by a number of players. This concept, though, when applied to elections for judicial candidates, impacts many basic beliefs about what we expect from our judiciary. To a great extent, the current manner in which judicial campaigns are being held may have a negative impact on the public's trust and confidence in our system of justice. Expensive campaigns, excessive campaign contributions from interested parties, and negative television advertising all call into question the partiality of judicial candidates. We have seen a dramatic shift in the cost, tone and tenor of state judicial campaigns over the past decade with no signs of any decrease in participation. This increased commitment to judicial campaigns is already in evidence for the 2002 elections, where all parties, special interest groups on all sides as well as the candidates, are preparing for very costly campaigns in a number of states. The factors that are driving this trend are numerous, but the impact of such negative

campaigns on the public's trust and confidence in the judiciary remains troubling. By encouraging greater dissemination of objective information, studying the impact of advertising on the public's trust and confidence, and establishing judicial campaign conduct committees in states that elect judges, the bar will be in a much better position to ensure that our judiciaries remain independent, efficient and effective for generations to come.

Respectfully submitted,

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