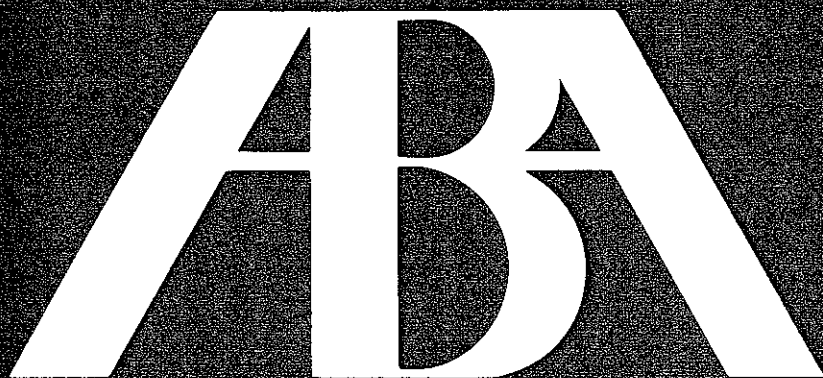


summary of action of the house of delegates

AMERICAN BAR ASSOCIATION



1998 ANNUAL MEETING • TORONTO, CANADA • AUGUST 3-4, 1998

* The Task Force's second recommendation (Report No. 301B), which urges that certain actions be taken with respect to the conduct of lawyers making significant political campaign contributions to judicial candidates, was withdrawn by the proponents.

Legal Aid and Indigent Defendants (Report Nos. 112D, 112E and 115)

For action on the Committee's first recommendation (Report No. 112D), recommending that all jurisdictions ensure defendants are represented by counsel at their initial judicial appearance where bail is set and that adequate resources be apportioned for effective implementation, which was presented by the Criminal Justice Section, see Criminal Justice at page 12.

For action on the Committee's second recommendation (Report No. 112E), urging that adequate funding be sought by the appropriate federal entities for the full and adequate compensation of attorneys appointed under the Criminal Justice Act (CJA) to represent indigent clients, and to include annual cost-of-living increases for CJA attorneys, which was presented by the Criminal Justice Section and cosponsored by the Commission on Opportunities for Minorities in the Profession, see Criminal Justice at page 21.

The Committee's third recommendation (Report No. 115), urging jurisdictions to adopt standards for indigent defense systems, using widely-available models to prepare such standards; urging both courts and state, territorial and local bar associations to support the development and adoption of such standards; and suggesting that funding for indigent defense systems be awarded contingent upon compliance with such standards, which was cosponsored by the Los Angeles County Bar Association, the Indiana State Bar Association, the Tort and Insurance Practice Section, the Young Lawyers Division, the Criminal Justice Section and the Government and Public Sector Lawyers Division, was approved by voice vote.³ It reads:

RESOLVED, That the American Bar Association calls upon each state, territorial and local jurisdiction to adopt minimum standards for the creation and operation of its indigent defense delivery systems based on:

- (i) American Bar Association, "ABA Standards for Criminal Justice: Providing Defense Services" (Third Edition (1992));
- (ii) American Bar Association, "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989); and ABA policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);
- (iii) National Legal Aid and Defender Association, "Guidelines for Negotiating and Awarding Indigent Defense Contracts" (December 1984); and

³ Marvin E. Aspen of Illinois abstained from voting with respect to this resolution.

REPORT NO. 2 OF THE
TASK FORCE ON LAWYERS'
POLITICAL CONTRIBUTIONS

RECOMMENDATION*

RESOLVED, That the American Bar Association in order to protect the integrity and independence of judges and candidates for election to judicial offices, and to promote public confidence in that integrity and independence, urges the amendment of the Model Code of Judicial Conduct, and where appropriate the Model Rules of Professional Responsibility, as set forth in Attachment A, Proposed Amendments to Protect the Integrity and Independence of Judges, dated August 1998 and requests that the Standing Committee on Ethics and Professional Responsibility take the appropriate actions to implement the amendments.

FURTHER RESOLVED, That the American Bar Association urges that the following additional steps be considered to further protect the integrity and independence of judges and candidates who stand for election and to further promote public confidence in that integrity and independence:

- 1) That States which have not adopted Canon 5's provisions limiting the period during which judicial campaigns may solicit contributions, should do so.
- 2) That the Model Code of Judicial Conduct should require that if a judicial candidate raises funds but has no opponent (as of the deadline by which candidates must file), or if a judicial candidate funds, after the election and after a reasonable period to pay all sums owed for campaign expenses, that the campaign has a final surplus, then the committee shall either return the funds to contributors *pro rata* and/or give the funds to an entity to be determined by the jurisdiction.
- 3) That bar associations and other citizen organizations consider three additional steps, to reduce judicial candidates' need for funds and encourage compliance with campaign regulation:
 - a) Voters' Guides, to promote informed voting.
 - b) Judicial Campaign Oversight Committees, to assist judicial candidates in meeting appropriate standards to assure that their campaigns promote public confidence in the judiciary.

*The recommendation was withdrawn. See page 36.

- c) The ABA should (a) initiate (with the National Center for State Courts) a system to receive and publish data on judicial campaign finance; and (b) urge state, territorial and local bar associations to gather and publish data on judicial campaign finance in their jurisdictions.
- 4) That States which provide public funding for some campaigns consider extending such funding to judicial campaigns; and that States, bar associations and other citizen organizations study and consider several States' experience with alternative sources of funds for judicial campaigns (public funding and voluntary pooled funds).

ATTACHMENT "A"

PROPOSED AMENDMENTS TO PROTECT THE INTEGRITY AND INDEPENDENCE OF JUDGES

AUGUST 1998

- 1) That Canon 5C(2) of the Model Code of Judicial Conduct be amended to include the following:
- A candidate's committee shall, in addition to complying with the jurisdiction's requirements for disclosure of campaign contributions, file all disclosure reports with the clerk of the court to which the candidate seeks election, and shall take all practicable steps to assure full disclosure of lawyers' contributions.

If a judicial candidate raises funds but has no opponent (as of the deadline by which candidates must file), or if a judicial candidate finds, after the election and after a reasonable period to pay all sums owed for campaign expenses, that the campaign committee has a final surplus, then the committee shall either return the funds to contributors *pro rata* and/or give the funds to [an entity to be determined by the jurisdiction].

- 2) That Canon 5 of the Model Code of Judicial Conduct be amended to include the following as a new Canon 5C(4):
- The campaign committee of a judge or of a candidate for election to a judicial office shall be limited in the amount of contributions it may receive from any individual, law firm, political action committee, or political party. The limits should be determined by each jurisdiction.

- 3) That Canon 5 of the Model Code of Judicial Conduct be amended to include the following as a new Canon 5E and that existing Canon 5E, "Applicability," shall be redesignated 5F:

Judges subject to election shall recuse themselves, upon motion of an opposing party, if a party to the lawsuit or counsel for a party has made (a) a contribution in violation of the jurisdiction's applicable contribution limit; or (b) if contribution limits are not adopted, a contribution larger than the applicable figure set as grounds for refusal.

- (1) If a judge (or a judge's campaign committee) received a campaign contribution in violation of the jurisdiction's limit on such contributions, this Section shall apply and the judge

- upon motion shall withdraw from the case, independent of any other enforcement sanctions for the violation. If the jurisdiction does not have any applicable limits on contributions to judicial candidates' campaigns, this Section shall apply and the judge upon motion shall withdraw from the case, if the judge (or the judge's campaign committee) received a campaign contribution which aggregates (including direct and any indirect contributions but in retention elections including only all direct contributions) more than [\$ ____].
- (2) A motion under this Section may be made by a party if an opposing party or an opposing party's counsel made a contribution covered by this Section. Such a motion shall be granted unless the judge who decides the motion makes findings that the violation was clearly inadvertent, that no reasonably prudent person would be in fear of not receiving a fair and impartial trial, and that granting the motion would cause undue delay or expense or substantial docket management difficulty.
- (3) A contribution covered by this Section shall be grounds for refusal from the time the contribution is made, until the end of the term to which the judge was elected in the campaign to which the contribution was made.
- 4) That the Model Code of Judicial Conduct and the Model Rules of Professional Conduct be amended to include the following:
- A judge shall not appoint a lawyer, and a lawyer shall not accept appointment, as a guardian, executor, special master or in any similar capacity if the lawyer, or the lawyer's law firm, or another lawyer or employee of the law firm has made political contributions to the judge's campaign above [\$ ____], being the applicable contribution limit or other figure established for the purposes of this provision]. The bar on appointments shall begin when the contribution limit is exceeded and run until the end of the term to which the judge was elected in the campaign for which the contribution was made. The bar on appointments shall not apply if the appointive service is (1) *pro bono* and without any fee, or (2) otherwise of such extraordinary nature that there are no grounds for any impression of impropriety and the judge makes findings to that effect.

REPORT¹

BACKGROUND

The American Bar Association created the Task Force on Lawyers' Political Contributions to examine lawyers' political contributions to government officials and to judges and judicial candidates

¹The Task Force on Lawyers' Political Contributions produced a final report in two parts. The second part, regarding contributions to judges and judicial candidates, entitled Report and Recommendations of the Task Force on Lawyers' Political Contributions Part Two (referred to herein as the "Full Report") is available from the Task Force.

before whom the lawyers may appear. The Task Force's mandate with regard to the latter issue is:

to determine whether additional professional standards, laws or procedures relating to political campaign contributions are necessary and desirable, including the conduct of lawyers making significant political campaign contributions to judicial candidates before whom the lawyers appear.

The Task Force has met with and consulted persons who have been involved in relevant efforts in several States, and has reviewed legal and political science research on the extent and nature of lawyers' financial role in judicial campaigns. The Task Force has also reviewed the efforts being made across the country to address problems in the funding and related conduct of judicial elections. Reform initiatives have blossomed in several States in recent years, including Alabama, Kentucky, Michigan, Mississippi, Ohio, Pennsylvania, Texas, and Washington. The Task Force's Report and the Recommendations contained in it reflect the experience gained to date in those jurisdictions and others.

The Task Force emphasizes our unanimous support for the American Bar Association's endorsement of merit selection of judges, adopted in 1937 and reaffirmed in many ways since. Our Task Force mandate rests on the recognition that with 42 states having judges at some level stand for election of some type,² the necessity

²Retention-only, non-partisan or partisan.

Of the nation's 1,243 state appellate judges, 81.9% stand for election of some type and 47.9% face contestable elections: 423 (34%) face retention-only, 174 (14%) face contestable non-partisan elections, and 421 (33.9%) face contestable partisan elections.

for raising campaign funds creates problems. Indeed, we believe the problems we document only add strength to the case for merit selection. But whatever one's views on how judges should be selected, the problems inherent in funding judicial election campaigns must be addressed. Judicial independence, the integrity of the courts, and the public's trust in the judicial process and in our profession are all vulnerable to erosion by concerns about the relations between a judge and the attorneys appearing before him or her. Our goal has been to address such concerns—both matters of appearance and to the extent they may exist, realities of potential impropriety—with respect to lawyer participation in judicial campaign financing. We reaffirm that lawyers have a rightful and important role in judicial elections. The Task Force's Recommendations are designed to fortify the lawyer's role and the public's appreciation of it.

Accordingly, the Task Force recommends several steps for immediate implementation in the States in which judges stand for election of some type. Additionally, the Task Force suggests several other steps, closely related to the mandate of the Task Force, which merit consideration by those States. These recommendations and suggestions are em-

²Of the nation's 8,489 state judges in trial courts of general jurisdiction, 86.9% stand for election of some type and 77.3% face contestable elections: 818 (9.6%) face retention-only, 2,891 (34.1%) face contestable non-partisan elections and 3,669 (43.2%) face contestable partisan elections. American Judicature Society, *Judicial Selection in the States*, 1998; National Center for State Courts, *State Court Caseload Statistics*, 1996. These data are more fully presented in Attachment A of this Summary and Appendix Two of the Full Report.

bodied in the Resolution which accompanies this Summary and appears as Appendix One of the Full Report.

The Context for Lawyers' Contributions to Judicial Elections

Any aspect of judicial elections begins with one over-riding fact: these elections are uniquely different from all other elections. But to appreciate the uniqueness of judicial elections, we must first note the differences between judges and other elective officials.

Executive and legislative officials are elected in all democracies, but the United States is all but unique in having judges stand for election. These judicial elections are of three types:

Retention Elections The elections that are most different from ordinary elections are "retention" elections, in which sitting judges are on the ballot seeking "yes" votes for another term, but there is no direct opponent. Twenty states have such elections.³ Despite the lack of an opponent, on occasion such elections are hotly contested. The most expensive and probably most controversial judicial election ever was California's in 1986, when Chief Justice Rose Bird and two of her colleagues were denied retention. A Wyoming Justice was denied retention in 1992 and Nebraska and Tennessee Justices in 1996. In Florida in 1990 and 1992, the Chief Justice and another Justice won retention despite active efforts against them, fueled by their votes in particular cases. And this year in California, the retention of the Chief Justice and an Associate Justice is drawing opposition substantial

enough that the Chief Justice has said he "had hired political advisors and had started raising campaign funds to 'avoid being blind-sided.'"

That recent experience with retention elections in States as diverse as Wyoming and Florida, Nebraska, California and Tennessee, calls for a special note. That experience makes clear how necessary and proper it is for lawyers to participate appropriately in judicial elections. Three generations of efforts by lawyers for merit selection have succeeded in almost 20 States, almost all with retention elections. (Retention elections are different from even other judicial elections in ways that warrant differences in how they are handled, as we specify below in §§ II and III.)

The Bar has a special obligation to make those elections fulfill their goal: the balanced pursuit of both judicial independence and judicial accountability. 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. In such a situation, it is particularly important for lawyers to support the judicial process and the rule of law. Below, when we examine lawyers' campaign contributions (§ II), we expand on the value of the lawyers' role in judicial elections. Our Task Force recommendations all aim at strengthening that role, the judicial independence it supports, and the public understanding of both.

Non-Partisan Elections Non-partisan, contestable elections are conducted in 17 states.

Partisan Elections Partisan, contestable elections are conducted in 14 states.

³See Full Report for footnotes.

Some States fall into more than one category: e.g., California and New York have retention elections for appellate judges, but California trial judges face nonpartisan contestable elections, and New York trial judges face partisan contestable elections.

In sum, in 42 States, judges at some level stand for election of some type.

The six major differences between judicial elections and other elections, which render them what may be called "quasi-elections," are 1) restraints on campaign conduct, 2) special types of elections, 3) ballot placement, 4) lack of voter awareness, 5) the special role of attorneys, and one more—6) the special role of name familiarity: Whatever one's view of the value of famous names in politics, in judicial elections name-familiarity is more important than ever. (In a sense, this is not a separate, sixth difference from other kinds of elections, but rather a result that flows from the other differences.) Examples are striking:

In Washington State in 1990, the highly regarded Chief Justice Callow was defeated by an unknown Tacoma lawyer who won 53% of the vote though he didn't campaign (he spent \$500), but who had the same name as Tacoma's TV anchorman, well-known statewide. In the Dallas area, only one Democratic judge has survived the rising Republican tide, and though he is able and well-regarded, he enjoys the same name as the leading local disk jockey. In San Antonio in 1990, a well-regarded judge was defeated for a Supreme Court nomination by a lawyer new to the area, a recent retiree from the Army, but whose name was Gene Kelly. And this year in North Carolina, a primary election cost one of the State's most respected appellate judges his seat.

The trial judge who defeated him had twice been censured by the Supreme Court for improper conduct, but had the same name as a recent former governor and used campaign signs that looked like that Governor's. Similar examples abound. [See Full Report at pp. 11-13.]

When we turn to aspects of judicial campaigns, such as lawyers' contributions to the candidates and the candidates' fund-raising generally, the differences noted above show we must keep in mind how great is the difficulty judicial candidates face in aiding voters to cast meaningful votes.

Changes in Judicial Elections

"In the past, judicial elections were low-key affairs, conducted with civility and dignity. As a result, they were relatively inexpensive. However, that is no longer the case. Today, in many jurisdictions, judicial elections have taken on all of the trappings of partisan politics, significantly increasing the resulting cost."

There is a widespread misperception that Texas is the main arena for judicial campaign finance problems, or at least that such problems rarely arise in States that have non-partisan or retention-only elections. But consider:

First, examples of notable spending in retention-only elections:

1) California had the most expensive judicial campaign ever, in 1986 when \$10,700,000 was spent and three Justices were denied retention. The Justices had raised \$4,100,000, including some large contributions from lawyers and lawyer-affiliated groups; almost all of the opposition's \$6,600,000 were small, grass-roots contributions.

Unprecedented as was 1986, it was not the first time for costly retention elections in California: 1978,

total spending; for and against one Justice: \$643,000; and 1982, total spending for and against the same Justice: \$870,000.

2) Florida's Justices have won retention but faced such opposition that in 1984 two Justices spent about \$300,000, in 1990 and spent \$300,000 and in 1992, one spent \$400,000.

3) Nebraska in 1996 denied retention to a Justice. The Justice had raised \$80,000, the opposition was an organized group that spent an estimated \$200,000.

Next, notable examples of spending in non-partisan elections:

1) Los Angeles Superior Court: campaigns' median spending in 1976 was \$3,177. In 1994, the median spending was \$70,000.

2) Kentucky's Supreme Court spending for one seat in 1978 was \$52,000. In 1996, the average spending for two seats was \$412,362.

3) Montana's Supreme Court spending in 1980 was \$59,000 but \$247,000 in 1986. In 1984 the average was \$63,647 for a contested seat, but in 1996 that average was \$138,460.

4) Washington's Supreme Court spending in 1970 averaged \$17,500, but in 1995 each winner spent about \$150,000.

5) Wisconsin—which is unique with its public funds for judicial candidates—in 1979 had average Supreme Court spending of \$51,000, but in 1997 the average was \$449,537.⁴

We submit that the need for reform could not be clearer nor more urgent, given the value we place on public confidence in the courts, on judges' independence and integrity, and on

making the bench attractive to the kinds of people we need as judges.

When the California Judges Association in 1983 sent its members a questionnaire about their campaign experience, one Judge's reply included this:

I would solicit and expect more help from local attorneys next time. Because of the ethical problems I avoided the whole issue. If the Bar wants competent judges (and in my case the issue was clear) it must get down in the dirt with us.

Another judge wrote this:

The best lawyers are not applying for judgeships because of lack of faith in the appointment process and they do not want to engage in political campaigns in order to gain re-election.

For such reasons, the American Bar Association must take steps to make judicial elections much more what they should be. Our recommendations are designed to accomplish that goal, with flexibility so as to be tailored appropriately for each jurisdiction's circumstances.

State Supreme Courts, and in some States lawyer disciplinary authorities, can regulate the behavior of judges and judicial candidates as they cannot that of other government officials and candidates. In doing so, the courts and disciplinary authorities have often heeded the ABA's statements of proper conduct for judges and judicial candidates, as found in the Model Code of Judicial Conduct. Hence, the ABA can appropriately propose rules for judges and candidates who receive judicial campaign contributions as well as for lawyers who contribute. This permits

⁴For sources and fuller data, see Appendix Three of the Full Report, at pp. 77-103.

ways of addressing problems posed by campaign contributions in judicial elections that are not open to the ABA or the Task Force in considering contributions to candidates for other government posts.

TASK FORCE RECOMMENDATIONS

I. Canon 5 of the Model Code of Judicial Conduct Should be Amended With Regard to Disclosure Requirements

[See Resolution and Full Report at pp. 19-23.]

The Task Force recommends, that the Resolution be implemented along the following lines:

- 1) Consistent with existing law, disclosure requirements shall apply to all contributors to a judicial campaign. Appropriate bodies should review the sufficiency of existing provisions (and their implementation).
- 2) Judicial candidates' campaign committees should take two additional steps:
 - a) Judges' and judicial candidates' campaign committees should file their campaign finance disclosure reports not only with the official repository agency, but also with the clerk of the court to which the candidate is seeking (or has just sought) election. This will assure public access to the information.
 - b) The special position of lawyers warrants especially full disclosure of their contributions. The fuller disclosure will be unburdened some in jurisdictions that have (or in the many that are about to have) elec-

tronic filing of campaign finance reports. We recommend fuller disclosure through electronic filing. If electronic filing is not available in the near future, we recommend fuller disclosure even in the absence of electronic filing.

c) That fuller disclosure should cover:

- (1) All "lawyer-contributors," which shall include any contributor who is (A) a lawyer or lawyer's spouse or minor child resident with the lawyer, (B) a law firm, (C) an employee of a lawyer or a law firm, or (D) a political action committee sponsored by a law firm.
- (2) Every contribution (above a *de minimus* level of \$___) from a lawyer-contributor shall be identified by full name, and firm or employer. In addition, every lawyer-contributor who is also a member of the candidate's campaign committee shall so indicate.
- (3) The judicial candidates' committees shall make best efforts to collect the required information. The jurisdiction should monitor the level of compliance in reporting identifying information on contributors. If the compliance level proves unsatisfactory, the jurisdiction should consider requiring that candidates'

committees return contributions from any contributor who is not fully identified.

(4) Judicial candidates' committees shall, in (or in addition to) their official filings, indicate separately (A) the total sum received from lawyer-contributors, (B) the name, address, and contribution of each lawyer-contributor who contributed more than \$___, and (C) the amount received, directly or indirectly, from each law firm that contributed more than \$___ (whether from the firm, its members and employees, or its political action committee).

- 3) Any political party, political action committee, other entity which either contributes more than \$[say, \$1,000] to or makes expenditures of more than \$[say, \$1,000] in connection with a judicial campaign (other than expenditures by a political party for generic voter registration or get-out-the-vote efforts, or for generic advertising about the party and its positions, or for lists of candidates that include a majority who are not judicial candidates), shall
 - a) report the same additional information as specified in 2(c) above in its campaign finance disclosure reports. If the entity is not otherwise required to file campaign finance reports, it shall file such reports with the jurisdiction's official body re-

sponsible for lawyer discipline, on the same time schedule as is required for candidates and entities that are required to report; and b) file their campaign finance reports not only with the official repository agency but also with the clerk of the court to which the judicial candidate is seeking (or has just sought) election.

4) The official repository of campaign finance reports shall aggregate the contributions of each lawyer-contributor to each candidate and to each party or other entity and report the total contributions from all lawyer-contributors to each; and shall report, for each lawyer-contributor whose aggregate contributions (and/or fund-raising) amount to more than \$[___], the aggregate sum contributed and/or raised.

II. Canon 5 of the Model Code of Judicial Conduct Should be Amended With Regard to Contribution Limits

[See Resolution and Full Report at pp. 23-34.]

If in fact very large proportions of the public believe that judicial decisions are affected by campaign contributions, that alone requires action. We must preserve the public confidence that is crucial to sustain the courts, "the least dangerous branch," which lacks the other branches' powers of purse and sword, and which enjoys none of the constant bonding with constituents that characterizes officials in the other branches.

Unfortunately but not surprisingly, recent polls demonstrate that campaign contributions to judges are seriously eroding public confidence in the courts:

1) "Nine out of ten Ohioans believe judicial decisions are influenced by contributions to political campaigns."

Report of the Citizens' Committee on Judicial Elections [appointed by Chief Justice Moyer], 1995, at 1.

2) "[Pennsylvania] voters are firmly convinced that large campaign contributions lead to special treatment, including from judges. They believe contributors expect—and receive—something in return for their largesse, even in the courtroom...."

Report of the Special Commission to Limit Campaign Expenditures [appointed by the Supreme Court], 1998, at 4⁵.

3) A 1987 Texas poll found strong support for changing the system of selecting judges, "driven mostly by two negative perceptions of the present system.... Election costs are out of hand, threatening the independence of judges from special interest campaign contributions. Voters are ill-informed about judicial candidates...."

Tarrance Hill Newport & Ryan, New Poll Shows Overwhelming Support for Judicial Election Reforms (January 1987), 4-5.

4) A 1997 Arizona poll found 84% expressing "Total Dis-

The Pennsylvania poll asked "How frequently do you think the decisions made by judges in their courtrooms are influenced by large contributions made to their election campaigns, always, most of the time, some of the time or never?"

The answers, divided into four geographic regions: "always/most of the time" ranged from a high of 46% in North/NE to a low of 31% in Metro Philadelphia and Central.

agreement]" with this statement: "It is appropriate for judges to accept campaign contributions from persons and corporations who may later be litigants in court."

Administrative Office of the Courts, State Court Citizen Survey, at 14.

We know enough—from, such polls, from scholarly and popular articles, and from consultation with judges, lawyers, and lay persons—that we say this confidently: the problems encountered in jurisdictions with judicial elections are so similar (especially when it comes to campaigns that are state-wide or in large urban areas) and are so acute as not merely to justify remedial steps, but to demand them.

The problem will not be remedied by addressing only contributions from lawyers for three reasons [See Full Report at p.27].

We recommend that Canon 5 of the ABA Model Code of Judicial Conduct be amended to add the following:

"C(4) A judge's or a candidate's committee may not accept from any contributor a contribution which aggregates (including direct and any indirect contributions, but in retention elections including only all direct contributions):

"(1) more than \$ _____ if from an individual; or

The different treatment of retention elections is explained in n. 9 below.

We stress that the precise figure for the contribution limit must be determined in light of each State's particular circumstances. The figure should reflect several variables, such as: (a) What does the particular jurisdiction's recent experience show are typical levels of contributions for the judgeship in question? (b) What are the typical levels of expenditure

in those campaigns, including campaigns for open seats and in competitive elections? (c) What amount of expenditures would allow a candidate in that jurisdiction to communicate effectively to the electorate, even in a large field of candidates and with many other offices up for election?

We stress also that: the level of contribution limits must be set with full awareness of three almost certain consequences, however unintentional, of such limits: (1) the lower the limits, the higher the status of individuals who raise funds; (2) the lower the limits, the greater the incentive for either independent spending (which is constitutionally protected), or indirect support by political parties or other groups; (3) the lower the limits, the greater the likelihood that more wealthy, self-funding, candidates will win or at least challenge less wealthy candidates. Note also that some limits have been found so low as to interfere with First Amendment rights, see e.g. *Carver v. Nixon*, 72 F3d 633 (8th Cir. 1995), c.d. 518 U.S. 1033 (1996) (striking statewide limits of \$300, and lower limits for races in smaller constituencies); *Iannatta v. Keishig*, 931 P2d 770 (Ore. S. Ct. 1996) (striking \$500 limits on statewide candidates including Supreme Court, Court of Appeals or Tax Court, and \$100 limit for state legislators).

A fourth consequence of contribution limits is well recognized but to date has not been reflected in law in any jurisdiction: the lower the limits, the harder it is likely to be for challengers who lack ready access to large networks of support, women and minority candidates often have less access than others. There is anecdotal evidence that such candidates often rely on a relatively smaller number of relatively larger contributors to gain sufficient visibility to secure more wide-spread electoral support. Our nation's most successful PAC, "Emily's List," operates on the principle that "Early Money Is Like Yeast." There is a good case for allowing a "seed money" exception to contribution caps: e.g., candidates (or at least challengers) would be allowed to receive from up to X number of people, contributions as high as several times the otherwise applicable contribution limits, for a prescribed period early in the campaign.

In addition to the contribution ceilings that have been adopted by several States (see below), we urge consideration of the ceilings that have been proposed by notable special commissions. E.g., for Ohio in 1995, these aggregate limits per election cycle were proposed: For the Supreme Court, \$1,000 for individuals' contributions; \$5,000 for organizations such as PAC's and political organiza-

tions other than state, county or national parties; and \$90,000 for contributions from the state, county and national political parties. For lower courts, \$500 for individuals, \$2500 for organizations; and for parties, a formula with \$05 per voter. (Report, n.33 above, at 10.) For *Washington State* in 1996, these limits were proposed: individuals other than the candidate, \$250-\$1,000 "depending on court level"; organizations, \$2,500-\$5,000; court appointees, \$250 regardless of court level. (Report, n. 39 above, at 45.) For *Pennsylvania* in 1998, the proposed limits for statewide races were \$1000 per individual and \$5000 per legal entity, and for common pleas campaigns, \$500 per individual and \$2500 per legal entity. (Report, n. 42 above, at 15.) Last, although not an official commission, in 1993 Texas's League of Women Voters, Common Cause, Public Citizen and Consumer Rights Action League jointly introduced a Fair Campaign Pledge for 1994's judicial races, and succeeded in getting 70% of the candidates (87 of 126) in 23 contested races to sign that pledge. The parchment for us is that the groups' pledge set these limits on contributions: \$5,000 for individuals and \$25,000 for aggregate contributions for law firms. Austin American-Statesman (Feb. 2, 1994), 38. Compare Texas's statute, below.

At present, a number of States have generally applicable contribution limits, and seven States have contribution limits specifically on judicial campaigns: Alaska, Idaho, Kansas, Missouri, Ohio, Texas, and Wisconsin (limits apply separately to any primary and general elections; also, there may be different limits for contributors other than individuals):

Alaska, which has only retention elections: individuals, \$500; non-party groups, \$1,000; parties, \$5,000; all limits are per year. *ALASKA STAT.* § 15.10.070. *Idaho*: For judicial districts, \$1,000; for candidates for all statewide offices, \$5,000. *IDA. CODE* § 67-6610A(1) and (5) (Supp. 1997). *Kansas*, which has both retention elections and, for many trial judges, partisan elections: for supreme court—individuals and parties, \$2,000 per election; for district judges—individuals and parties, \$500 per election. *KAN. STAT. ANN.* § 25-4153. *Missouri*, which has both retention elections and, for many trial judges, partisan elections: individuals, from \$1,000 to \$250 per election depending on the district's population, and parties, 10 times those limits. *MO. ANN. STAT.* § 130.032. For Ohio's current ceilings, see Appendix Four (if the primary is not contested, general election limits apply throughout permissible fundraising period.) Note that Ohio's court rule setting earlier spending ceilings was invalidated

(2) more than \$_____ if from a law firm, including its lawyers, employees and any firm sponsored political action committee⁹; or

In Satter v. Marshall, 951 F. Supp. 693 (N.D. Ohio 1996), and is now on appeal before the Sixth Circuit Court of Appeals, Case No. 97-3174. *Texas*: \$5,000 for statewide judicial offices and for courts in judicial districts with population above one million; \$2,500 for districts of 250,000-1,000,000, and \$1,000 for smaller districts. Law firms are under an aggregate limit of six times those figures, e.g., \$30,000 for statewide races. *Tex. Elec. Code Ann.*, § 253.155(a) and .157 (Supp. 1997). *Massachusetts* (for primary and general whether or not the primary is contested): \$10,000 for Supreme Court; \$3,000 for other appellate courts in districts with population over 500,000 and for trial courts in circuits with population over 300,000; \$2,500 for other appellate courts and \$1,000 for other trial courts. *Wis. STAT. ANN.* § 11.26(1) (Supp. 1997).

Two more States have had special contribution limits on judicial candidates. *Florida*, until 1991, limited contributions to any candidate for retention as Supreme Court justice to \$3,000; to candidates for retention as court of appeal judge, \$2,000; and to candidates for county or circuit court, \$1,000. Florida law now imposes a simple \$500 limit on all candidates, nonjudicial and judicial. However, there is no limit on how much individuals can contribute to parties, and parties can contribute up to \$50,000 to candidates. Moreover, that \$50,000 limit does not apply to "polling services, research services, costs for campaign staff, professional consulting services, and telephone calls." *Fl. A. STAT. ANN.* § 106.08. *Oregon*'s \$500 limit on all statewide candidates, including Supreme Court, Court of Appeals, and Tax Court, in 1996 was stricken as unconstitutionally low; see above.

A last variable is important: For courts of special jurisdiction, like probate courts, there are differences that may warrant different figures for contribution limits. See the discussion in § III below, on Recusal.

If there is no per-firm limit, then the limits on contributions from individuals have a far greater impact on small firms than on large ones.

However, we recognize that flexibility is needed to set fair limits on aggregate contributions from firms. If too low a per-firm limit is set (e.g., for all firms regardless of size, five times the limit on an individual's contributions), then members and employees of large firms may be barred from appropri-

(3) more than \$_____ if from a political party (with all committees of a single party constituting a single entity); or

(4) more than \$_____ if from a political action committee; or

(5) [in a jurisdiction that allows corporations or unions to make contributions or expenditures in connection with elections] if from a labor organization or a corporation, more than \$_____.

(a) "Contribution" has the same meaning as in [the jurisdiction's statute on campaign finance regulation and/or disclosure].

(b) "aggregates (including direct and any indirect contributions)" means:

ate political participation. On the other hand, if the per-firm limit is too high, it will be viewed as only a facade.

We find that there are two different reasonable approaches to the per-firm limit. With one approach, a single figure (say, a multiple of ten times the individual's contribution limit) is set for each firm, regardless of firm size. So long as that figure strikes a reasonable balance between small and large firms, there is great value in this approach's advantage of simplicity in application; actually, the fluidity of law firm life means that it is often difficult to say, for a precise date, just how many members and employees are in a firm. With the other approach, a "star-step" scale provides two (or several) levels for the per-firm aggregate limit. E.g., a firm of fewer than 15 partners could give, say, up to a total five times as much as a single individual; a firm of 16-50 could give, say, up to 10 times as much as a single individual; and a firm of more than 50 could give, say, up to 20 times as much as a single individual.

Assuming that some per-firm limit is set, we believe it is essential to recognize the sufficiency of good-faith compliance, since absolute liability does not fit in campaign finance regulation. E.g.: "A firm will not violate the applicable contribution limit if a finding is made that the firm had developed and instituted written procedures reasonably designed to ensure compliance with this Rule and contributors at the firm reasonably believed that they were complying with the applicable contribution limit."

(i) in the case of an individual contributor or a law firm [or corporation], the labor organization], the aggregate of that contributor's contributions to: the candidate and/or candidate's campaign committee, and to a political party or political action committee or group with the understanding (as demonstrated by objective circumstances) that that party or committee or group will use that contribution for a contribution to or expenditure in support of that same candidate or in opposition to that candidate's opponent. However, in the special case of a judge in a retention election, only contributions made directly to the judge shall be included in the aggregate.⁹

⁹In ordinary, contestable elections, it is necessary to include both direct and indirect contributions to a candidate; otherwise, there is no stopping supporters from contributing within the limit to the candidate, then contributing more to a political action committee or party that will support the candidate.

However, in retention elections, there is a difference that requires different treatment. Opponents of the judge up for retention are likely to be an *ad hoc* group engaged in "independent spending," i.e., direct advocacy which is not coordinated with any candidate—indeed, it could not be coordinated, because those opponents have no candidate to support. "Independent spending" is protected from campaign finance regulation other than disclosure, by clear holdings of *Buckley v. Valeo*, 424 U.S. 1 (1976) and other lower court decisions before as well as since. (Independent spending may be engaged in by a political action committee, *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480 (1985) or by a party, *Colorado Republican Federal Campaign Committee v. FEC*,

(ii) in the case of a political party or political action committee, the aggregate of the party's or committee's contributions to the candidate or candidate's campaign committee, or expenditures made in support of that candidate or in opposition to that candidate's opponent.

Provided however that the limit on contributions from such entities shall not include:

(A) expenditures made in support of that candidate or in opposition to that candidate's opponent which are not coordinated with the candidate and on which the entity has filed with [the appropriate agency] an affidavit affirming that the expenditure was made without consultation with the candidate or the

518 U.S. 604 (1996). However, contributions to PACs and parties are limited even if used for independent spending.)

Under the current law, there may be limits on contributions to candidates, parties, and political action committees—but not on contributions to independent spenders who support or oppose candidates. In ordinary elections, while that may create various problems, it is not inherently unfair. But it would be clearly unfair in a retention election if one side (the judge's supporters) were subject to contribution limits while the other side (the opponents) were not. By keeping a limit on direct contributions to the judge seeking retention, we adhere to the values that such limits reflect, including preservation of the distance between the supporters and the judge. But it would distort those values to render a judge seeking retention vulnerable to unlimited spending by opponents. Therefore, the judge's supporters should be just as free as the judge's opponents to engage in independent, i.e., uncoordinated, spending.

candidate's campaign committee and without use of any information shared with the candidate or the candidate's campaign committee.

(B) expenditures made by a political party for generic voter registration or get-out-the-vote efforts, or for generic advertising about the party and its positions, or for lists of candidates that include a majority who are not judicial candidates.

III. Canon 5 of the Model Code of Judicial Conduct Should be Amended With Regard to Recusal [See Resolution and Full Report at pp. 34-44.]

To implement the Resolution to establish a recusal system for unduly large campaign contributions, we recommend that seven issues be addressed [set forth more fully in the Full Report, pp. 38-44]: 1) the contribution level that triggers recusal; 2) the party moving for recusal; 3) contributions covered by the provision; 4) factual basis for recusal; 5) procedural aspects of recusal motion; 6) automatic recusal; and 7) duration of recusal rule.

IV. The ABA Model Judicial Code and the Model Rules of Professional Conduct Should be Amended to Bar Judges' Appointments of Certain Lawyer-Contributors [See Resolution and Full Report at pp. 44-47.]

V. Several Related Steps Should Be Considered to Reduce Judicial Candidates' Need to Raise Funds and to Encourage Compliance with Campaign Regulation [See Resolution and Full Report at pp. 47-58.]

(A) The Task Force recommends that States which have not adopted Canon 5's provisions limiting the period during which judicial campaigns may solicit contributions, should do so.

(B) Canon 5 of the Model Code of Judicial Conduct Should be Amended With Regard to the Retention and Use of Surplus Campaign Funds

(C) Bar Associations, Other Citizen Organizations And Law-Makers Should Consider Voter Guides, Judicial Campaign Oversight Committees and Improved Judicial Campaign Finance Data Collection and Publication

CONCLUSION

Public confidence in the integrity of the judiciary and the bar is essential to the administration of justice in the United States. The status quo in judicial campaign finance has already eroded that public confidence in several jurisdictions and puts it at too great a risk in all 42 States where judges stand for election. The Task Force's recommendations are designed to fortify the public's confidence in the elective judiciary and in the important role of lawyers in judicial elections. The principal means the Task Force recommends for achieving these goals are those traditionally chosen by the ABA: additions and amendments to model rules that may be adopted by the jurisdictions according to their particular circumstances. It is our hope that these recommendations and our Report will prove useful to the ABA and to the States, bar associations and citizen groups working at improvement of this vital electoral process.

ATTACHMENT "B"

ELECTIVE JUDICIARY IN THE UNITED STATES
State Appellate Courts

*Data as of 1996, with selection systems as of March 1998

Total Appellate judges: 1,243
Total Appellate judges that stand for some form of election: 1,018 (81.9%)
Total Appellate judges that stand for contestable election: 595 (47.9%)

Initial Term	Subsequent Terms
Appointment: 648 (52.1%) Partisan Election: 421 (33.9%) Nonpartisan: 174 (14.0%)	Appointment: 199 (16.4%) Partisan Election: 326 (26.7%) Nonpartisan: 174 (14.3%) Retention Only: 518 (42.6%)

State	Initial Term		Subsequent Terms			
	Appt. ¹	Partisan Election	Non-Partisan	Appt. Election	Non-Partisan	Retention Only
Alabama		19		19		8
Alaska ²	8					8
Arizona ³	27					27
Arkansas		16		16		27
California	95					95
Colorado ⁴	23					23
Connecticut	16			16		
Delaware	5			5		
D.C.	9			9		
Florida ⁵	68					68
Georgia			17		17	
Hawaii	9			9		
Idaho			8		8	
Illinois		49				49
Indiana ⁶	21					21
Iowa ⁷	15					15
Kansas ⁸	17					17
Kentucky			21		21	
Louisiana		62			62	
Maine	7			7		
Maryland ⁹	20					20
Massachusetts ¹⁰	21			n/a		
Michigan ¹¹		35			35	
Minnesota			23		23	
Mississippi			19		19	
Missouri ¹²	39					39
Montana			7		7	
Nebraska ¹³	13					13

State	Initial Term			Subsequent Terms			Retention Only
	Appt. Partisan Election	Non-Partisan	Appt. Partisan	Partisan Election	Non-Partisan	Retention Only	
Nevada		5			5		
New Hampshire	5			5			
New Jersey	39			39			
New Mexico		15				15	
New York	73			73			
North Carolina		19			19		
North Dakota			5		5		
Ohio ¹⁴		72		72			
Oklahoma ¹⁵	26					26	
Oregon			17		17		
Pennsylvania		31				31	
Rhode Island ¹⁶	5			n/a			
South Carolina		14			14		
South Dakota ¹⁷	5					5	
Tennessee ¹⁸	29					29	
Texas		98		98			
Utah ¹⁹	12					12	
Vermont	5			5			
Virginia		17			17		
Washington			29		29		
West Virginia		5			5		
Wisconsin			23		23		
Wyoming ²⁰	5					5	
Totals	648	421	174	199	326	174	518

¹⁴"Appointment" includes gubernatorial and legislative appointment/selection.

²In 15 states, the initial appointive term is shorter than subsequent terms. For example, in Alaska, the initial term is 3 years with subsequent terms either 10 or 8 years depending on the court; in Maryland, the initial appointive term lasts until the first general election following the expiration of one year from the occupancy of a vacancy, while subsequent terms are 15 years.

³See supra, note 2.

⁴See supra, note 2.

⁵See supra, note 2.

⁶See supra, note 2.

⁷See supra, note 2.

⁸See supra, note 2.

⁹See supra, note 2.

¹⁰In Massachusetts, once appointed, judges may serve until the age of 70.

¹¹In Michigan, the judicial candidates appear on the ballot as nonpartisan, but they are usually selected and campaign as partisans.

¹²See supra, note 2.

¹³See supra, note 2.

¹⁴Ohio is like Michigan, see supra, note 11.

¹⁵See supra, note 2.

¹⁶In Rhode Island, once appointed, judges serve a life term.

¹⁷See supra, note 2.

¹⁸See supra, note 2.

¹⁹See supra, note 2.

²⁰See supra, note 2.

Sources: American Judicature Society, Judicial Selection in the States, 1998; National Center for State Courts, State Court Caseload Statistics, 1996.

State Trial Courts of General Jurisdiction

*Data as of 1996 (or later as indicated), with selection systems as of March 1998.

Total trial judges: 8,489

Total trial judges that stand for some form of election: 7,378 (87%)

Total trial judges that stand for contestable election: 6,560 (77.3%)

Initial Term	Subsequent Terms
Appointment: 2,061 (24.3%) Partisdn Election: 3,669 (43.2%) Nonpartisan: 2,759 (32.5%)	Appointment: 1,013 (12.1%) Partisan Election: 2,360 (28.1%) Nonpartisan: 2,891 (34.5%) Retention Only: 2,127 (25.3%)

State	Initial Term		Subsequent Terms		
	Appt. ¹ Partisan Election	Non-Partisan	Appt. Partisan Election	Non-Partisan	Retention Only
Alabama		131		131	
Alaska ²	32				32
Arizona ³	93		39		93
Arkansas		104		104	
California ⁴			804		804
Colorado ⁵	115				115
Conn.	174		174		
Delaware	59		59		
D.C.	22		22		
Florida		455		455	
Georgia		169		169	
Hawaii	42		42		
Idaho		37		37	
Illinois ⁶		492			492
Indiana ⁷	21	245	16		21
Iowa ⁸	205				205
Kansas ⁹	114	111		111	114
Kentucky			93		93
Louisiana		214		214	
Maine	16			16	
Maryland ¹⁰	132				132
Massachusetts ¹¹	76		N/A		
Michigan ¹²		210		210	
Minnesota			252		252
Mississippi			93		93
Missouri ¹³	102	207		207	102
Montana ¹⁴	8		37		37
Nebraska ¹⁵	51				51
Nevada		46			46

State	Initial Term			Subsequent Terms			
	Appt. ¹	Partisan Election	Non-Partisan	Appt.	Partisan Election	Non-Partisan	Retention Only
New Hampshire	29			29			
New Jersey	372			372			
New Mexico ¹⁶		69					69
New York		457			457		
North Carolina		95			95		
North Dakota			46			46	
Ohio ¹⁷		369			369		
Oklahoma ¹⁸	73		148	73		148	
Oregon			94			94	
Pennsylvania		366					366
Rhode Island ¹⁹	22			N/A			
South Carolina	43			43			
South Dakota			36			36	
Tennessee		142			142		
Texas		395			395		
Utah ²⁰	68						68
Vermont	31			31			
Virginia	144			144			
Washington			62			62	
West Virginia			161			161	
Wisconsin			233			233	
Wyoming ²¹	17						17
Totals	2,061	4,669	2,759	1,013	2,360	2,891	2,127

¹⁴ "Appointment" includes gubernatorial and legislative appointment/selection.

² In 12 states, the initial appointive term is shorter than subsequent terms. For example, in Alaska, the initial term is three years with subsequent terms of six years; in Maryland, the initial appointive term lasts until the first general election following the expiration of one year from the occupancy of a vacancy, while subsequent terms are 15 years.

³ In Arizona, the two counties with Phoenix and Tucson have appointed judges followed by retention elections; the other counties use partisan elections. Additionally, any county with partisan elections can elect to have the governor appoint its judges instead. In the counties in which judges are initially appointed, the initial appointive term is for two years, while subsequent terms are four years. The data for Arizona are as of 1997.

⁴ In California, county electors may opt for commission appointment of judges for an initial full term. California's data are as of 1997.

⁵ See supra, note 2.

⁶ In Illinois, circuit judges appoint more than 300 associate judges and approximately 50 permissive associate judges whom don't handle the court's full jurisdiction.

⁷ In Indiana, two counties utilize appointment with subsequent retention elections for judges, two others have nonpartisan elections and the rest have partisan elections. In the counties in which judges are initially appointed, the initial appointive term is for two years, while subsequent terms are six years. Indiana's data are as of 1997.

⁸ See supra, note 2.

⁹ In Kansas, 17 circuits utilize appointment with subsequent retention elections for judges, 14 circuits utilize partisan elections. In the circuits in which judges are initially appointed, the initial appointive term last until the next general election, while subsequent terms are four years. Kansas' data are as of 1997.

¹⁰ See supra, note 2.

¹¹ In Massachusetts, once appointed, judges may serve until the age of 70.

¹² In Michigan, the judicial candidates appear on the ballot as nonpartisan, but they are usually selected and campaign as partisans.

¹³ Missouri has 40 circuits that choose judges by partisan election and five circuits (including the areas of St. Louis and Kansas City) that appoint their judges. In the circuits in which judges are initially appointed, the initial appointive term is for one year, while subsequent terms are six years. The data on Missouri are as of 1997.

¹⁴ In Montana, each court of general jurisdiction has a separate mechanism for selecting judges.

¹⁵ See supra, note 2.

¹⁶ In New Mexico, in the case of a judicial vacancy, judges are appointed and serve until the next general election when they are subject to partisan election. The winner thereafter runs in a retention election for subsequent terms.

¹⁷ In Ohio, the judicial candidates appear on the ballot as nonpartisan, but they are usually selected and campaign as partisans.

¹⁸ In Oklahoma, the district court is split into district, associate district, and special judges, each with different mechanisms for selection.

¹⁹ In Rhode Island, judges serve a life term once appointed.

²⁰ See supra, note 2.

²¹ See supra, note 2.
Sources: American Judicature Society, *Judicial Selection in the States*, 1998; National Center for State Courts, *State Court Caseload Statistics*, 1996.