

## Judicial Independence and Selection

**Matthew J. Evans**

In recent years, the ABA has made the rule of law a focused priority. Civilized societies provide forums that peacefully and impartially resolve disputes according to the rule of law. Crucial to those forums is a fair and independent judiciary. In this issue, Penny J. White, a former justice of the Tennessee Supreme Court, examines judicial campaigns following the Supreme Court decision in *Republican Party of Minnesota v. White* and the decision's effect on a judicial candidate's right to make campaign statements and a litigant's right to fair and impartial justice. Professor White also considers the disqualification standards adopted by the ABA and the requirements of the Model Code regarding a judge's duty to disclose information that is potentially relevant to a motion for disqualification. Wendy Keefer explores the various methods used by states to select judges for their courts. Jeffrey J. White reviews the Connecticut General Assembly's immediate

(in a legislative sense) response to what it perceived to be an activist decision by the Connecticut Supreme Court and discusses implications of the Connecticut legislation and its potential application in other states.

This issue also profiles administrative jurist Richard Luis in "When I Was a New Lawyer" and provides observations from a state court's highest bench by Eric Magnuson, who recently became chief justice of the Minnesota Supreme Court. Hervey Levin informs us about bill mark-ups and congressional hearings on proposed insurance legislation, and TIPS's immediate past chair, Peter Bennett, offers an impassioned commentary on the importance of fair and impartial courts. Ginger Busby recaps TIPS events from the ABA Annual Meeting in New York City, including gala evenings on Ellis Island and at the United Nations. Finally, Barbara O'Donnell, immediate past chair of the *TortSource* editorial board, previews the 2009 ABA Midyear Meeting in Boston and highlights the wonderful aspects of visiting her hometown—even in February. ♦

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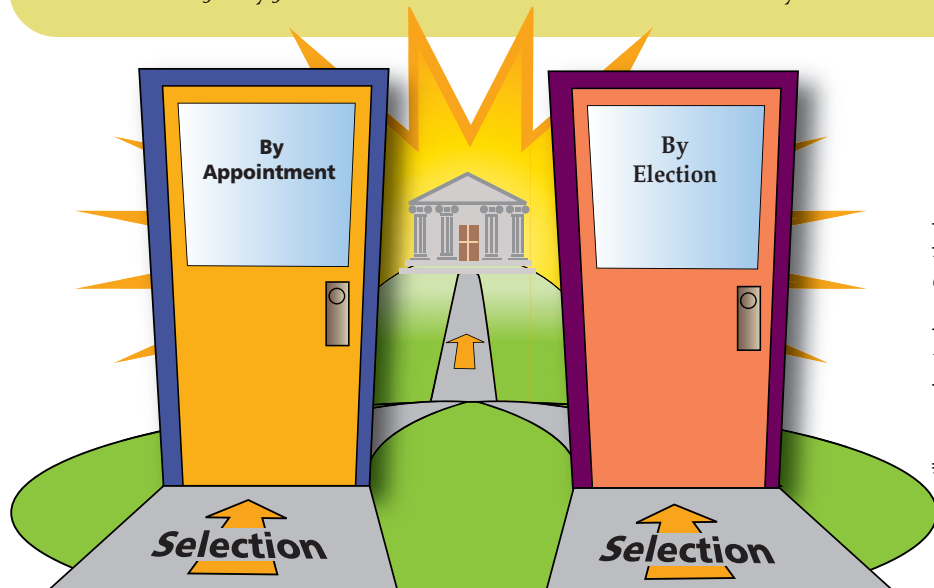


Illustration by Andrew O. Alcalá

## Judicial Disqualification after *White*: Dual Duties

**Penny J. White**

This year more than 40 seats on the states' highest courts will be up for grabs in the new world of judicial elections. These formerly decorous contests, in which candidates discussed their educational and legal backgrounds, will include instead generously-funded campaigns raising issues of same-sex marriage, abortion rights, and tort reform. Statements outlining candidates' positions on political and legal issues—once off-limits for those seeking judicial office—are now commonplace. What has led to this change in judicial elections? And how does it affect lawyers, clients, and the overall integrity of the American legal system?

The changed landscape for judicial elections is due in large part to the Supreme Court's 5-4 decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which held that a provision of the 1972 Model Code of Judicial Conduct prohibiting judicial candidates from "announc[ing] their views on disputed legal or political issues" violated the ... on page 4

## Balancing Independence and Accountability Judicial Selection Methods

**Wendy J. Keefer**

When the country's Founders established the means for selecting members of the federal judiciary, judicial independence was of primary importance. Division of responsibility between the president and the Senate for initial selection and lifetime tenure of those confirmed was the resulting mechanism. In terms of a jurist's independence once the judge is confirmed, it is hard to argue that the federal system is not preferable. There is no doubt that the ever-increasing role of politics in the actual nomination and confirmation processes may add an unintended political aspect, but once selected, our federal judges need not fear reprisal as they remain in their judicial positions absent impeachment. The states, however, opted for a variety of ever-changing and ever-debated mechanisms in the quest to balance judicial independence with accountability to the populace. This article briefly describes the various methods of judicial selection utilized in the states and discusses some of the benefits and concerns about them.

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Illustration by Andrew O. Alcalá

# Meeting Round-Up

## Annual Meeting in New York City

Ginger Busby

If you wanted to wake up in the city that never sleeps, you certainly had more than ample opportunity to do so at the ABA Annual Meeting, August 7–12, in New York. Perhaps since I am speaking to TIPSters, I should say “that is, if you ever went to sleep.” What an exciting trip, full of memorable experiences for all who were able to participate in the TIPS 75th anniversary celebration. There was plenty of dining, dancing, and memories—and of course quite a few meetings as well. TIPS graduated the second Leadership Academy class and presented numerous excellent CLE programs.

Our trip down memory lane began with a ferry boat ride to Ellis Island on Friday evening. What an extraordinary event! As the Statue of Liberty flickered in the background, we celebrated our heritage, our diversity, and the meaning of family and friendship as we experienced history together. Many attendees were able to locate—and some discovered for the first time—engraved names and archival information about immigrating ancestors who entered the United States at Ellis Island. Preceding a lavish buffet, the first recipients of the TIPS Liberty Achievement Award, Catherine Christian and Hon. Bernice Donald, delivered moving acceptance speeches.



The Honorable Bernice Donald, one of the first recipients of the new Liberty Achievement Award, accepts her award from TIPS Chair Peter Bennett at the Ellis Island reception.

Back in Manhattan at the Waldorf=Astoria Hotel, we attended meetings and ate first-rate meals. Saturday night was free for some to explore the city, while others headed to the University Club for TIPS's second Leadership Academy commencement dinner.

On Sunday evening, we shared the TIPS 75th anniversary gala at the United Nations Building with one of the Section's sponsors, Matson, Driscoll & Damico. MDD also celebrates its 75th anniversary this year and sponsored the Leadership Dinner in the delegates' dining room overlooking the East River. Speakers for the event included Justice William Ian Corneil Binnie of the Supreme Court of Canada and Edmund S. Muskie Pro Bono Service Award recipient Victor Garo, who inspired us by sharing his experience of representing an innocent man for 30 years, all pro bono.



The second graduating class of the TIPS Leadership Academy celebrates at the University Club.

Thanks to the staff and to TIPS members for your dedication—it takes so many to make this Section successful. None of us will forget the wonderful year we spent together—starting in Palm Beach, Midyear in Los Angeles, Las Vegas in May, and ending in New York. We all know Peter Bennett lived the “suite life” as chair, and we thank him for such a terrific, thoughtful, well-orchestrated year of not only meaningful

works, unique experiences, valuable CLE programs, and warm friendships, but also for devoting a year of his life to the Section's 75th year. So when you think of New York, remember Frank Sinatra's song, as the words of John Kander and Fred Ebb—slightly modified—are instructive: *Those little town blues . . . melted away when we made a brand new start of it in old New York. If we can make it there, we'll make it anywhere*; so it's up to you TIPS members, it's up to you. Here's to 75 more! ❖

Ginger Busby is a partner at Burr & Forman LLP in Birmingham, Alabama, and is TIPS's vice-chair. She can be reached at [Gbusby@burr.com](mailto:Gbusby@burr.com).



## Trial Tips

Eric Magnuson

### Litigator to Jurist: Paradigm Shift

In June 2, 2008, I left private practice and assumed the position of chief justice of the Minnesota Supreme Court. It had been 31 years since I last worked for the court as a law clerk for then-Chief Justice Robert Sheran. When I clerked, the court used IBM Selectric typewriters; there were no computers. My first word processor at the court was a large pair of scissors. Now the courts have state-of-the-art technology for gathering and disseminating information, which flows at the speed of light. But the biggest differences I have experienced are in the contrasts between being before the bench and behind it.

My new job is fundamentally different. As an advocate, my primary goal was to vindicate my client's position. I saw the issues through that prism. As a judge, I am responsible for the decision rather than the result. I have to consider not only who wins and who loses, but also more importantly, how the outcome is explained.

I have also been struck by the imperative need for lawyers to have a point in their briefs and oral argument. As an advocate, I always thought that I was succinct in my

presentations. With a fuller appreciation of the mind-numbing volume of information that assaults an appellate judge daily, I recognize that my efforts fell short. Briefs are not brief, and oral argument time passes far more slowly when you are on the receiving end. Advocates are far more effective if they understand the point they want to make, and make it as quickly and clearly as possible. Cut down on the windup, and make the pitch. Your client will be better off for it.

Not everything is different. Both public and private organizations are filled with bright people who bring great dedication to their jobs every day, and private practice has no monopoly on talent or hard work. I am happy to report that, after 31 years, the level of professionalism at the court is as high as ever. Private practitioners do well to remember they are not the only professionals hard at work.

One of my children once said to me, “Dad, no matter where you go, that's where you are.” Truer words were never spoken. In my first few weeks on the Minnesota Supreme Court, I feel that I have come home. Perhaps I never really left completely, but brought to private practice the values and work habits that I had learned as a law clerk and member of the court family. My perspective is different, as is my role in the system. But I remain part of the same enterprise—providing speedy, fair, and accessible justice to all. ❖

On June 2, 2008, Eric Magnuson became the 21st chief justice of the Minnesota Supreme Court. Prior to his appointment he had been in private practice with Briggs and Morgan in Minneapolis. He is the past co-chair of the TIPS Appellate Advocacy Committee. He can be reached at [eric.magnuson@courts.state.mn.us](mailto:eric.magnuson@courts.state.mn.us).

# Legislative Efforts to Control Statutory Interpretation Threat or Equality Assurance?

Jeffrey J. White

The issue of statutory construction has been front and center for many years. The words “plain and unambiguous,” “strict constructionist,” and “activist judges” have been engrained in the nation’s legal lexicon. Naturally, when assessing a court’s interpretation of a particular statute, many will focus on the outcome. Yet, the tools used in a statutory analysis often play a pivotal role in reaching that result. For instance, a court’s interpretation of a “plain and unambiguous” statute may be quite different if the court looks only to the text as opposed to other sources, including legislative history.

## Plain-Meaning Rule vs. Legislative Intent

Although some may presume that the courts should have control over how they interpret a statute, recent events in Connecticut have called this presumption into question. In 2003, a divided Connecticut Supreme Court decided *State v. Courchesne*, 262 Conn. 537 (2003), a death penalty case. What made this death penalty case noteworthy is that the court (without any request to do so) abandoned the plain-meaning rule when interpreting statutes. The court held that in conducting a “reasoned search for the intent of the legislature” it would in *all* cases consider extra-textual sources, including most notably, legislative history and the policy that the statute was designed to implement. To reach this result, the court provided an extensive critique of the plain-meaning rule, which, according to the majority, has “led this court into a number of declarations that are, in our view, intellectually and linguistically dubious, and risk leaving the court open to the criticism of being result-oriented in interpreting statutes.” *Id.* at 571. As a result, in the post-*Courchesne* world, a threshold finding of ambiguity would not be necessary before a court could look to extra-textual sources.

The dissenters on the Connecticut Supreme Court were aghast—calling the decision “nothing short of breathtaking.” For the dissenters, the plain-meaning rule should be adhered to because it ensured that “common law” judging would not carry the day. Or in other words, a judge’s policy stance on issues could not override the clear language employed by the legislature.

The majority’s vision of the world of statutory construction lasted less than four months. In June 2003, the Connecticut General Assembly curbed what it perceived as an activist court by passing a law that required that the plain-meaning rule be followed if the text of the statute was plain and unambiguous. *See* CONN. GEN. STAT. § 1-2z (2007).

As to be expected, following the passage of this law, there were rumblings from some (including the author of the majority opinion of *Courchesne*) that this legislative edict was unconstitutional as violative of the separation of powers clause. This position, however, has gained little traction. Indeed, it does not appear that the current court has any interest in engaging in a constitutional showdown with the legislature.

Nonetheless, regardless of what Connecticut does, it is worthwhile to consider whether such statutes are a harbinger for things to come. Several states faithfully follow the plain-meaning rule; others have discarded it without legislative

response. The Texas legislature has provided statutory construction aids for its courts. Yet, it appears that no state legislature has issued as soundly a rebuke to perceived judicial activism as the Connecticut General Assembly.

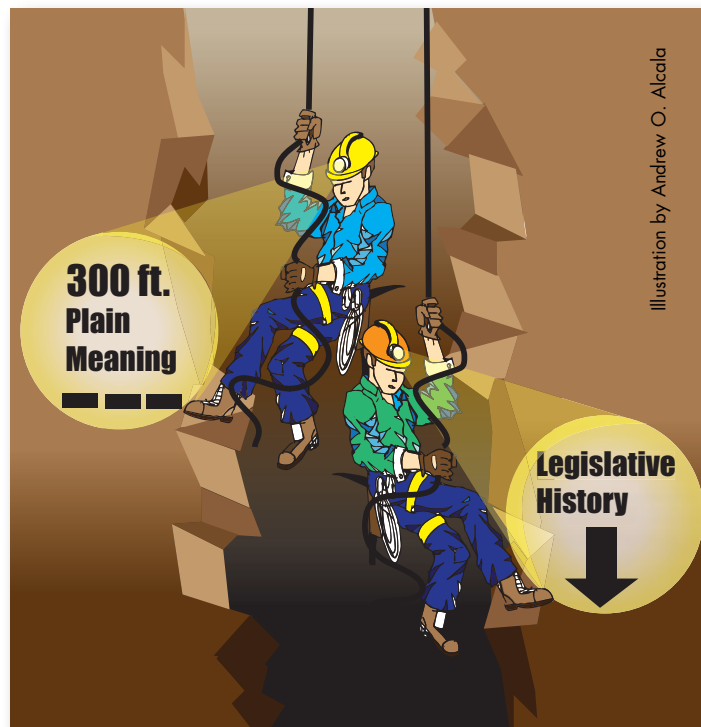
## Impact of Legislative Enactments

The question remains whether a legislative enactment designed to control the rules of statutory interpretation is a threat to judicial independence or merely the preservation of legislative power. On the one hand, as the majority author of *Courchesne* noted in a subsequent case, legislative acts such as those adopted in Connecticut can be construed as directing judges “how to *think* about the process of statutory interpretation,” and thus may violate the separation of powers clause and infringe upon judicial inde-

pendence. *See Kinsey v. Pacific Employers Ins. Co.*, 891 A.2d 959, 971 (Conn. 2006) (Borden, J., concurring). On the other, it can be argued that the Constitution says nothing about the method that the judiciary must employ when interpreting statutes, and thus, it is fair game for the legislature to ensure that isolated statements made in the context of political proceedings are not used to determine the meaning of statutes—particularly because it is possible that a judge’s preferences or policy beliefs can leak into the decision-making process. Indeed, it is not uncommon for a court to find that a legislator didn’t mean what he or she said.

As in many debates, there are meritorious arguments on both sides. But, perhaps more importantly, both sides understand that the rules that govern statutory interpretation can have a significant (if not determinative) impact on the outcome of a case. As a result, it will not be surprising if other legislative bodies try to use the rules of statutory construction to rein in judges who they believe are overstepping their bounds. And, for their part, judges will continue to insist that it is necessary for an independent judiciary to set the rules of the statutory game. ❖

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## Judicial Disqualification after *White*

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First Amendment. Though the majority opinion nullified only this “announce” provision, the decision’s impact has been far greater. Based on the underlying theme that speech can rarely be prohibited in the political arena, state supreme courts and disciplinary bodies have rewritten, reformed, and, in some instances, completely removed related restrictions on judicial speech and conduct. (For an overview of the impact of the decision, see, e.g., Cynthia Gray, *The State’s Response to Republican Party of Minnesota v. White*, 86 JUDICATURE 163 (2002) and Penny J. White, *A Matter of Perspective*, 3 U.N.C. SCH. L. FIRST AMENDMENT L. REV. 5 (Winter 2004).) In an assortment of suits challenging numerous judicial ethics provisions, state and federal courts have eliminated other speech-related provisions, as well as restrictions on campaign finance, partisan activity, and party affiliation. See, e.g., *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

### Announcing Personal Views

The accidental, and unfortunate, beneficiaries of the *White* decision are special interest groups with the desire and resources to influence judicial elections. Using questionnaires, these groups solicit candidates’ views on a range of legal and political issues. The groups funnel large sums of money into campaign coffers and advertising that advances their issues and the candidates whose views reflect their own. As a result, special interest groups have assumed increased importance in determining who will sit on state court benches.

An obvious tension arises when a successful judicial candidate has announced a highly publicized personal view during a campaign that is counter to a client’s position in an upcoming case on the judge’s docket. Although the *White* decision distinguished between an announcement of personal views and a commitment in advance to rule in accord with those views, the distinction is at best one of degree, not of kind. May a judge who campaigned on “reforming runaway verdicts” and “limiting punitive damages” hear cases in which parties seek high compensatory and punitive damages awards? May a judge who publicly opposed *Roe v. Wade* hear a case challenging state restrictions on a minor’s access to abortion? Or may a judge who pledged support for comprehensive class action reform decide a motion to certify a class?

The conflict between a judge’s First Amendment rights and a litigant’s right to a fair trial creates a classical constitutional conundrum. A judicial candidate has a right to announce views, attract support, seek financing, and cater to special interests in order to get elected as long as he or she is announcing views, not issuing commitments. All litigants, conversely, have the right to a fair trial presided over by an impartial judge, one who does not have a “direct, personal, substantial pecuniary interest” (*Tumey v. Ohio*, 273 U.S. 510, 523 (1927)) in reaching a result against a litigant, one who is able to hold the balance “nice, clear, and true” between litigating parties. *Id.* at 532.

### Disqualification Standards

This inherent conflict may be lessened by a robust application of judicial disqualification standards. The constitutional base line on judicial disqualification is the due process clause, but the Supreme Court has consistently recognized that states may draw the line elsewhere. Justice Kennedy, concurring in *White*, opined that states “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.” 536 U.S. at 794. Presumably, a state may adhere to *White* while rigorously enforcing stringent judicial disqualification standards.

When the ABA substantially revised the Model Code of Judicial Conduct in 2007, it left intact the general provision regarding judicial disqualification. That provision

requires that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned. . . .” ABA MODEL CODE OF JUD. CONDUCT R. 2.11(A) (2007) (formerly ABA MODEL CODE OF JUD. CONDUCT Canon 3E(1) (1990)). Both the new and prior versions of the Code specifically require disqualification under circumstances in which “[t]he judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.” *Id.* at R. 2.11(A)(5). Thus, the standard remains an objective one, recognizing not only that judges must *be* impartial but that they must also *be perceived* as impartial. The retention of the standard and the specific disqualification provision symbolize the profession’s commitment to preserving a fair and impartial justice system in which the public has confidence.

By retaining objective standards for judicial disqualification, the ABA has provided a mechanism for addressing some of the unfortunate consequences of *White*. But this mechanism depends on ethical judges and vigilant advocates to operate.

Judges must accept the immense responsibility that flows from the prestige of judicial office. To demonstrate their commitment to maintaining public confidence in the judiciary, judges who choose to announce their views in judicial campaigns should disqualify themselves in cases raising those issues. This is not because these judges cannot be fair; it is because they will not be perceived as fair.

### Transparency in Disclosure

Judges should embrace a philosophy of transparency in disclosure of personal, political, and financial relationships. Open disclosure is not admirable judicial conduct, it is required judicial ethics. The Model Code requires judges to disclose all information “that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” *Id.* at R. 2.11 cmt. 5 (2007).

Before *White*, judicial disqualification issues frequently involved a judge’s personal and financial relationships, which state law required to be disclosed. After *White*, candid and complete judicial disclosure assumes new importance. Not only must a judge report relationships, a judge must report any information that, from an objective viewpoint, might be considered relevant to the judge’s ability to decide the case fairly and impartially. A judge’s response to special interest questionnaires, for example, may include information that a reasonable lawyer would consider relevant in determining whether to file a disqualification motion.

Lawyers, too, must assume new responsibilities after *White*. As “representative[s] of clients, . . . officer[s] of the legal system and . . . public citizen[s] having special responsibility for the quality of justice” (ABA MODEL RULES OF PROFESSIONAL CONDUCT, pmbl. [1]), lawyers must raise legitimate disqualification by filing motions accompanied with supporting documentation. This documentation may include a judge’s campaign materials, responses to special interest questionnaires, and campaign finance disclosures. By filing motions for disqualification in appropriate cases, lawyers will identify circumstances in which one party views a judge’s participation as inimical to justice. In many cases this will prompt disqualification, but at a minimum, it will create a public record regarding the judge’s connection with special interests.

As Justice Kennedy advised in *White*, the legal profession must sometimes use its own voice “if democracy is to fulfill its promise.” 536 U.S. at 795. Only by raising, documenting, and litigating legitimate judicial disqualification issues can the standards be given an opportunity to work. ♦

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# Legislative Update

Hervey P. Levin

## Congress Focuses on Insurance

On July 9, the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises held a markup and approved H.R. 5840 and H.R. 5792, which had been referred to the subcommittee from the House Committee on Financial Services. Lillian Gaskin, senior legislative counsel from the ABA Government Affairs Office (GAO), and Allison Nichols, an intern in that office, reported the following:

### H.R. 5840—Insurance Information Act of 2008

Congressman Paul E. Kanjorski (D-PA), sponsor of H.R. 5840, offered a substitute to the text of the bill introduced in April to create an advisory group and address the issue of preemption. According to Kanjorski, “The Office [of Insurance Information] (OII) will coordinate federal efforts and establish federal policy on international insurance matters. . . . The Treasury will have the ability, under very limited circumstances and very detailed procedures, to preempt a state insurance measure that is inconsistent with an international agreement regarding the policy.”

### H.R. 5792—Increasing Insurance Coverage Options for Consumers Act of 2008

Kanjorski said “H.R. 5792 would reform and expand the Product Liability Risk Retention Act by allowing risk retention groups to provide commercial property insurance.”

### Systemic Risk and the Financial Markets

On July 10, the House Committee on Financial Services convened a hearing to discuss the efficacy of the financial regulatory system. According to GAO, Chairman Barney Frank (D-MA) said the Bear Stearns bailout provides a new context for the issue of financial regulation. Frank also advised that the subprime mortgage crisis requires an increase in regulation and international cooperation, both of which must be market-sensitive.

Secretary of the Treasury Henry M. Paulson Jr. observed that most people expect the Federal Reserve to intervene in order to prevent systemic risk, but the Fed’s authority is limited. He said it is important to reinforce market discipline but added that institutions must be allowed to fail. Only in the case of an “extraordinary event” should the Fed intervene.



## InMotion

**Louise Bjorkman** was appointed to the Minnesota Court of Appeals by Governor Tim Pawlenty. A partner with Larson King LLP in Saint Paul with an extensive background in appellate law, Bjorkman was previously a Second Judicial District trial court bench judge in Ramsey County, Minnesota, from 1998 to 2005. She chairs TIPS’s Public Relations Committee.

**Lawrence T. Bowman**, member of Cozen O’Connor in the Dallas, Texas, office and former chair of the firm’s general litigation department, was a faculty member at the National Institute for Trial Advocacy’s 37th Annual National Trial Session in Louisville, Colorado. He concentrates his practice in complex Commercial Litigation.

**Kelley Campoli** and **Melody Manning** have joined Shook, Hardy & Bacon as associates in national product liability litigation practice in the firm’s Tampa, Florida, office. Campoli recently earned her JD from the Stetson University College of Law, and Manning recently earned her JD from The College of St. Rose.

**Charles J. Faruki**, partner of Faruki Ireland & Cox P.L.L. is one of only five lawyers ranked in Band 1, the top tier in the category Litigation: General Commercial, as his firm was ranked among the top litigation law firms in Ohio by the directory *Chambers*

### Examining the Insurance Industry’s Regulatory and Oversight Structure

On July 29, the Senate Banking Committee held a hearing to discuss the regulatory structure of the insurance industry and possible methods for its improvement. GAO attended and reported the following:

Chairman Christopher Dodd (D-CT) stated insurance is a “critical underpinning” of our economy. Regulation of this industry is handled by the states, despite an increasingly national and international scope. For this reason, the system must be reformed and modernized. Dodd, without taking a position on any legislation currently before Congress, said he believes that an effective proposal must address three issues: (1) consumer protection, (2) marketplace competition, and (3) efficiency.

The National Association of Insurance Commissioners (NAIC) believes that an optional federal charter is “misguided policy.” The association’s representative said a variety of reforms adopted by the NAIC are successful alternatives to this option.

The current regulatory system must be modernized in order to allow the United States to remain competitive in an international market, according to a representative from the American Insurance Association. The United States may experience a competitive disadvantage in Europe because of its inability to require individual states to comply with European Union solvency requirements.

The Consumer Federation of America does not have a preference regarding who regulates the insurance industry, according to its spokesperson. The federation has six major concerns: (1) abusive claims practices following natural disasters; (2) overcharging by property and casualty insurers; (3) the addition of deductibles, making it more expensive for consumers to be reimbursed, and shifting the cost of claims to federal programs; (4) use of new risk-classification data to redline potential customers; (5) anticompetitive behavior; and (6) rate increases and pull-outs along coastlines.

The Reinsurance Association of America supports national legislation that would streamline the state-based system to facilitate the functioning of reinsurance companies domestically, including the National Insurance Act of 2007 (S. 40) and the Nonadmitted and Reinsurance Reform Act of 2007 (S. 929) (the surplus lines bill).

**Reported elsewhere:** The National Association of Mutual Insurance Companies supports reform, not replacement, of state regulation, and supports OII and H.R. 1065 (surplus lines). The association opposes H.R. 5792, discussed above.

**One recent headline:** “NCOIL Members Blast NAIC OII Stance” (NU Online News Service, July 15, 2008; NCOIL is the National Conference of Insurance Legislators).

**This author’s predictions:** Absolutely none. ❖

*Hervey Levin is principal in the Law Offices of Hervey P. Levin in Dallas, Texas, and chair of the TIPS Governmental Affairs Committee. He can be reached at hervey@airmail.net.*

*USA: Ohio’s Leading Lawyers for Business, for the second consecutive year. Partner D. Jeffrey Ireland was ranked in Band 4 in Litigation: General Commercial by the same directory. Faruki and Ireland cofounded the firm in 1989.*

**Eric Magnuson** was appointed by Governor Tim Pawlenty as chief justice of the Minnesota Supreme Court. Magnuson leaves his position as shareholder of Briggs and Morgan P.A. in Minneapolis, where he practiced almost exclusively in state and federal appellate courts. He is a former chair of the TIPS Appellate Advocacy Committee.

**Thomas Penfield**, a partner with Casey Gerry Schenk Francavilla Blatt & Penfield, LLP, in San Diego, California, was recently named president-elect of the Bar Association of North San Diego County. His practice focuses on personal injury, products liability, and class actions.

**Catherine Bonaker Slavin**, Cozen O’Connor member in the firm’s Philadelphia, Pennsylvania, office, served as panel moderator for “Persuasion After the Evidence” at the ABA’s 2008 Aviation Trial Demonstrations and Cutting Edge Issues CLE seminar, cosponsored by the New York City Bar. Slavin specializes in aviation litigation.

**David V. Wilson II**, shareholder with Hays, McConn, Rice & Pickering, P.C., in Houston, Texas, was named a 2008 Distinguished Alumnus by the Duke University Talent Identification Program and received the Houston Bar Association’s President’s Award for his service as editor-in-chief of *The Houston Lawyer*. ❖

## Balancing Independence and Accountability

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Judicial selection methods can generally be characterized as one of the following: (1) election—either partisan or nonpartisan; (2) commission-based appointment; (3) merit selection or the “Missouri Plan”; (4) gubernatorial appointment; (5) legislative appointment; or (6) a combination of these methods. Some states use different methods of selection for different judicial levels or positions. States also may provide for one method of original selection and another method for the retention of a judicial position. In all instances, however, it must be assumed that the goal is to seat and retain fair, impartial, and independent judges.

Judges, however, are human and as with all of us may be susceptible to political and other external pressures. Implementing the means of selecting these judges should focus on alleviating these outside influences to the greatest extent possible. The debate will likely continue for years as to which of the following methods best achieves this goal.

### Contested Elections

Contested elections provide the seemingly most democratic means of selecting judges. Whether partisan or nonpartisan, these elections allow the people to select those who will sit in judgment of them. Elections, however, subject candidates to the pitfalls of fund-raising and lobbying by special interest groups. Indeed, the increasing cost and growing contentious nature of judicial elections, paired with decreasing voter participation and turnout for these elections, have resulted in reform attempts in a number of jurisdictions once dependent upon popular election for the selection of state judges. Although once a common means of judicial selection, contested election now is increasingly rejected in favor of methods that appear to be less costly, less contentious, and more merit based. More and more states are choosing straightforward commission-based appointments or a Missouri Plan-style merit selection process.

### Commission-Based Appointments

Commission-based appointment is just as it sounds: a commission, appointed by one (or a combination) of the political branches, selects judges for initial appointment. To provide accountability, the states using commission-based appointment typically require periodic retention elections for these judges, opening them up to public critique after a defined term of service. Although the combination of these two features is somewhat appealing, neither the original selection—which involves no election nor the direct involvement of elected officials—nor the following popular elections are trouble free.

### The Missouri Plan

The Missouri Plan attempts to resolve issues created by commission appointment followed by retention elections by combining both the merit review by a commission and involvement of the people through their elected officials at the outset of original selection. The Missouri Plan includes a nominating commission that reviews candidates and sends the names of those deemed qualified to the governor for actual appointment. The goal of this selection method is purportedly to alleviate the problem of an unqualified candidate receiving appointment as a political favor from an appointing political branch, whether the governor or the legislature. In other words, because the nominating commission will put forward only qualified applicants, the political branch responsible for actual appointment will have no choice but to appoint a qualified candidate. This method also seeks to eliminate the undue political influences that can impact traditional elections of judges.

Merit selection or the Missouri Plan is not without its critics. Evidence of stacking the panel of “qualified” applicants or of political deals among the merit selection commissioners may be present. Whether this process results in a more independent, more qualified judiciary has not yet been demonstrated. Some demonstration of success in these areas may be required for the Missouri Plan to continue to garner support in states where involvement of the people is seemingly at a low point.

### Appointment by Governor or Legislature

Less popular among the states is appointment of state judges by governors or legislatures. Indeed, only a handful of states choose the members of their judiciary in either of these manners. Straightforward appointment eliminates the fund-raising and other direct campaigning that can jeopardize the judicial independence of elected judges. Appointed state judges, however, do not have life tenure; they remain indebted to those making the appointment decisions. Some may prefer—where appointment is the

manner of judicial selection—to spread the appointment decision among many individuals, such as an entire legislature, rather than placing that authority in the hands of one person.

Only South Carolina and Virginia currently use legislative appointment to fill judicial positions. Criticism alleging vote trading and the influence of other political favors among legislators led to reforms in 1997 of South Carolina’s selection method, which now includes detailed procedures prohibiting legislators from supporting a judicial candidate in exchange for support or opposition to legislative enactments. These reforms also established timelines before which a legislator may not support a particular judicial candidate (i.e., proclaiming one’s support for a candidate may not occur until after a judicial merit selection committee has reviewed applicants and established those who are qualified).

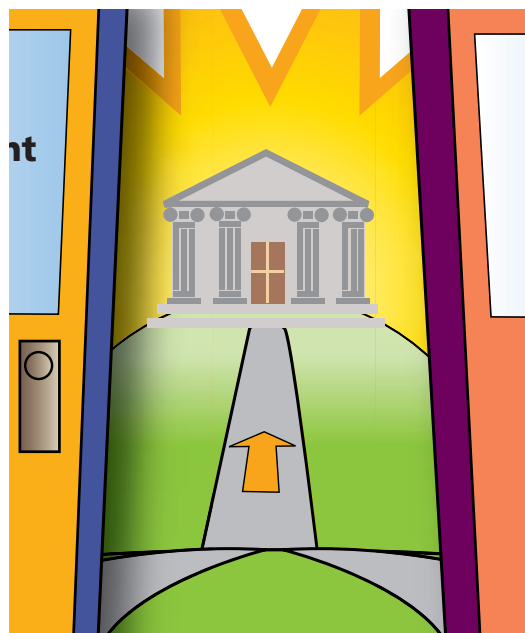
The judicial merit selection committee in South Carolina reviews initial applicants and recommends a set number of candidates to the general assembly, from which legislators vote to fill a given judicial vacancy. The merit selection committee itself may not be completely free from political influences, however, because the ten-member committee is made up of six members of the general assembly and four members of the public who

are selected by that legislative body.

### The Experiments Continue

The experiences of the various states and continued reform efforts reveal no panacea in the world of judicial selection. No method exists that can fully ensure both independence and accountability. Instead, our unique federal system permits each state to determine the method that best suits its citizens and circumstances and to continue to experiment with selection and retention methods that will provide the basis for a judiciary that is as fair, impartial, and independent as possible. ♦

Wendy J. Keefer is of counsel in the Charleston, South Carolina, office of the law firm of Haynsworth Sinkler Boyd, P.A. She previously served in the Office of Legal Policy at the U.S. Department of Justice, where she was involved in the nomination and confirmation of federal judicial nominees. She can be reached at [wkeefe@hsblawfirm.com](mailto:wkeefe@hsblawfirm.com).



## Mark Your Calendar

### Aviation Litigation Program

October 16–17, 2008, Washington, DC  
(312-988-5708)

### Fidelity and Surety Law Committee

#### Fall CLE Program

November 6–7, 2008, Baltimore, MD  
(312-988-5708)

### Equal Access to Justice/Elderly & Disabilities

December 5, 2008, St. Petersburg, FL  
(312-988-5708)

### Midwinter Symposium on Insurance, Employment, and Benefits

January 15–18, 2009, Bonita Springs, FL  
(312-988-5597)

### Fidelity & Surety Law Committee

#### Midwinter Meeting

January 22–23, 2009, New York, NY

(312-988-5672)

### ABA Midyear Meeting

February 11–17, 2009, Boston, MA  
(312-988-5672)



# “When I Was a New Lawyer”

**Richard (Rick) Luis**  
State Administrative Law Judge  
Office of Administrative Hearings  
St. Paul, Minnesota

## What is your background, and what inspired you to become a lawyer?

I was raised in a small town, Shakopee, Minnesota, and earned a BA from Yale. Dad was a corporate lawyer who commuted to 3M in St. Paul. He influenced me by example, and I've always liked discussion and debate.

## Where did you go to law school, and what did you do right after that?

My studies at the University of Minnesota Law School were interrupted by the draft. Following my return and graduation, I started as an associate for a small town general/trial practitioner—unfortunately, it was not *my* small town. After a year, I was hired as an unemployment compensation judge, based in St. Paul, and I traveled statewide to 20-plus unemployment offices to hear cases. It was a high-volume docket, and I learned early that I loved judging. I worked there from 1976–1980, when I was promoted to my present position as a “central panel” trial judge, for which I continued to travel the state. The state’s Office of Administrative Hearings was housed in Minneapolis for 25 years, but we moved back to St. Paul a year ago. Over the years, I have heard cases in almost all of Minnesota’s 87 counties.

## Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become so successful?

My first senior judge/mentor advised, “We’re not looking for opinions from Justice Holmes.” Crude as that sounds, it was an early “heads up” never to lose sight of moving the calendar along. I’m required to issue written decisions in every case, and a top expectation of the public is that cases are decided promptly. We had to issue 20 decisions each week in unemployment comp, and this taught me not to fall behind. Also, most unemployment hearings proceed without lawyers, so I learned to manage trials efficiently and to develop a proper record each time based on the elements of the case.

## Whom do you most admire?

I admire people who are not afraid to be unpopular.

## What is your greatest source of professional pride?

I strive to understand, and empathize with, positions taken by litigants. I’m told that it shows, and that I provide a “day in court” for all sides. I receive comments like that from people I’ve ruled against, and that gives me pride.

## What got you started with ABA involvement?

My wife, Nita Luis, got involved with TIPS first, and I soon met many fine people who welcomed me quickly into the Section. I wanted to get more involved, as a way to “give back.” I participate actively in the ABA’s Judicial Division as well.

## What was the worst professional advice you ever received?

We periodically receive confidential, anonymous evaluations from counsel and parties on our performance as judges. In answer to “What can the judge do to improve performance?” the advice was “Submit to a lobotomy.” I have not done it.

## What was the best professional advice you ever received?

See the previous question. No, seriously, the best advice was to find time to prepare for hearings, but that’s a grind at times.



Richard Luis  
then and now.



## What personality trait has served you best over the years?

I like people. I like to think I’ve been served best by my patience with them and by maintaining a sense of humor at trial. I am aided by being persistent and by possessing stamina—I sometimes preside over public hearings lasting to the wee hours, and I never quit until everyone who wants to be heard has his or her chance.

## What challenges you the most?

Most challenging for me is staying calm and maintaining an even demeanor. My imagination and sense of humor have to be reined in, even if I find something hilarious. Also, I’m challenged to refrain from commenting on positions I think are absurd.

## What is the one thing you cannot stand (regarding the law/lawyers)?

Very little—I like the law, and lawyers are about my favorite people. One pet peeve is when lawyers have made their point already but do not have the common sense to stop “piling on.” That may occur when a lawyer does not understand that I am the sole trier of fact (there are no juries in my cases).

## What is your favorite type of legal work?

Human rights, employment, and environmental cases are my favorites. I sit on a central panel of judges who all hear a wide variety of government agency matters, but I created a niche 20-plus years ago by showing a knack for public utilities cases.

## What are your future ambitions?

My future personal ambitions include traveling and continuing my volunteer activities. Professionally, I am not yet planning retirement, but after I do retire I hope to work as a private judge or arbitrator—that is, unless I can become commissioner of the NFL.

## What can the ABA do to be a good home to young lawyers?

Offer cheap, or free, membership for several years after bar admission, and allow those in the Young Lawyers Division to join another ABA section initially without charge. In this way, talented newcomers can be spotted early. ❖

## Rick Luis’s advice for new lawyers:

- Represent clients zealously, but avoid frivolous arguments. Your credibility will be enhanced if you’re willing to concede points or issues where your case is weak.
- Stay healthy—and take time off for your family.
- Get involved in the ABA; it’s a wonderful extended family.
- Be nice to the judge—arguing with the bench gets you nowhere. ❖

## Join a TIPS Committee Today

Did you know that, as a TIPS member, you can join up to three TIPS committees at no extra charge?

Here are five reasons why you should join a TIPS committee:

1. Increase your visibility within TIPS.
2. Enhance your networking opportunities.
3. Sharpen your skills.
4. Lend your expertise.
5. Become a leader among your peers.

Go to [www.abanet.org/tips/committee.html](http://www.abanet.org/tips/committee.html) to find out more about the advantages of belonging to a TIPS committee, and join a committee today!



# Trial Tips

Peter Bennett

## Fair and Impartial Courts

**T**IPS has recently focused on the issue of fair and impartial courts for good reason. Our lawyer members, who appear every day in our nation's courtrooms, know that preserving the fairness and impartiality of our judiciary is critical to the functioning of our government. We understand that the judicial branch serves as a check on the other two branches of government and protects minority rights from oppression by the majority.

When our government was formed, the Founders instituted an appointment system for judges. But although federal judges are appointed for life, 39 states now elect their judges. And the process of electing judges has become increasingly political and complex. Recent years have seen an unprecedented growth in money raised and spent on judicial campaigns to publicize and sometimes to distort the candidates' records and views. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), exacerbated this problem by prohibiting states from limiting speech in judicial campaigns. Candidates for office can no longer be prevented from announcing their views on political issues even when those issues may come before them on the bench. Multi-million dollar campaigns are becoming the norm. The role of special interest groups in these campaigns is also increasing, as is the role of out-of-state money. Often, this campaign advertising misleads the public about the relevant qualifications of a judicial candidate to serve on the bench. The result is the appearance that justice is for sale and that candidates are not whom they really appear to be.

Unfortunately, money taints the perception of whether judges exercise independent judgment. Given that this taint is borne out by public opinion research, the deeper problem becomes obvious. Regardless of whether judges function independently, the citizenry's perception of judicial fairness erodes along with its confidence in government when it appears that the judiciary cannot provide a true check and balance.

Lawyers, especially those involved in the justice system, have a special duty to defend the judiciary's impartiality. Here are three actions we can take.

First, when we lose we have to stop blaming the judge to our clients. It is also time to stop leading clients to believe that a lawyer's relationship to a judge can influence the outcome of a matter, or that a judge rules for or against a party because he or she likes the lawyer. When we blame the judge or suggest that favor makes a difference, we demean the integrity of the entire bench and, ultimately, of our profession and the rule of law.

Second, we must educate the public and more particularly our children about the role of the judiciary and why it is important to maintain a fair and impartial judiciary.

Third, in those states that conduct some form of election, we must help form or participate in campaign conduct committees. These committees educate the public about how to choose a candidate, expose the actions of the special interest groups that are undermining the process, and improve transparency and fairness of the election process.

Our third branch of government stands apart from its two coequal sisters. Courts do not exist to serve the majority, or those—majority or otherwise—who are willing to spend the most money or make the most noise. Our courts ensure that we preserve the rule of law and the minority's bedrock rights against majority power. ♦

*Peter Bennett, president of The Bennett Law Firm in Portland, Maine, is the immediate past chair of TIPS. He can be reached at pbennett@thebennettlawfirm.com.*

*Barbara O'Donnell is a partner with Robinson & Cole LLP in Boston. She is a member of the TIPS Publications editorial board and is the immediate past chair of the TortSource editorial board. She can be reached at bodonnell@rc.com.*

Of course, amidst visiting Boston's attractions and TIPS social events, attendees will also have a busy and productive schedule of top-notch CLE offerings, TIPS business meetings, and networking opportunities. Be sure to check the TIPS Web site at [www.abanet.org/tips](http://www.abanet.org/tips) in the coming weeks for information about the Section's events at the Midyear Meeting. The chance to connect with ABA acquaintances and friends in this historic city should not be missed—just be sure to pack a warm coat and prepare for a little snow. We'll look forward to welcoming you for an extended Valentine's Day weekend in New England! ♦

Museum goers will have a wealth of options. First opened in 1903 to showcase art and decorative finds collected from travels throughout Europe, Asia, and the United States, the Isabella Stewart Gardner Museum offers three floors of galleries surrounding a garden courtyard. Art patrons can also enjoy afternoon or evening concerts in the longest-running museum music program in the nation. In dynamic contrast to the historic Gardner Museum, the Institute of Contemporary Art occupies an architecturally acclaimed space overlooking the Boston Harbor, to which the museum moved in 2007. Boston's Museum of Fine Arts showcases one of the world's finest collections of museums and artifacts from ancient Egypt, Greece, and the Roman Empire, as well as wonderful collections of European masterpieces and art from the Americas.

h, Boston in February. For those attending from locales that lack four robust seasons, the ABA Midyear Meeting will provide the opportunity to take advantage of this eminently walkable city by observing or partaking in ice skating on Boston Common, strolling amidst the historic homes on Beacon Hill, taking a guided Freedom Trail tour, and sampling culinary delights in the North End (for Italian fare) or Chinatown. Those who prefer indoor comforts can indulge in fabulous shopping at the high-end Prudential Center Mall and Copley Place stores attached to the Marriott Copley, the TIPS headquarters hotel.

## TIPS Midyear Meeting February 12-17, 2009

Barbara O'Donnell



“My Boston”

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