

JUDICIAL INDEPENDENCE

Background

The success and longevity of our tripartite system of government is predicated on the existence of an independent, co-equal judicial branch. Recent years have brought greater media coverage and critiques of judges and judicial elections, along with legislative intervention in judicial decisions. Both the political left and right have weighed in with criticism of particular judicial decisions. Calls for impeachment of federal judges and intense challenges to state judges running for election or retention often come from narrowly focused special interests not interested in impartiality or fairness.

The American Bar Association's Standing Committee on Judicial Independence has disseminated a public awareness plan on judicial independence to bar associations throughout the U.S. The ABA has also created a model for responding to unfair or inaccurate criticism of the judiciary and promotes its adoption. The ABA is not alone in its efforts to educate the public about the significance of judicial independence. Other national organizations that strive to promote an understanding of the importance of protecting access to a fair and independent judiciary include the American Judicature Society, the League of Women Voters, the Brennan Center for Justice at NYU School of Law, The Constitution Project's Center for Independent Courts, the People for the American Way, and the Justice at Stake Campaign.

State bar associations have also been active in this field. All state bar associations work to bolster the public's trust and confidence in the judicial system, and more and more are undertaking initiatives to increase public awareness of the importance of judicial independence. State and local bar associations have also established judicial campaign conduct committees to improve the tone of elections. Despite such committees, contested judicial elections at the state supreme court level are becoming more like other political elections, complete with negative campaign ads and multi-million dollar costs associated with them. In the 2004 election for a seat on the Supreme Court of Illinois, the candidates' parties spent more than \$8 million on negative ads. In all, judges in 15 states ran television ads, spending more than \$19 million.

Negative ads and the huge sums of money that go into judicial campaigning undermine the public's trust in the impartiality of the judiciary. Some state legislatures are making additional attempts to weaken the judiciary by adding a layer of politics to their non-partisan selection plans. Both Missouri and Kansas have seen bills introduced that would require Senate confirmation of candidates, even after the governor has chosen one of the nominees presented by the appellate judicial commission.

While state legislatures consider ways to politicize judicial selection, other groups, such as the League of Women Voters, are attempting to reduce the role of politics in judicial elections. Thirteen state and local branches of the League of Women Voters have conducted judicial independence projects that include monitoring of elections, surveys of judges and citizens, and public programming. The League is working with state and local bar associations to further the bar-public dialogue on judicial independence.

The ABA Standing Committee on Judicial Independence assists courts and bar associations by taking a proactive stance on judicial independence. In addition to responding to specific infringements on judicial independence, the committee is building public awareness and appreciation

of judicial independence and merit selection. Also, the committee recommends ways to enhance and improve the institutional independence and efficiency of courts, and serves as a clearinghouse for the ABA's activities regarding judicial independence. Its primary focus is on state and local judiciaries.

In February 2002, the ABA House of Delegates adopted the recommendations of the Commission on Public Financing of Judicial Campaigns, calling on states that continue to elect their judges to adopt public financing systems for high court elections. The Standards on State Judicial Selection also spurs further discussion of appropriate and achievable reforms in the states.

The decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White*, which invalidates prohibitions on judicial candidates from announcing their views on disputed legal or political issues, is likely to spur more efforts by bar associations to encourage higher standards of conduct in judicial campaigns. A broad-based ABA Working Group on the First Amendment and Judicial Campaigns was formed to address the impact of the *White* decision on the ABA Model Code of Judicial Conduct. During the current ABA year, an ABA Commission on the 21st Century Judiciary will take up the challenge of crafting a new approach to state judicial selection that enhances the independence and accountability of the judiciary. A resource kit on judicial independence is available on the committee's web site at www.abanet.org/judind/resourcekit.

The Standing Committee on Judicial Independence and the Standing Committee on Election Law sponsored a recommendation to the ABA House of Delegates in 2002 encouraging better education of voters in judicial elections and the creation of judicial campaign conduct committees. Under a grant from the Open Society Institute, the Standing Committee on Judicial Independence organized public education efforts on judicial independence issues nationwide. The committee works with state, local and territorial bar associations and non-legal organizations to sponsor citizens conferences, public service announcements, and Judges Network programs, which capitalize on the public's interest in learning about the judicial system directly from judges.

Missouri Bar Activities

In late 1998, The Missouri Bar co-sponsored, along with the American Judicature Society, judicial independence forums in St. Louis and Kansas City. The forums were part of a series of such events taking place nationwide under the auspices of AJS. The forums brought together leaders from the bench, bar and media to address issues related to unfair criticism of judges who properly exercise their judicial authority.

That same year, the Board of Governors adopted a policy, drafted by the Foresight Committee, setting out the parameters of a proper response to criticism of judges, when appropriate, by The Missouri Bar:

Providing the public with information about the importance of an independent judiciary under our constitutional form of government is of crucial importance in maintaining a fair and effective justice system. Accordingly, consistent with The Missouri Bar's scope, purpose and procedure, the President, Board of Governors or its Executive Committee may respond to criticism of judges and courts. The staff of The Missouri Bar shall include in its annual communications plan specifics regarding the means by which The Missouri Bar will convey to the public information about the operation and independence of the judicial branch of government.

In 2004, a special Missouri Bar commission on the independence of the judiciary was created to advise the Board of Governors on how to determine when a response is warranted and to provide options for responding to improper criticism. The Board of Governors will review the commission's recommendations and continue to develop public education projects in this area.

Several years before the formation of the special commission, The Missouri Bar produced a video on judicial independence that was designed for high school students and other audiences. The public education video, introduced in 2001, is still being ordered by teachers and libraries throughout the United States. The video, "Loitering Around the 21st Century: Our Courts and the Significance of Judicial Independence," was professionally produced, and provides an excellent introduction to the topic. Rather than a standard civics lesson, the video tells an entertaining story in which Thomas Jefferson and Benjamin Franklin travel to the 21st Century to see how their experiment in democracy is progressing. They view a controversial court case and visit a law school. Through their comments and the plot action, viewers learn about the role of the courts and the significance of judicial independence. The video was also designed to be used as an educational tool for lawyers speaking to community groups and social organizations, particularly those who participated in the "Pillars of Justice Speakers' Bureau" organized by the state bar. Participants in the speakers' bureau were provided with a packet containing a speech outline and a question-and-answer sheet about judicial independence.

The Missouri Bar also entered into the fray when the United States Supreme Court, in the case of *Republican Party of Minnesota v. White* (2002), held that Minnesota law cannot bar candidates for any office – including judges – from discussing issues. Such laws, the Court majority said, impose an unconstitutional gag order on candidates. Because Missouri's Rules of Professional Conduct contain similar language to the Minnesota law in question, the Board of Governors authorized the preparation of an amicus brief in the case. The brief – prepared for The Missouri Bar by the Sikeston law firm of Blanton, Rice, Sidwell, Nicell & Cozean, L.L.C. – noted "the harm caused when judicial candidates make comments about matters on which they must later rule as judges. Few situations are more injurious to public confidence in the judicial system than a judge hearing a contested matter after making categorical public statements about the key issues in that matter Comments of this type are likely to damage the litigants' and the public's view of the impartiality and fairness of the proceeding."

This year, The Missouri Bar developed several additional projects to promote a better understanding of judicial independence. The bar created a brochure, "Speak Up for Missouri Courts," which explains the significance of the Non-Partisan Court Plan and the importance of judicial independence as a safeguard of our freedoms. The brochure is made available to Missouri courts and to lawyers who would like to keep several copies in their waiting rooms for clients. It is also available on the bar's website (www.mobar.org), on a page that includes new resources for lawyers who would advocate on behalf of the courts, the Non-Partisan Court Plan and judicial independence. That resource page includes a videotape of a brief scholarly lecture about the Non-Partisan Court Plan by University of Missouri Professor Rick Hardy. Those lawyers who prefer text to video can download a transcription of the presentation.

The Missouri Bar continues to monitor media reports about the judicial system to ensure that any instances of unfair or inaccurate criticism of judges and the courts can be evaluated and an appropriate response determined.