

## JUDICIAL SELECTION

### Background

Throughout our nation's history, the manner of selecting judges – be it by appointment, election, or a combination of the two – has been the subject of ongoing debate. While the framers of the Constitution were wary of investing absolute authority for judicial appointments in the hands of the executive branch (having had firsthand experience with the tyranny of royal appointments), post-American Revolution systems of judicial selection included checks on unfettered power by means of legislative oversight. With the rise of populism and Jacksonian Democracy, many states adopted partisan election. The failure of partisan elections to achieve reform led to more reform, including the advent of non-partisan elections, retention elections after appointment, and a patchwork of judicial election systems currently in place in the states. No two states have identical selection systems. Methods of selection within a state often vary depending on the level of court or jurisdiction.

Current reform initiatives share a commonality with earlier measures – the desire to ensure judicial independence and a high-quality bench. The increasing rancor and cost of judicial campaigns are of growing concern to both the bench and the bar.

Overall, 87% of state court judges face the voters either through direct or retention election, according to the National Center for State Courts ([www.ncsc.dni.us](http://www.ncsc.dni.us)). However, the most common way to gain a seat on the bench is through a midterm appointment – more than half of all state judges initially take the bench this way. Currently, there are six methods or combinations of methods for selecting judges for both appellate and general jurisdiction courts:

- Sixteen states use some form of merit selection through a nominating commission;
- Six states use gubernatorial or legislative appointment without a nominating commission;
- Eight states have partisan elections;
- Thirteen states have nonpartisan elections;
- Nine states – including Missouri – combine merit selection with elections for different levels of court and jurisdictions; and
- Nine states using elections have merit plans only to fill mid-term vacancies on some or all levels of their courts.

While the American Bar Association and most state and local bar associations, along with such non-government organizations as the League of Women Voters, continue to support merit selection as the preferred method for the states, the momentum toward merit selection systems has slowed considerably.

In an effort to improve existing judicial election systems, states are considering a range of interim steps. Legislative proposals to create public financing of appellate court elections have been

introduced in Illinois, North Carolina, Texas and Wisconsin; study commissions on public financing have been formed in Georgia and Idaho. In 2000, Arkansas voters approved an amendment to the constitution that shifts from partisan to non-partisan elections. Texas adopted judicial campaign contribution limits and a ban on campaign contributions to judicial campaigns by judges. State supreme courts and state and local bar associations in many states have formed judicial campaign conduct committees to improve the tone and conduct of campaigns.

The American Bar Association has also been very active in this important area. The ABA's House of Delegates adopted the recommendations of the Commission on Public Financing of Judicial Campaigns. Also, the ABA's Standing Committee on Judicial Independence sponsored the Standards for State Judicial Selection, which provides guidelines for obtaining the best qualified judges regardless of the method of selection ([www.abanet.org/judind/jud\\_selection.html](http://www.abanet.org/judind/jud_selection.html)).

Two other ABA entities – the Standing Committee on Judicial Independence and the Standing Committee on Election Law – sponsored a recommendation to the ABA House of Delegates encouraging better education of voters in judicial elections and the creation of judicial campaign conduct committees. A broad-based ABA Working Group on the First Amendment and Judicial Campaigns was also formed to address the impact of the *Republican Party of Minnesota v. White* decision on the ABA Model Code of Judicial Conduct. A Commission on the 21st Century Judiciary also explored the challenge of crafting a new approach to state judicial selection that enhances the independence and accountability of the judiciary.

### **Missouri Bar Activities**

When the citizens of Missouri voted in favor of a non-partisan selection and retention procedure for some judges – what has come to be known nationally as “the Missouri Plan” – in 1940, it soon became evident that voters needed additional information about these judges in order to cast an informed judicial retention ballot. This was particularly so because the judges included in the plan were either appellate judges (Supreme Court of Missouri and Missouri Court of Appeals) who had little direct contact with the public, or were trial judges in highly populated areas (Jackson County, St. Louis County and the City of St. Louis). Platte County and Clay County were added to the plan in the late 1960s by vote of their citizens.

Thus, beginning in 1948, The Missouri Bar began conducting a Judicial Poll during each judicial election year. Each member of The Missouri Bar in good standing was sent a list of the judges seeking retention, with the single question: “Shall Judge (name) be retained?” The results of the poll were tabulated and disseminated to the public, primarily through the print and broadcast media, to assist them in making decisions at the polls. It was argued that the poll results would provide voters with information as to the qualifications of the judges seeking retention from those who know them best – the lawyers who appear before them on a regular basis.

This structure remained in place until 1990, when leaders of the bench and bar expressed alarm at the significant lowering of support for retention of judges. Indeed, at the 1990 general election, judges averaged less than 60 percent support from voters. As a result, in 1992 The Missouri Bar joined forces with The Bar Association of Metropolitan St. Louis and The Kansas City Metropolitan Bar Association to launch an expanded voter information effort. The initiative featured a new

name for the lawyer poll – the Judicial Evaluation Survey – and a new format featuring expanded lawyer evaluations of particular judicial qualifications, such as decisiveness, impartiality, courtesy, legal analysis, integrity, and more. The undertaking also included a comprehensive effort to increase voter awareness of the structure, operation and benefits of Missouri’s non-partisan court plan. The results of the 1992 Judicial Evaluation Survey were compiled in “Voters’ Information About Judges,” a comprehensive booklet containing photographs and brief biographical sketches of the judges seeking retention and the evaluation results for each judge. Hundreds of thousands of copies of the booklet were distributed around the state through the three participating bar organizations.

The evaluation results were announced during news conferences in St. Louis, Kansas City and Jefferson City, at which representatives of the print and broadcast media were provided with the results and an opportunity to interview bar leaders. In addition, The Missouri Bar published a colorful pamphlet, “Voting for Missouri’s Judges,” that explained the differences between partisan and non-partisan elections and the value of each. This brochure, which has since been updated, continues to play an important role in enhancing public information about Missouri’s judges.

The expanded public information efforts bore fruit immediately, with retention averages climbing appreciably during the 1992 general election. That trend has continued to date, with the average retention rate for judges at the 2002 general election hovering in the 80-85 percent range.

The Judicial Evaluation Survey and related activities have continued virtually unchanged since 1992, with one significant addition: online availability of the results of the Judicial Evaluation Survey. Through The Missouri Bar’s website, any citizen with access to a computer can learn the results of the survey 24 hours a day, seven days a week.

However, efforts are underway to determine if the Judicial Evaluation Survey can be made even more useful to Missourians. A special committee of The Missouri Bar’s Board of Governors is studying the existing survey to consider what changes, if any, should be made. Issues being considered by the committee include possible revisions to the existing survey questions, improved distribution methods, and the possible inclusion of a survey of jurors regarding trial judges before whom they have appeared.