



ILLINOIS STATE BAR ASSOCIATION

# BENCH & BAR

*The newsletter of the Illinois State Bar Association's Bench & Bar Section*

## Perception vs. reality: Money in judicial elections

By David W. Inlander and Ronald D. Menna, Jr.<sup>1</sup>

The role money plays in influencing judicial elections, and its subsequent impact on the public's perception of the judiciary, has come under increased scrutiny in courts, legislatures and the media. A 2009 USA Today/ Gallup poll found that 89 percent of those surveyed responded that the influence of campaign contributions on a judge's ruling is a problem; 52 percent deemed it a "major" problem.<sup>2</sup> According to the Brennan Center for Justice, "Thirty-nine states elect at least some of their judges, and the vast majority of cases in the United States are heard by elective courts."<sup>3</sup> With the costs associated with judicial (and retention) elections at all levels skyrocketing, the issue of campaign contributions is bound to become even more problematic both for judicial candidates and the public's view of both elections and subsequent conduct.<sup>4</sup> The issue of money in judicial elections has been raised recently in New York, Illinois and other States.<sup>5</sup> Here, we contrast New York's approach with Illinois'.

On February 14, 2011, the New York Appellate Division (its highest Court) issued a proposed rule which provides that judges will not be assigned to any cases involving an individual attorney, plaintiff or defendant who has contributed \$2,500 or more to the judge's campaign within the previous two years.<sup>6</sup> Most contributions in New York trial court elections fall below this proposed limit.<sup>7</sup> This proposed rule is believed to be the most restrictive in the nation.<sup>8</sup> According to the *New York Times*, the State of New York's Chief Judge, Jonathon Lippman, "who promoted the adoption of the measure by a statewide judicial board, said in an interview that the rule was critical to preserve the integrity of the state's courts. 'Nothing could be

more important for the judiciary than to have the public see that we're neutral arbiters of disputes," he said. 'If we don't have that, we don't have anything."<sup>9</sup> Thus, New York addressed the question of money in judicial elections by prohibiting judges from hearing cases where certain contributors, parties or lawyers, appear before them.

While there is no such existing or proposed Supreme Court Rule regulating which cases an Illinois Judge may hear,<sup>10</sup> Illinois recently adopted campaign contribution limits which are applicable to judicial (and retention) elections.<sup>11</sup> As of January 1, 2011, a candidate for office or retention can no longer accept unlimited contributions. Rather, for the first time, substantial restrictions have been placed on campaign contributions. The highlights of the new law include:

- A "Candidate Political Committee" now includes judicial and retention candidates;<sup>12</sup>
- A candidate can only establish one Candidate Political Committee for each office that public official or candidate holds or is seeking;<sup>13</sup>
- Individuals can give up to: \$5,000 to any candidate committee each election; \$10,000 to any political party or legislative caucus committee each year; \$10,000 to any political action committee each calendar year;<sup>14</sup>
- Businesses, unions and associations can give up to: \$10,000 to any candidate committee each election; \$20,000 to any political party or legislative caucus committee each year;<sup>15</sup>
- Political Party Committees can give up to: \$125,000 for a candidate political com-

mittee established to support a candidate seeking nomination to the Supreme Court or Appellate Court in the First Judicial District, or, an office elected by all voters of a county of 1,000,000 or more residents; \$75,000 for a candidate political committee established to support a candidate seeking nomination to the Supreme Court or Appellate Court for a Judicial District other than the First Judicial District, or an office elected by all voters of a county of fewer than 1,000,000 residents; and \$50,000 for a candidate political committee established to support the nomination of a candidate to any other office;<sup>16</sup>

- A person who collects or accepts a contribution for a political committee, no matter how small, shall, within five days after receipt submit to the treasurer a detailed account of the contribution including: (i) the amount, (ii) the name and address of the person making such contribution, (iii) the date on which the contribution was received, and (iv) the name and address of the person collecting or accepting the contribution for the political committee (There formerly was a \$20 non-reporting exception);<sup>17</sup>
- The reporting requirements have been broadened to mandate: committees are to file quarterly contribution and expenditure reports;<sup>18</sup> contributions of \$1,000 or more received within 30 days of an election to be disclosed within two business days;<sup>19</sup> contributions of \$1,000 or more received more than 30 days before an election to be disclosed within five business days;<sup>20</sup> disclosure of individuals (other than an officer of the committee,

a compensated employee, a person authorized by an officer or the candidate of a committee to accept contributions on behalf of the committee, or an entity used for processing financial transactions by credit card or other means) who gather contributions of \$3,000 or more in aggregate from five or more contributors outside the presence of the candidate;<sup>21</sup> reporting of "independent expenditures"<sup>22</sup> of \$3,000 or more made by individuals or groups;<sup>23</sup> reporting of a political committee's independent expenditures of \$1,000 or more made within 30 days of an election<sup>24</sup> (The statute also allows for a temporary injunction against any entity that fails to report independent expenditures<sup>25</sup>);

- Defines "receipt" as occurring when a contribution is deposited in a committee's account, when a committee receives electronic notice of a contribution, or receives notice of an in-kind contribution;<sup>26</sup>
- Finally, there is the "Millionaire's amendment" which provides that if during the twelve months prior to an election, one candidate (or the candidate's spouse, parent or child) contributes, loans or makes independent expenditures of more than \$100,000 for a non-statewide elective office, the candidate must file a "Notification of Self-Funding," and once the notification is received from the Board of Elections, all candidates for that office (including the "self-funding" candidate) may accept contributions in excess of the limits set forth above.<sup>27</sup>

While Illinois' law is not as restrictive as New York's proposed rule, it does take a significant step towards regulating spending on judicial elections. While there is no "perfect"

way to elect or select our judiciary, we now have taken steps to reduce the perception that money will buy influence in Illinois' judicial races and beyond. ■

1. David W. Inlander and Ronald D. Menna, Jr. are principals in the Chicago law firm of Fischel & Kahn, Ltd., where they concentrate in general civil litigation. Mr. Inlander is a member of the ISBA Bench & Bar Section Council.

2. *Supreme Court Case With the Feel of a Best Seller*, <[http://www.usatoday.com/news/washington/2009-02-16-grisham-court\\_N.htm](http://www.usatoday.com/news/washington/2009-02-16-grisham-court_N.htm)>.

3. <[http://www.brennancenter.org/content/section/category/state\\_judicial\\_elections](http://www.brennancenter.org/content/section/category/state_judicial_elections)>.

4. The Illinois Campaign for Political Reform notes on its Web site that "a partisan election system—like the system Illinois uses for its Supreme Court, Appellate Court and Circuit Court positions, where candidates seek office under the flag of a political party—can create a perception among the public that would-be judges are politicians first[,] impartial interpreters of the law second"; <<http://www.ilcampaign.org/issues/judicial-retention/illinois-system>>; see also, *Big Money Threat to Independence of our Judiciary*, <[http://www.pantagraph.com/news/opinion/editorial/article\\_0157780e-e3b6-11df-b3fd-001cc4c002e0.html](http://www.pantagraph.com/news/opinion/editorial/article_0157780e-e3b6-11df-b3fd-001cc4c002e0.html)>; *New York Takes Step on Money in Judicial Elections*, <[http://www.nytimes.com/2011/02/14/nyregion/14judges.html?\\_r=1&emc=eta1](http://www.nytimes.com/2011/02/14/nyregion/14judges.html?_r=1&emc=eta1)> ("The national drive for scrutiny of contributions to judicial campaigns gained momentum after a 2009 Supreme Court ruling that said the chief justice of the West Virginia Supreme Court had wrongly ruled in the \$50 million case of a coal company whose chief executive had spent \$3 million to help elect him.");

5. See also, *Missouri Plan for Selecting Judges Faces New Challenge*, <[http://www.stltoday.com/news/local/govt-and-politics/article\\_7fb91810-c4da-5957-951d-daec4f112746.html](http://www.stltoday.com/news/local/govt-and-politics/article_7fb91810-c4da-5957-951d-daec4f112746.html)>; *Putting a Halt to Judicial Elections*, <<http://www.washingtonpost.com/wp-dyn/content/article/2010/11/04/AR2010110407139.html>>.

6. <<http://www.nylj.com/nylawyer/adgifs/decisions/021511rule.pdf>>.

7. *Recusal Is Step in Right Direction, Bar Leaders Say*, <<http://www.law.com/jsp/nylj/>

[PubArticleNY.jsp?id=1202481963973&Recusal\\_Is\\_Step\\_in\\_Right\\_Direction\\_Bar\\_Leaders\\_Say&slreturn=1&hbxlogin=1](http://www.nytimes.com/2011/02/14/nyregion/14judges.html?_r=1&emc=eta1)>.

8. *New York Takes Step on Money in Judicial Elections*, <[http://www.nytimes.com/2011/02/14/nyregion/14judges.html?\\_r=1&emc=eta1](http://www.nytimes.com/2011/02/14/nyregion/14judges.html?_r=1&emc=eta1)>.

9. *Id.*

10. Canon 2(A) of the Illinois Code of Judicial Conduct provides that "A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." 210 Ill.2d R. 62. Canon 3(C)(1) provides that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to ..." Canon 3(C) does not list campaign contributions by a party, lawyer or law firm as a specific basis for disqualification. 210 Ill.2d R. 63.

However the United States Supreme Court held in *Caperton v. A.T. Massey Coal Co., Inc.*, 566 U.S. \_\_\_, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), that a West Virginia Supreme Court judge erred in failing to recuse himself after receiving \$3 million in campaign contributions from the defendant in that case. *Caperton* did not provide any guidelines regarding what constitutes a contribution so large as to require recusal, or regarding in what instances a judge should recuse himself or herself in a case involving campaign supporters.

11. P.A. 96-0832; <<http://ilga.gov/legislation/publicacts/96/PDF/096-0832.pdf>>.

12. 10 ILCS 5/9-1.8(b); 10 ILCS 5/9-1.9(3); 10 ILCS 5/9-1.10

13. 10 ILCS 5/9-2

14. 10 ILCS 5/9-8.5(b)

15. 10 ILCS 5/9-8.5(b)

16. 10 ILCS 5/9-8.5(b)

17. 10 ILCS 5/9-6(a); 10 ILCS 5/9-7

18. 10 ILCS 5/9-10(b)

19. 10 ILCS 5/9-10(c)

20. 10 ILCS 5/9-10(c)

21. 10 ILCS 5/9-6(a)

22. 10 ILCS 5/9-1.15

23. 10 ILCS 5/9-8.6(a)

24. 10 ILCS 5/9-10(e)

25. 10 ILCS 5/9-28.5(a)

26. 10 ILCS 5/9-10(d)

27. 10 ILCS 5/9-8.5(h)

THIS ARTICLE ORIGINALLY APPEARED IN  
THE ILLINOIS STATE BAR ASSOCIATION'S  
BENCH & BAR NEWSLETTER, VOL. 41 #4, MARCH 2011.  
IT IS REPRINTED HERE BY, AND UNDER THE AUTHORITY OF, THE ISBA.  
UNAUTHORIZED USE OR REPRODUCTION OF THIS REPRINT OR  
THE ISBA TRADEMARK IS PROHIBITED.