Greater Expectations

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I believe deeply that our vocation is a noble one and that, in serving our clients, we perform a great service to the public. This belief has been the driving force of my 45-year career as an attorney, and it is the primary reason I've devoted time to various roles with the State Bar of Michigan. The work that the State Bar and its members do is critical to our democracy and to the lives of the women and men we represent.

Yet nonlawyers—and, sadly, some lawyers and judges—hold a negative view of the legal profession. It is hard to read a newspaper (if anyone does such a quaint thing anymore) or a blog without seeing a lawyer, a judge, or the profession as a whole accused of some misdeed. And if one ventures into the comments sections of online articles about the profession, it is apparent that many view lawyers and judges with outright contempt. Not much has changed since Carl Sandburg penned his famous lines:

> Why is there always a secret singing
> When a lawyer cashes in?
> Why does a hearse horse snicker
> Hauling a lawyer away?[1]

I have been representing lawyers in malpractice cases for at least 35 years and have found that people really *do* appreciate individual lawyers and come to applaud the difficult job lawyers perform. I have also represented the occasional judge and know as a result that individual judges and their decisions are usually treated respectfully.

It is the *profession* itself that seems to come under attack. But the profession the media targets is not the real legal profession. The media seldom, if ever, gives attention to the thousands of pro bono hours lawyers willingly provide. Nor does it give much attention to lawyers who represent the indigent or to the embarrassingly small fees these lawyers are paid.[2]

This jaundiced public perception is something the State Bar must continue to address. The State Bar and Bar representatives like me have a limited ability to advocate for public policy positions that are ideological in nature. This prohibition applies to matters that affect the practice of law, like individual civil rights (e.g., same-sex marriage) or statutory child support criteria.[3] But the State Bar and I can, should, and will spend Bar dues to promote improvements in the administration of justice, improve relations between the legal profession and the public, and promote the interests of the legal profession. During the next 12 months, as president of the State Bar of Michigan, I intend to do all those things.

My message is and always has been that we lawyers are not the problem; we are the solution. Our daily work drives the rule of law. It enables commerce, democracy, and civilized society.

Grandiose ideas aren't enough. The only way to change what might be a prevailing view of our profession is to deal in specifics, with the myriad rules and canons and statutes that form the context in which we practice law. And I can think of no better starting point than reforming campaign spending in judicial elections. There is no problem that combines such a desperate need for change with such an obvious fix.

It is no secret that unattributed campaign contributions play a significant role in Michigan's judicial campaigns. The Michigan Judicial Selection Task Force explained in its 2012 report that the 2010 campaign for the Michigan Supreme Court "was the most expensive and most secretive in the nation."[4] Most of the campaign ads were from sources other than the candidates' campaign committees and "were not subject to disclosure in the State's campaign finance reporting system."[5] In fact, "[o]ver the last decade, more than half of all spending on supreme court races in Michigan went unreported (and therefore the sources went undisclosed)."[6] The lack of disclosure was "worse" in 2012.[7] If the problem is not corrected, the expenditures and the secrets will be even more extreme in 2014 and beyond.

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Oakland County's 2012 judicial election put these problems in sharp relief. The *Detroit Free Press* documented the situation in an article titled "2 candidates for Oakland County Circuit Court say they are mystified over who is paying for TV ads."[8] The article explained that Deborah Carley and Bill Rollstin, both of whom were associated with the Michigan Attorney General's office, challenged five incumbent judges on the Oakland County Circuit Court. More than $2 million was spent on advertising for Carley and Rollstin, but both denied any knowledge of where the funds originated. According to the *Free Press,* the ads were funded by "Americans for Job Security in Virginia and Judicial Crisis Network in Washington, D.C.," two groups with innocuous names and unknown ties to Michigan (or Oakland County, for that matter).

This kind of judicial campaign is anathema to the rule of law and to the transparency that is necessary in our democracy. Courtrooms are open to the public and judicial decisions include full explanations of courts' rationales for a reason: the clear light of accountability promotes integrity and respect for the law. Indeed, openness and accountability are so central to our government in Michigan that we have chosen to elect our judges rather than have them appointed by a group of presumed cognoscenti.

No wonder the State Bar Representative Assembly, by a unanimous vote in 2010, called for disclosure before a judicial election of the source of the funding for all expenditures for campaign advertising.

The Assembly and the Judicial Selection Task Force concluded—and I agree wholeheartedly—that secret campaign spending is harmful in two ways. It can confuse voters about the message they rely on to assess the candidates, as it is difficult to judge a statement's credibility without knowing its source. Also, it obscures financial contributions that might cause conflicts of interest and require recusal from cases involving those donors. Both problems undermine the public's respect for courts and, in my view, diminish democratic accountability.

Michigan voters believe by large margins that campaign spending has affected the decision-making of their judiciary.[9] Still, some may respond to this concern about recusal like Carley. When asked by the *Free Press* about the role of anonymous contributions to her Oakland County campaign, Carley said, "I don't know anything about [the groups], where they're from, whom they're comprised of. How could I possibly be influenced by people I don't know?"[10]

There is something deeply unsatisfactory about this view. It presumes that an infection in the electoral process only matters if we know it's there. As we all know, the longer an infection goes undetected, the harder it is to cure. And there always comes a day when an infection cannot be ignored.

The suggestion that we can avoid corruption by maintaining ignorance is not just wrong; it is contrary to the rule of law. We must have greater expectations for ourselves as lawyers and citizens for the people of the state of Michigan, and for our elected judges. Requiring full transparency and accountability in judicial campaigns will make both voters *and* judges better informed and allow more people to have faith in the judicial system.

The Judicial Selection Task Force proposed an amendment to the Michigan Campaign Finance Act to eliminate this shadow campaigning.[11] But perhaps a better and quicker way to bring transparency to campaign financing for judicial elections is one the State Bar has initiated. The Michigan Campaign Finance Act and the Michigan Administrative Code both allow a party to request a declaratory ruling on the applicability of the Act to specific acts and fact patterns. Under a 2004 Department of State interpretation of the Michigan Campaign Finance Act, third-party issue ads that are not "express advocacy"—the very ads that have saturated the airwaves in our judicial races—do not have to be disclosed under the Act. The Bar is seeking a declaratory ruling from Secretary of State Ruth Johnson that *all* sources of financing for electioneering must be disclosed in judicial campaigns. The letter sent to Secretary of State Johnson from Janet Welch, our executive director, and my predecessor, Bruce Courtade, on September 11, 2013, is reproduced in full beginning on page 18. It explains that three United States Supreme Court decisions—*Federal Election Commission v Wisconsin Right to Life,*[12] *Caperton v Massey Coal Company,*[13] and *Citizens United v Federal Election Commission*[14]—change the assumptions underlying the 2004 interpretive letter and require a different answer concerning judicial elections.

I doubt there are many judges and justices who do not want to know who is contributing to both their own and their competitors' campaigns. It is much easier to address the complaints when one knows who is complaining and it is certainly easier to avoid conflicts of interest when one knows all the facts.

I will spend as much time as needed during my year as president to ensure we achieve full disclosure in judicial elections. If our request for a declaratory ruling does not bring about the necessary change, we will work with the legislature so the Michigan Campaign Finance Act is amended to require full identification of those funding advertisements and contributing to judicial campaigns.

Either change will lead to better decision-making at the ballot box and from the bench. And in doing so, it may allow all of us—lawyers and nonlawyers alike—to have more faith in the rule of law. ■

(Continued on next page)

ENDNOTES

1. Contempt for the legal profession apparently began long before Carl Sandburg. Plato supposedly wrote in 321 BCE that "a lawyer has learned how to flatter his master in word and indulge him in deed; but his soul is small and unrighteous….from the first he has practiced deception and retaliation, and has become stunted and warped. So he is passed out of youth into manhood having no soundness in him…." Brallier, *Lawyers and Other Reptiles* (New York: McGraw-Hill, 1992).
2. The indigent defense counsel compensation problem will be addressed through the governor's soon-to-be-appointed Michigan Indigent Defense Commission created by Public Act 93 of 2013, an act brought about in large part through the work of the State Bar. The Commission is charged with providing indigent defendants with effective assistance of counsel, standards for the appointment of legal counsel, and directing certain appropriations and grants.
3. *Keller v State Bar of California,* 496 US 1; 110 S Ct 2228; 110 L Ed 2d 1 (1990), a United States Supreme Court decision, prohibits mandatory bar associations from spending members' dues to advocate for public policy positions that are ideological in nature.
4. Michigan Judicial Selection Task Force, *Report and Recommendations* (April 2012), p 4, available at <http://www.lwvmi.org/documents/JSTFreport.pdf>. All websites cited in this article were accessed September 17, 2013.
5. *Id.*
6. *Id.*
7. In the 2012 Michigan Supreme Court campaign, the candidate committees reported raising $3.4 million, and reported independent expenditures were $1.6 million. The $5 million of reported activity was vastly overshadowed by $13.85 million of TV advertising about the candidates sponsored by the Michigan Republican Party, the Michigan Democratic Party, and the D.C.-based nonprofit corporation called Judicial Crisis Network. There is no public record of whose contributions paid for the issue advertising. See Michigan Campaign Finance Network, *Descending into Dark Money* (June 2013), available at <http://www.mcfn.org/pdfs/reports/MCFN_2012_Cit_Guide_final_rev..pdf>.
8. Brasier, *2 candidates for Oakland County Circuit Court say they are mystified over who is paying for TV ads,* Detroit Free Press, November 4, 2012, available at <http://www.freep.com/article/20121104/NEWS15/311040290/2-candidates-for-Oakland-County-Circuit-Court-say-they-are-mystified-over-who-is-paying-for-TV-ads>.
9. See Denno-Noor Research poll, *Survey of Michigan Statewide Voters* (March 12, 2009).
10. Brasier, n 8 *supra.*
11. Judicial Selection Task Force, n 4 *supra* at 31.
12. *Federal Election Commission v Wisconsin Right to Life,* 551 US 449; 127 S Ct 2652; 168 L Ed 2d 329 (2007).
13. *Caperton v Massey Coal Company,* 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009).
14. *Citizens United v Federal Election Commission,* 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).