An Appointed Judiciary is Not the Answer

To the Editor:

While former State Bar President Brian Einhorn is right to be concerned about the enormous amount of money spent on judicial campaigns, his proposed solution, under which Michigan switches to an appointed judiciary, amounts to throwing out the baby with the bathwater.

We should always be wary when someone suggests reducing democracy by making elected offices appointive. Once we get past the window dressing of committees screening and recommending candidates, an appointed judiciary would amount in practice to a system of gubernatorial patronage, with judges restricted to a small group of the well-connected.

A better solution is to maintain an elected judiciary, but exclusively mandate public campaign financing. While the United States Supreme Court has dishonestly held that campaign money is "speech," it is, in fact, bribery, particularly on the large scale we see today. Even so, a speech claim can't apply to judicial elections when judges can't be lobbied and judicial candidates can't make campaign promises to decide cases in a particular way. After all, a judge is supposed to be fair, even-handed, and impartial in deciding cases by interpreting and applying the law to the facts at hand.

Public campaign financing would greatly improve the integrity of Michigan's court system, with judges no longer for sale. Candidates would be on a more level playing field instead of uncompetitive elections featuring huge campaign money disparities between them.

Another positive result would be opening up the judiciary to a more diverse field of potential judges by allowing every candidate to mount a viable campaign. As it stands now, an able lawyer with a high degree of integrity and a good judicial temperament who lacks the money and political connections is simply shut out of the process.

Public campaign financing would greatly improve the integrity of Michigan's court system, with judges no longer for sale.

Public campaign financing would produce a more independent and diverse judiciary in Michigan. Is anyone willing to take up the cause?

Dave Hornstein
Birmingham

Response from the Author

I thank Mr. Hornstein for both reading my column and for his comments. I point out two things.

First, although I think an appointment-based system for selecting judges has merit, my primary concern at this stage is creating a Bar-sponsored workgroup to investigate whether and how to reform judicial selection in Michigan. Whatever its ultimate recommendation, I think the time is right for the Bar to create a workgroup and to lead a discussion about improving our current system.

Second, I'm concerned about the feasibility of Mr. Hornstein's suggestion. For one thing, candidates would almost certainly be able to opt out of a public financing option. For another, I doubt that Mr. Hornstein's underlying assumption—that judicial elections can be excluded from the scope of *Citizens United v Federal Election Commission*[1]—would survive judicial review.

States' attempts to limit speech in judicial campaigns have not been successful. For example, see *In re Chmura*[2] and *Republican Party of Minnesota v White*.[3] In *Chmura*, Michigan's Judicial Tenure Commission attempted to sanction a judge for supposedly misrepresenting facts in campaign communications. Judge Chmura argued that he was entitled to the same rights as any other candidate for any other office. The Michigan Supreme Court recognized that although judicial candidates may have greater responsibilities in election communications, those communications are indeed subject to the First Amendment.[4]

The United States Supreme Court is also skeptical of attempts to limit speech by judicial candidates. In *Republican Party*, the Court considered a Canon of Judicial Conduct in Minnesota—the so-called "announce clause"—that prohibited judicial candidates from announcing their views on disputed legal or political issues. It found that the announce clause "both prohibit[ed] speech on the basis of its content and burden[ed] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."[5]

When the Eighth Circuit upheld the announce clause, it acknowledged that it was prohibiting some speech. But it concluded that the state had "established two interests as sufficiently compelling" to justify these restrictions: "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary."[6] The Supreme Court reversed the Eighth Circuit. Its rationale, in short, was that elections are supposed to be vehicles for candidates to express and explain their views. The state cannot limit a candidate's ability to express those views, whether he or she is running for governor or legislator or judge.

Given this legal framework, I doubt attempts to cap spending in judicial campaigns are legally feasible. If *Citizens United* applies to judicial spending—and I see no reason to believe that it does not—then caps on spending by judicial candidates are unlikely to survive a constitutional challenge.[7]

That said, I don't think Mr. Hornstein's proposal (or any proposal for reform) should be excluded from a Bar-created workgroup's consideration.

Finally, I appreciate Mr. Hornstein's concern that an appointment-based system "would amount in practice to a system of gubernatorial patronage, with judges restricted to a small group of the well-connected."

> Candidates would almost certainly be able to opt out of a public financing option.

But as I argued in my December 2013 President's Page, the Michigan Judicial Selection Task Force ably addressed that concern in its 2012 report.[8] It suggested that a nonpartisan group of 15 individuals should review applications, interview candidates in public, and obtain public input. The group would then provide the governor with the names of five or six people from which to choose.

Again, it's not perfect. But it just might be better than our current election-based system.

Brian D. Einhorn
Past President, State Bar of Michigan

ENDNOTES

1. *Citizens United v FEC*, 558 US 310; 130 S Ct 876; 175 L Ed 2d 753 (2010).
2. *In re Chmura*, 464 Mich 58; 626 NW2d 876 (2001).
3. *Republican Party of Minnesota v White*, 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002).
4. See *Chmura*, n 2 *supra* at 67 ("Allowing elected judges relatively unfettered breathing room ensures that the electorate acts as the primary, although not exclusive, check on judicial integrity and fitness for office.").
5. *Republican Party*, n 3 *supra* at 774 (citations omitted).
6. *Id.* at 775.
7. Former Justice Sandra Day O'Connor wrote a concurring opinion in *Republican Party* in which she questioned the propriety of electing judges at all: "If the State has a problem with judicial impartiality, it is largely one that the State brought upon itself by continuing the practice of popularly electing judges." *Republican Party*, n 3 *supra* at 792 (O'Connor, J., concurring).
8. See Michigan Judicial Selection Task Force, *Report and Recommendations* (April 2012), available at <http://jstf.files.wordpress.com/2012/04/jstf_report.pdf> (accessed September 25, 2014).

Correction

The article in the September issue of the *Michigan Bar Journal* titled "A Time to Celebrate Our Best," which recognized the 2014 SBM award winners, incorrectly stated that Champion of Justice Award winner Brian L. Morrow launched a juvenile court program in which teens serve on juries for their peers in felony cases. The teens only serve on juries in simple misdemeanor cases.

SBM MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals on January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2014 is 2.622 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

(1) 13 percent a year, compounded annually; or

(2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.