

Minnesota State Bar Association

514 Nicollet Mall, Suite 300, Minneapolis, MN 55402 — 612/333-1183

JUDICIAL ELECTIONS TASK FORCE REPORT & RECOMMENDATIONS

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MSBA
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MSBA Judicial Elections Task Force

Co-Chairs:

George W. Soule, Minneapolis
Natalie E. Hudson, St. Paul

Members:

Jo Marie Alexander, Minneapolis
G. Barry Anderson, Hutchinson
Stephen R. Arnott, St Paul
Kenneth H. Bayliss, St Cloud
Karen R. Cole, Minneapolis
Honorable Bruce R. Douglas, Buffalo
John F. Eisberg, Minneapolis
Wood R. Foster, Minneapolis
Honorable Donovan W. Frank, Virginia
Thomas S. Fraser, Minneapolis
Honorable Alan E. Giles, Minneapolis
Jill F. Halbrooks, Minneapolis
Candice M. Hojan, St Paul
Thomas L. Johnson, Minneapolis
Matthew E. Johnson, Minneapolis
Charles E. Lundberg, Minneapolis
Terrance W. Moore, Minneapolis
William E. Mullin, Minneapolis
Brett W. Olander, St Paul
Jeffrey S. Sheridan, Inver Grove Heights
Kenneth R. White, Mankato

MSBA Staff:

Joni G. Fenner
Mary G. Grau

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I. Introduction

The 1996 Minnesota judicial elections focused attention on a broad range of concerns about the judicial selection process in the state.

Although Minnesota is known for the quality of its judiciary and its elections have generally yielded good results, various factors combined in 1996 to make a number of thoughtful observers wonder whether the judicial election system in Minnesota was working as well as it could. These factors included the number of contested seats, the escalating costs involved in judicial campaigns, the role of special interests in several of the races, and the generally low public profile of judicial elections and resulting difficulty providing meaningful information to the electorate.

The MSBA Civil Litigation Section was among those with an interest in this area. Immediately after the November 7 election, the Section commissioned a survey in an effort to obtain objective information about voter behavior in the recent judicial elections. The statewide telephone survey was conducted on November 13 and 14. Four hundred Minnesota voters were asked a series of questions about the Supreme Court race between incumbent Justice Edward Stringer and challenger Roger Peterson. In addition, voters from Hennepin County were questioned about the Fourth District race between Janet Nordell Poston and Bruce Peterson.

While not particularly surprising, the results of this phone survey were disturbing, revealing an uninformed and in some ways uninterested electorate. In the race between Justice Stringer and Roger Peterson, a race in which the challenger received 46% of the vote, significant percentages of survey respondents reported that they either did not know why they had voted for a particular candidate, or had never heard of the candidate they voted for before entering the voting booth, or had no opinion of the candidate before voting. The results were similar in the Hennepin County race between Janet Poston and Bruce Peterson.

Almost half of the responding voters in the Supreme Court Stringer/Peterson race could not remember whom they had voted for barely a week after the election. And almost 20% of those voting for Roger Peterson did so based on the mistaken notion that he was the incumbent. Overall, fully 86% of the respondents said they needed more information about judicial candidates in order to make informed decisions; 77% believed they got less information about judicial elections than about other political races. (A more detailed summary of the survey results is attached as Appendix A.)

In response to the survey results and the generally heightened level of concern about the election process, the Civil Litigation Section joined with the MSBA

leadership in January 1997 to establish the MSBA Judicial Elections Task Force. The Task Force was given the following charge:

. . . to study the judicial elections process in Minnesota, including the structure of elections, the financing and conduct of judicial campaigns, and the role of the bar. The Task Force shall make recommendations to help ensure the selection and retention of qualified judges and to preserve the integrity and independence of the judiciary.

A. Task Force Organization

The Task Force consisted of twenty-three members from across Minnesota and included judges and lawyers from a wide range of practice areas. A number of the attorney members had at one time or another been actively involved in judicial campaigns as, of course, had the judges. George Soule of Minneapolis and Natalie Hudson of St. Paul served as the Task Force's co-chairs.

The Task Force divided itself into subcommittees organized around its three primary areas of investigation: 1) the structure of the process and whether to retain Minnesota's current system of contested nonpartisan elections — this Subcommittee was chaired by Task Force member John Eisberg; 2) campaign conduct and financing, chaired by Candice Hojan; and 3) the role of the bar and lawyers in ensuring an informed electorate, chaired by Brett Olander.

The Task Force met bi-weekly from early February through mid-May. It reviewed a wealth of information on the history of judicial elections in Minnesota and the mechanics of the process here and in other states. The Task Force also heard from a number of individuals who were able to provide their own invaluable perspective on the judicial selection process. Among these were Justice Stringer, who chaired the Supreme Court's Committee on Judicial Elections, which was also established in response to the 1996 elections; DePaul Willette, Executive Secretary of the Minnesota Board of Judicial Standards; and Scott Cottingham of Public Issue Management, LLP, who spoke with the group about effective ways to communicate with the electorate in a judicial campaign. The Hennepin County Bar Association convened a meeting of the 1996 judicial candidates from the Fourth District and provided the Task Force with a helpful summary of their observations. (A complete list of the individuals who provided information to the Task Force is attached as Appendix B.)

B. Guiding Principles

The Task Force adopted the following principles to guide its members in their deliberations:

- The independence of the judiciary should be preserved.
- Judges should be qualified, experienced, and even-tempered.
- Judges performing well should not be removed from office.
- There should be a mechanism for non-retention of judges performing poorly.
- Evaluation of a judge's performance should not be based on individual cases or decisions.

The Task Force's work has been grounded on these principles, particularly on an overriding commitment to preserving the integrity and independence of a qualified and experienced judiciary in Minnesota.

C. Judicial Elections in Minnesota

The Task Force began its work by reviewing the current process for selecting and retaining judges in Minnesota.

Minnesota's judicial selection system is a hybrid — a combination of an elective and appointment process. The Minnesota Constitution provides that judges "shall be elected by the voters from the area in which they are to serve," but also permits the governor to fill mid-term vacancies by appointment. (Constitution, Article VI, Sections 7 & 8.) Since historically most sitting judges have left the bench before their terms have expired, thereby giving the governor an opportunity to appoint a successor, most judges first reach the bench by this route. These judges must then run for a full six-year term "at the next general election occurring more than one year after the appointment," and every six years thereafter. Judicial elections in Minnesota are nonpartisan, and are held in conjunction with those for other county, state and federal elective offices. (MSA §204B.06, subd.6; §204D.02, subd.1.)

Since 1991, when it was established by the legislature, the Minnesota Commission on Judicial Selection has advised the governor on judicial appointments. The Commission has forty-nine members and consists of both lawyers and non-lawyers. Fifty-five percent of the members are appointed by the governor, and 45% by the state Supreme Court. Nine commission members have statewide jurisdiction. Each of the state's ten judicial districts also has four members, who participate only when there is a vacancy in their district. The commission investigates candidates for each judicial vacancy and then forwards the names of three to five qualified individuals to the governor, who makes the final appointment decision. (MSA §480B.01.)

The Task Force's concerns about the Minnesota system arise primarily as a result of the election process, not the appointment method currently used to fill vacancies. They are:

1. It is extremely difficult to focus voter attention on judicial elections.

As the telephone survey commissioned by the MSBA Civil Litigation Section so vividly illustrates, judicial elections are not a high priority for most Minnesota voters. About a third of those who voted in the 1996 general election did not even cast ballots in the contested judicial races, and of those who did, many were not sure of who they were voting for or why they chose a particular candidate. This situation exists in spite of the fact that the 1996 judicial campaigns had higher visibility than in many previous years, and in spite of commendable efforts by community groups such as the League of Women Voters to educate the electorate.

2. Judicial elections are becoming increasingly expensive.

Justice Stringer spent approximately \$250,000 in his 1996 Supreme Court race against Roger Peterson, and ultimately prevailed with only 53% of the vote. Incumbent Justice Paul Anderson spent \$87,000 to defeat John Remington Graham, a challenger who, until he declared for office, lived for most of the year in Canada. While district court races generally do not involve the same level of financial commitment as the statewide races, cost can be a significant factor there as well, especially in large multi-county districts. Task Force members reported that individual candidates in the Ninth Judicial District in northern Minnesota have spent almost \$100,000 in recent contested elections in an effort to communicate with an electorate spread over 17 counties.

Minnesota has not reached the level of spending on judicial races that has become common in some states. Texas, where candidates in hotly contested state races routinely raise millions of dollars, is often identified as the most extreme example of judicial spending run amok. But even in other states the trend towards ever escalating costs is visible. In 1989, a prevailing candidate in Pennsylvania spent more than \$1.4 million on his race, and in Arkansas, campaign spending for a seat on the state supreme court exceeded \$500,000 for the first time in 1990.

There is no reason to believe that the costs involved in mounting a campaign in a contested judicial election in Minnesota will go anywhere but up in the future. Scott Cottingham, a public affairs and media consultant who has been involved in a number of contested elections both in Minnesota and nationally, estimated that media costs alone could easily exceed \$200,000 for a statewide race, and could reach \$125,000 for contested races in metropolitan districts like Hennepin County and Ramsey County.

It is also worth noting that judicial candidates in Minnesota often have found it difficult to raise relatively modest amounts. In the 1996 race between Steve Aldrich and Stephen Rathke in Hennepin County, the two well-qualified candidates spent about \$40,000 each and ended their campaigns in debt.

The Task Force is concerned that the need to raise large sums of money to be considered a viable candidate could have negative implications for the independence and integrity of the judiciary. It is a fact of life in judicial campaigns that most contributors are the lawyers who appear before judges on a daily basis. Even those who are confident of judges' ability to render impartial decisions in this environment are legitimately concerned about the public's perception of the fairness of such a system.

3. The role of special interests in judicial campaigns appears to be expanding.

The Task Force is also disturbed by the potentially negative influence of special interest groups on judicial elections in Minnesota. The Task Force's concern stems chiefly from a belief that there is a fundamental difference between the role of an elected political official in a representative democracy and the role of a judge. The first should be responsive to the political opinions of the electorate; judges must apply the law even when it is politically unpopular to do so.

The Task Force is concerned that special interests too often make decisions about judicial candidates based on a single-issue, ideological litmus test while ignoring the candidate's overall qualifications. In the Task Force's opinion, any effort to elect judges on the basis of their political opinions on issues that may come before the court is an inappropriate attempt to undermine the independence of the judiciary.

There is evidence that this is becoming increasingly common in state judicial contests. A recent example is the 1996 Minnesota Citizens Concerned for Life endorsement of challengers John Remington Graham and Roger Peterson in their Supreme Court races and of

Janet Poston in her successful race against Bruce Peterson in Hennepin County. Literature distributed by MCCL during the campaign made it clear that these endorsements were motivated by a desire to elect judges opposed to abortion.

Closely related, and equally disturbing, is the national trend towards organized campaigns to remove from office judges who have issued politically “unpopular” decisions. Recent examples include that of Tennessee Supreme Court Justice Penny White, who was defeated for re-election in 1996 after voting — with the majority — to remand a conviction in a capital punishment case. In Nebraska, Supreme Court Justice David Lanphier was targeted in the 1996 elections by a group calling itself “Citizens for Responsible Judges”. The group was unhappy with the judge’s rulings rejecting term limits for elected officials and ordering retrials for several convicted murderers. Judge Lanphier was also defeated.

Speaking to a reporter for the former weekly *Twin Cities Reader*, a judge from southern Minnesota recently commented on the chilling effect that such campaigns can have on judges: “These crusaders really cause problems in courts . . . I see young judges who really crumble in front of them; they’ve . . . got families and mortgages — and they’ve got elections. The last thing they need is these people terrorizing them into making decisions.” (Feb. 26-March 4, 1997, p.19)

4. The number of contests may be increasing, which will only compound the challenges involved in educating the electorate.

On the national level, there is evidence that the number of contested elections has increased significantly over the last ten years. (“Selection and Retention of Judges: Is There One Best Method,” 23 Fla.St.U. L.Rev. 1;19) It is not clear at this point however, whether there is any corresponding pattern of an increased level of contested judicial activity in Minnesota. (There were sixteen contested judicial elections in Minnesota in 1996. Both Supreme Court seats up for election were contested, as were fourteen district court seats, seven of them in Hennepin County.)

At the Supreme Court, contests have been fairly common for years; since 1950, 51% of the available seats have been contested. Nor is there any evidence of increased activity at the Court of Appeals. Since its creation in the early 1980s there has been only one contested race out of a total of 39 elections (3%).

The evidence for an increase in the number of contested judicial elections is perhaps strongest at the district court level. In 1980 there were 180 trial court judgeships in the state; by 1996 that number had

risen to 254. Under these circumstances, and assuming that the bench will continue to grow, an increase in the absolute number of seats up for election and a corresponding increase in the number of contested seats is to be expected. There also appears to be an increase in the percentage of available seats being challenged, although it is not yet clear whether this percentage increase is permanent.

	Trial Court Seats up for Election	Number of Contests	Percentage
1980	25	2	8%
1982	25	0	0%
1984	56	5	9%
1986	54	9	17%
1988	67	2	3%
1990	93	4	4%
1992	82	5	6%
1994	42	6	14%
1996	111	14	13%

Of course, to the average voter, the reasons for any increase are probably irrelevant. Regardless of the reasons for the level of contested activity, voters who may be perfectly willing to educate themselves about the qualifications of the candidates in three or four contested judicial elections in any given year may very well throw up their hands at the prospect of learning enough to make an informed choice in eight or nine such races. Although any increase in the number of contested judicial elections has implications for all the problems the Task Force has identified with the current system, the concerns are most pronounced in this area.

II. Alternatives to Contested Judicial Elections

When it began examining alternatives to Minnesota's current judicial election process, the Task Force quickly focused its attention on two — the "retention election" or "Missouri Plan" system, and the appointment process used in Connecticut. The Task Force decided at the outset that it did not view partisan judicial elections as a viable alternative to Minnesota's current process.

Under the Missouri Plan, a nonpartisan commission of lawyers and non-lawyers recruits and investigates candidates for judicial office, and then forwards the names of the most highly qualified applicants to the governor, who makes the final selection. This appointment method, which is also known as "merit selection," is comparable to that already in use in Minnesota for judicial vacancies. In the Missouri Plan system, however, once appointed, judges continue in office by means of periodic retention elections — a straight yes or no vote on the question "should this judge be retained in office"? Judges who fail to achieve a certain percentage of favorable votes from the electorate must step down, and a successor is then appointed. There are no contested elections — in the sense of a contest between two individuals — in states using this system.

In Connecticut, judges are appointed, and then reappointed every eight years, by the legislature acting upon nominations from the governor. A twelve-member bipartisan merit selection commission made up of lawyers and lay people advises the governor on both initial appointments and reappointments. Connecticut law sets out the criteria that are to be used by the commission in evaluating judicial performance and includes a presumption that judges seeking reappointment qualify for retention; the burden of rebutting the presumption lies with the commission. There is also a separate Judicial Review Council with responsibility for judicial discipline.

After a careful review of both the Missouri Plan and the Connecticut process, the Task Force reached consensus on these points:

- 1) Retention elections do not solve the problems the Task Force has identified with the existing Minnesota system;
- 2) The Connecticut process has a number of attractive features but bears further scrutiny; and
- 3) In light of the fact that any fundamental change to the existing judicial election system in Minnesota would require an amendment to the state constitution, such an effort must come from a broad based coalition of the state's citizens.

A. The Missouri Plan

Retention elections have been advocated as a means of avoiding both the costs involved in contested judicial elections and the negative part played by special interests in politicizing the election process. A close look at the current reality of the retention election system led the Task Force to conclude that neither claim is justified.

Both Tennessee and Nebraska, where sitting judges were recently removed from office, are retention election states. In Tennessee, most reports agree that Penny White was defeated by a campaign orchestrated by the state Republican Party that seized on the judge's decision in a politically charged death penalty case. In Nebraska, Judge Lanphier was defeated by a concerted effort that also had political overtones and was extremely well funded; Judge Lanphier raised approximately \$80,000 in his race, while the group opposing him spent over \$200,000 on the campaign. Judges in retention states are just as likely to have to finance costly campaigns as those who are challenged by an individual opponent. In fact, the retention system requires the sitting judge to mount a campaign effort in virtually every election in order to avoid being unprepared in the event of a removal campaign.

Some have argued that the influence of special interests can be greater in retention elections than in either partisan or nonpartisan contests. A former justice of the Oregon Supreme Court has said that "retention elections, with their simple yes or no choice, more directly but crudely hold judges politically accountable on a singular popular issue, usually but not always crime, and therefore are a greater challenge to judicial independence and courage." (23 Fla.St.U.L. Rev. 1;37)

B. The Connecticut System

The Task Force was impressed with many aspects of the judicial appointment process in place in Connecticut. As in Minnesota, the use of a nonpartisan merit selection advisory commission serves to insulate the appointment process to a significant extent from the worst manifestations of partisan politics. Moreover, the purely appointive nature of the reappointment process addresses the Task Force's concerns about cost and the general lack of awareness on the part of the electorate in contested judicial races.

The Task Force also had a number of concerns about the Connecticut process, however, most of which revolved around the procedures used to review the performance of judges upon reappointment. While the Task Force approved of Connecticut's statutory presumption favoring retention of a sitting judge, some of the methods used to evaluate judicial performance in that state appeared to a number of Task Force members to be haphazard and overly subjective. For example, members of the Connecticut Judicial Selection Commission randomly

contact their own colleagues and friends to ask how a judge is doing as part of the reappointment process. The Task Force believes that if some form of the Connecticut system is adopted, it is vital that reappointment recommendations be made by a balanced, nonpartisan body. Overall, the Task Force felt that the Connecticut process warranted additional study and consideration.

RECOMMENDATION No. 1

A statewide commission representing various constituencies should be established to study and make recommendations to the legislature regarding methods for the selection of judges for open seats and for the retention of judges in Minnesota.

The Task Force is mindful of the fact that any change to the current system of contested nonpartisan judicial elections in Minnesota would require a constitutional amendment. Under these circumstances, it is essential that any movement toward an alternative process have the unqualified support of a broad constituency that goes well beyond the state's legal community. The Task Force believes that the legislature should bring lawyers and judges together with a diverse group of community leaders to examine thoroughly the various methods available for selection and retention of the state's judges.

The Task Force recommends that this study focus on selection of judges for open seats and on retention of sitting judges. This recommendation addresses only those selections now made by judicial election, not the current process for filling vacancies mid-term.

The Task Force also recommends that the study address the effect that various judicial selection methods may have on the diversity of the state's bench. Currently, proponents of contested elections, retention elections, and merit selection appointment processes all argue that their preferred selection method goes further towards ensuring a diverse judiciary than the other alternatives. While it was outside the scope of the Task Force's mandate to analyze the merits of these claims in detail, the Task Force remains fully committed to maintaining — and enhancing — the diversity of Minnesota's judiciary.

The Task Force recognizes that any attempt to amend the state constitution could take many years, and may ultimately never receive the level of public support necessary for passage. Under the most optimistic projection, a proposed amendment would be put before the voters in 1998, and would not take effect until the year 2000.

III. Improvements to the Current System

If the existing system of contested judicial elections is retained, the Task Force believes that a number of things could be done to improve the process. The Task Force's recommendations for changes to the present system focus on the need to provide voters with more information and on encouraging greater participation in the process. Many of these changes could be implemented in time for the 1998 election season.

A. Conduct of Judicial Campaigns

In considering the conduct of judicial campaigns the Task Force concentrated on financing issues, questions of permissible candidate speech, and some of the practical considerations involved in running for judge.

The Task Force gave serious consideration to several proposals designed to hold down escalating campaign spending. While limits on total campaign expenditures have been found unconstitutional, individual contribution limits are constitutionally permissible, as are spending limits that are conditioned on receipt of public funds. Buckley v. Valeo, 424 U. S. 1 (1976).

The Task Force considered recommending adoption of a procedure for public financing of judicial campaigns. In Wisconsin, for example, a voluntary taxpayer check-off is used to fund candidates for the state Supreme Court. Candidates must raise a threshold amount in matching funds in order to qualify for public money and must also agree to comply with state mandated campaign spending limits. While the Task Force was intrigued by the concept of public financing, conversations with Wisconsin court personnel and judges revealed the limits of this approach. Because participation is necessarily voluntary, a candidate who rejects public funding, and is therefore not bound by spending limits, effectively forces the same decision on an opposing candidate who wishes to mount a viable campaign. The Task Force decided that under these circumstances public financing would be of marginal value. The Task Force also considered, but rejected, recommending the imposition of contribution limits for judicial campaigns comparable to those in effect for elective political offices.

The Task Force reviewed the portions of Canon 5 of the Minnesota Code of Judicial Conduct which deal with campaign speech and financing. Canon 5 regulates the behavior of all judicial election candidates, incumbents and challengers.

The Code currently prohibits candidates from "personally soliciting" campaign contributions or public declarations of support. The Code does, however, permit campaign committees established by the candidates to seek both financial assistance and public support. (Canon 5B(2))

The Task Force determined that the current committee system for fundraising in judicial campaigns should be retained, as well as the prohibition against the candidate personally soliciting financial contributions. The Task Force believes that Canon 5 should be amended to separate the endorsement and funding concepts, and to allow the candidate to personally solicit publicly stated support from individuals.

Further, the Task Force recommends that the Comment to Canon 5 be amended to clarify that while a candidate may not personally solicit financial support, the candidate may speak generally about the need for funding and may make general requests for financial support.

In considering Canon 5's provisions regarding permissible candidate speech, the Task Force was faced with balancing the need to provide voters with enough information to make informed decisions about a judicial candidate's qualifications with the equally compelling need to maintain the integrity of the judiciary. The Task Force determined that the current rules governing permissible campaign speech give candidates enough scope to address issues germane to a judicial election, and should not be changed.

The Code prohibits candidates in judicial campaigns from stating their views on "disputed legal or political issues." (Canon 5A(3)(d)(i)) The Task Force believes that judicial elections should be based, not on how a candidate has ruled or may rule on particular issues, but on qualifications such as temperament, intelligence and fair-mindedness. The Task Force also believes, however, that many candidates, and thus by extension the voters with whom they come in contact, are unaware of the degree of latitude that is currently allowed in campaign speech, even given Canon 5's prohibition against political activity.

RECOMMENDATION No. 2

Canon 5 should be amended to permit judicial candidates to personally solicit public endorsement from individuals.

Canon 5B(2) currently prohibits candidates from personally soliciting “publicly stated support.” The Code does, however, permit candidates to establish campaign committees, which then are permitted to solicit public expressions of support. The Task Force believes that the current rule creates a fiction that does nothing to enhance either the independence or integrity of the judiciary. Since campaigns regularly publish the names of members of the campaign committee, a judicial candidate’s request that an individual serve on such a committee is in fact a solicitation of public support. Both candidates and their potential supporters know this. The Task Force’s view is that candidates should not be forced to engage in semantic word games for no good purpose.

RECOMMENDATION NO. 3

The Comment to Canon 5 should be expanded to clarify that general appeals for financial support are a permissible form of candidate speech.

While the Task Force decided not to recommend any substantive changes to Canon 5 in the area of campaign finance, it does believe that in one respect a clarification of the existing rule is in order.

The Code prohibits candidates from personally soliciting or accepting campaign contributions. (Canon 5B(2)) The Task Force does not object to this prohibition, but it does believe that candidates should be permitted, and in fact are under the existing rule, to make general requests for financial support when meeting with groups of voters at candidate forums. The Task Force recommends that language be added to the Comment to Canon 5 explicitly authorizing this type of general appeal under Canon 5B(1)(a), which allows a candidate to “speak to gatherings on his or her own behalf.”

RECOMMENDATION No. 4

The MSBA should cooperate with the state Board of Judicial Standards, the Office of Lawyers Professional Responsibility, and community organizations to educate candidates and the public about the permissible range of candidate speech in judicial elections.

The Board of Judicial Standards routinely conducts educational sessions for judicial candidates on the requirements of Canon 5. In the last election, the Board also approved several lists of proposed questions for use at candidate forums. These lists were developed and submitted to the Board by W.A.T.C.H. — they are attached to this report as Appendix C.

Both lists contain useful examples of the kinds of questions regarding judicial philosophy and administration issues that are perfectly permissible under Canon 5. The Task Force recommends that the MSBA work with the Board and community groups to make information like this widely available to candidates, potential candidates and members of the public. The Task Force believes that if more voters understand both the reasons for restrictions on candidate speech and the extent to which their questions can be addressed by judicial candidates, they will become more interested and involved in the process.

RECOMMENDATION No. 5

Organizations should consider the entirety of a candidate's qualifications when deciding whom to endorse in a judicial campaign.

While the Task Force believes that candidates should be able to personally seek public endorsement from individuals, it supports a continuing ban on candidate solicitation of support from organizations. The Task Force accepts the wisdom of restricting a candidate's ability to actively seek the public support of special interest groups. The Task Force recognizes, however, that organizations are free to endorse judicial candidates on their own initiative, and that candidates are free to publicize these endorsements. The Task Force urges organizations to base their endorsements on qualities such as experience and judicial temperament rather than on a single issue or narrow political grounds.

B. The Role of the Bar

The Task Force spent a considerable amount of time discussing the appropriate role of bar associations and lawyers in providing voters with the information they need to make informed decisions about candidates for judicial office.

The Minnesota State Bar Association has historically conducted a plebiscite of its members whenever there are contested judicial elections for the Supreme Court or Court of Appeals. While the results of these statewide plebiscites have been communicated to the voters by means of a press release in the past, the MSBA has not endorsed the plebiscite winners or conducted its own voter education campaign. The Task Force believes that the MSBA can and should adopt a more comprehensive approach to the task of encouraging an informed electorate. Lawyers are in a unique position to provide voters with useful information about the relative merits of particular judicial candidates as well as about the general qualities that go into making a good judge.

RECOMMENDATION No. 6

The MSBA should continue to conduct plebiscites for contested statewide judicial seats, and should endorse the prevailing candidate in the plebiscite if that candidate receives at least 60% of the votes cast.

The Task Force recognizes that adoption of this proposal would represent a change to existing MSBA policy. In June 1996 a special committee appointed by the Association to review the conduct of bar plebiscites specifically noted in its report that it was not addressing the question of whether the Association should endorse candidates for judicial office on the basis of plebiscite results. Upon careful consideration, this Task Force has concluded that such endorsements would provide concrete and useful information to Minnesota voters and should become standard practice.

The Task Force recommends that in the event the prevailing candidate in a judicial plebiscite receives less than 60% of the vote, the MSBA should make the plebiscite results known as it has in the past, but not endorse the prevailing candidate. The Task Force reviewed the results of earlier plebiscites in arriving at the proposed 60% endorsement threshold. (See Appendix D.) Most plebiscites have been decided by fairly lopsided margins; where the bar is closely divided on a race, as it was in the 1992 Supreme Court contest between Alan Page, who received 46% of the plebiscite vote, and Kevin Johnson, who received 54%, endorsement would not occur.

An endorsed judicial candidate would be free to use the MSBA endorsement in any manner consistent with the standards governing the conduct of judicial campaigns.

RECOMMENDATION No. 7

The MSBA should launch a three-stage effort to ensure a more informed electorate in judicial races. The goals of this effort should be 1) engaging the press in a dialogue about its role in the process; 2) education of the electorate about judicial seats and about the qualities of a good judge; and 3) education of the electorate about specific candidates and how they are viewed by the Association.

Many members of the press, like some candidates, do not understand the constraints on speech by judicial candidates. Many believe that judicial candidates cannot address any substantive issues at all. In addition to the efforts already discussed, a concerted attempt should be made to explain to the press the limits set by the judicial canons and the areas where inquiry is not constrained. The goal of this effort should be to dispel mistaken ideas about limits on candidate speech and to pique interest in judicial election coverage.

In connection with this effort, a dialogue should be initiated with members of the press on judicial coverage. What impediments do members of the media see to judicial coverage and how can those impediments be addressed? What information would the media like about candidates and how can that information be delivered?

The Task Force believes that it was difficult in 1996 to focus public attention on the judicial races during an election season filled with many other races. Efforts should be made to capture the interest of the public about the importance of the judicial races and the qualities of a good judge before candidates file for election. One goal of these efforts should be to discourage single-issue voting. The most effective ways to reach the public on these issues should be studied.

After the filing deadline, the MSBA should initiate an education effort about specific judicial races and candidates. Plebiscite results should be publicized. If candidates qualify for endorsement, this fact should be heavily publicized. To the extent that the Association does not make an endorsement for each race, the MSBA should consider assembling and disseminating other information about the candidates. Creative ways of publicizing information about the races should be considered as well as traditional means. The Association should work closely with other groups to reach voters. The Task Force recognizes that the second and third phases of this effort will require some study as to the most effective ways to reach the electorate.

RECOMMENDATION No. 8

The MSBA should appoint a committee in each year in which it conducts a judicial plebiscite, the purpose of which would be to educate the media and the electorate of the plebiscite results and any endorsements.

The Task Force believes that it is essential that, once the results of the plebiscite are known, and endorsed candidates have been identified, this information be communicated to both the press and the public as quickly and as thoroughly as possible. To complement the three-phase effort already described, the Task Force recommends that an MSBA committee be charged with responsibility for this effort.

RECOMMENDATION No. 9

The MSBA should encourage each of the state's district bar associations to adopt similar procedures regarding the conduct of judicial plebiscites, endorsement of prevailing candidates, and education of the electorate.

The Task Force understands that it will be easier for some district bar associations than others to adopt the procedures outlined here. Some, for example those in Hennepin and Ramsey counties, already conduct plebiscites for contested district court races. In some parts of the state, however, there are several bar districts encompassed within one judicial district. The Fifth Judicial District in southwest Minnesota, for example, includes the Sixth, Ninth, Thirteenth and Seventeenth MSBA Districts. In these areas, the logistics of coordinating implementation of these recommendations could be complex. Given the public's critical need for constructive information about judicial elections, however, the Task Force believes that it will be worth the effort.

RECOMMENDATION No. 10

More lawyers should become involved in judicial election campaigns.

The Task Force believes that an involved, educated electorate is the key to meaningful judicial elections, and that lawyers, because of their familiarity with the judicial system, have a special responsibility to provide leadership in the process by supporting qualified candidates.

Individual lawyers, as well as the MSBA, should take a more active role in judicial campaigns than they have in the past. Lawyers should support candidates, not only with financial contributions, but with their time.

IV. Conclusion

Throughout, the Task Force has been quite conscious of the fact that, while it is relatively easy to identify problems with the judicial election process in Minnesota, it is much more difficult to develop workable solutions to those problems. With this report the Task Force has attempted to provide a thoughtful analysis of the current system, to make a number of recommendations focusing on the particular role that lawyers can play in improving the process, and to encourage an ongoing dialogue with the citizens of Minnesota about the best way to preserve a highly qualified and independent judiciary for the state.

Judicial Elections Task Force

Summary of Voter Survey Results

The Civil Litigation Section Council commissioned a survey to gather information concerning voter behavior during the November 1996 state judicial elections.

The random phone survey was conducted by Moore Information on November 13 and 14; 400 registered Minnesota voters were interviewed. They were questioned about the Supreme Court race between Edward Stringer and Roger Peterson and the Fourth Judicial District race between Bruce Peterson and Janet Nordell Poston.

The results can be summarized as follows:

Stringer/Peterson Race

- ◆ 46% of those who reported voting in the Stringer/Peterson race could not remember who they voted for.
- ◆ 23% of those who voted for Stringer didn't know why they voted for him.
- ◆ 24% of those who voted for Peterson didn't know why they voted for him.
- ◆ 43% of those who voted for Peterson had never heard of him; 24% had heard of him but had no opinion of him.
- ◆ 13% of those who voted for Stringer had never heard of him; 30% had no opinion of him.
- ◆ 19% of those voting for Peterson did so because "he was the incumbent" (11% voted for Stringer because he was the incumbent); 3% voted for Peterson because of favorable TV ads.
- ◆ 11% of those voting for Peterson did so because he votes pro-life.

The primary reasons respondents gave for not voting in the Supreme Court race were:

Needed more information	38%
Unknown candidates	30%
Don't know	15%

Peterson/Poston Race

- ◆ 25% of those who reported voting in this race couldn't remember who they voted for.
- ◆ 36% of those who voted for Peterson didn't know why they voted for him.
- ◆ 15% of those who voted for Poston didn't know why they voted for her.
- ◆ 36% of those who voted for Peterson said they had never heard of him.
- ◆ 23% of those who voted for Poston said they had never heard of her; 31% had no opinion.
- ◆ 39% of those who voted for Poston did so because she is a female.

- ◆ 7% of those who voted for Peterson did so because he is a male; another 3% voted for Peterson because Poston is a female.
- ◆ 8% of those who voted for Poston did so because of her pro-life stance; another 8% voted for her because of her religious background.

The primary reasons respondents in Hennepin County gave for not voting in the Peterson/Poston race were:

Unfamiliar with candidates	33%
Needed more information	20%
Don't know	26%

General Questions:

- ◆ 86% of the respondents said they needed more information about the judicial candidates in order to make an informed decision.
- ◆ 77% of the respondents believed they were provided with less information about the judicial elections than about other political races.
- ◆ 33% of the respondents said they support the current judicial selection system, 37% support changes, and 31% don't know.

Note:

- ◆ 77% of all voters cast ballots in the Supreme Court race; 69% of Hennepin County voters cast ballots in the Fourth District race. (Minnesota Secretary of State's Office)

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**Proposed Questions for Judicial Candidates' Forum
September 5, 1996**

1. What do you believe to be the most critical issue currently facing the Hennepin County Criminal Justice System and what do you recommend be done to address it?
2. The Minnesota Supreme Court recently adopted changes to the Rules and Canons that govern judicial behavior and discipline. One of the changes requires public disclosure of disciplinary actions when the judge's inappropriate actions or behavior is part of a pattern of such behavior. Give us your thoughts about this change to the Rules.
3. Minnesota is one of a handful of states that does not routinely allow cameras in the courtroom. Where do you stand on this issue and why?
4. How do you feel about judicial evaluation being undertaken by outside organizations? Should the results be disclosed publicly or should they be given privately and used only for the judge's personal improvement?
5. The caseload in Hennepin County Juvenile Court has skyrocketed over the past few years. What do you believe to be the root cause for the high numbers of juvenile offenders? What can the court system do to reduce these numbers?
6. As a judge, who are the people you serve and what does it mean to provide good service to them?
7. Without giving his or her name, please describe the character of the judge you most admire.
8. Attorneys in civil litigation practice express great frustration at the length of time it takes to get their cases to trial in Hennepin County. They also express frustration about the fact that, instead of getting a specific date for trial they are often given a period of six to eight weeks in which their case could be called, making it very difficult to prepare for trial. What can be done to address their concerns?
9. If you were given 50 million dollars and were told that it must be used to address the issues of crime and violence, what would you spend it on?
10. A variety of articles and reports on the problem of domestic abuse point to the very high percentage of cases (around 70%) that are dismissed at the pretrial stage, reportedly because the victim cannot be found or is unwilling to cooperate. What can be done to lower the number of domestic assault cases that are being dismissed?
11. What kinds of things would you do outside the courtroom to improve the justice system in Hennepin County?

12. Many feel that voluntary professional and community service is a necessary commitment for persons holding public office. What types of voluntary service have you been involved in?
13. What is, or will be, your personal mission in your role as judge and how will you go about accomplishing it?
14. Recent polls show that public trust in the justice system is at an all time low. Why do you think the public is so distrustful and what would you do to gain their trust?
15. If you observed an individual in your courtroom being poorly represented by an unprepared or ineffective lawyer, what would you do?
16. The Racial Bias and Gender Bias Task Force Reports identify a multitude of ways in which women and minorities are not treated fairly by our court system. What would you do to remedy the situation described in these reports?
17. Many victim's advocates have concerns about victim's rights in juvenile court. How would you balance the rights of crime victims and witnesses with the right to confidentiality possessed by juvenile respondents?
18. The recent outburst by Polly Klaus' murderer at his sentencing brought to national attention the potentially explosive dynamics that exist at such appearances. While defendants always have the right to speak at their sentencing, local victims' organizations have expressed concern about the fact that many judges are now allowing defendants' friends and family to speak on their behalf at sentencing. In some instances this has resulted in name calling, blaming the victim, and fights breaking out between the two families outside the courtroom. How do you, or would you, handle this situation in your courtroom?
19. It has been said that we learn best from our mistakes. Tell us about a mistake that you made that taught you something about law and justice. How did this or will this experience influence your work on the bench?

Questions for Judicial Candidate Forum
October 29, 1996

1. What do you believe to be the root causes for the high numbers of juvenile offenders? What changes can the court system make to reduce these numbers?
2. How could the costs of judicial administration be reduced? Can you give us a specific example of how you have reduced costs in your law practice/court?
3. In the area of hate crimes, what are some of the issues in balancing free speech rights against the need to control offensive activity?
4. What have been the most effective methods for improving court procedures and efficiency? What other methods would you suggest?
5. What do you perceive as the greatest obstacles to justice, if any?
6. What criteria would you use for deciding whether to impose or affirm sentences outside of standard ranges?
7. If you became aware of unethical conduct on the part of a trial advocate in a case in which you were presiding, how would you handle it? Do you believe judges should be required to report attorney misconduct?
8. To what extent have you practiced in the area of criminal law? Family Law? Complex civil litigation?
9. What do you believe are the causes of the high rates of minority incarceration?
10. Do you believe there is such a thing as a "victimless crime"? If so, what offenses would you place in this category?
11. Do you believe there is underrepresentation of women or people of color in the court system? If so, how would you work to correct the problem?
12. Do you believe that all citizens have adequate access to legal help and the legal system? If not, what can be done to provide wider and better access?
13. Please describe one instance in which you faced an ethical dilemma and how you resolved it.
14. Do you believe that voluntary professional and community service is a necessary commitment for persons holding public office? What forms of voluntary professional and community service have you been involved with in the past? Currently?
15. What injustices have you witnessed in or outside the courtroom and what was your response to those events?

16. What are the pros and cons of going to the bench as compared to practicing law?
17. Do you believe the current system for disciplining lawyers and judges is effective? Why or why not?
18. Who are your judicial role models? Why?
19. How do you deal with difficult people, including peers, lawyers, clients, or litigants?
20. Please describe a situation in which you took a controversial position that angered or offended people and explain how you handled it.
21. How would/do you deal with a *pro se* party appearing in your court?
22. Please describe your administrative experience. What are your primary strengths as a supervisor? As an administrator?
23. While serving on the bench, do you believe you have a role in bringing important legal or judicial issues before the public or the legislature? Why or why not? What should your role be?
24. What are the issues regarding alternative sentences for non-violent offenders?
25. What is your general judicial philosophy?
26. What is your vision for the future of our judicial system? What changes would you advocate and why?
27. Do judges have an obligation to improve public understanding of the courts? If so, how should they carry out that obligation?
28. Please describe your first-hand experiences, if any, dealing with people who are different from you socially, economically, or politically.
29. Do you think the court system is working or do you believe the civil or criminal justice system is breaking down?
30. What are your views on the need for more diversity on the bench and the manner in which the court treats members of different races?
31. Why should voters support you rather than your opponent?

**Minnesota State Bar Association
Judicial Plebiscite Results**

1966

Martin A. Nelson (I) - 2513 (92%)
William G. Dressel - 218 (8%)

C. Donald Peterson - 1958 (72%)
Thomas Gallagher - 763 (28%)

1970¹

Oscar R. Knutson (I)
Jerome M. Daly

1974

James C. Otis (I) - 2144 (91%)
John Remington Graham - 218 (9%)

Lawrence Yetka (I) - 1981 (85%)
John D. Flanery - 350 (15%)

1978

Rosalie Wahl (I) - 2547 (77%)
Robert W. Mattson, Sr. - 779 (23%)

C. Donald Peterson (I) - 3158 (95%)
Jack Baker - 162 (5%)

1982

Jack Baker - 167 (5%)
John E. Simonett (I) - 3483 (95%)

1992

Sandra Gardebring (I) - 2950 (61%)
Roger Peterson - 1873 (39%)

Ross A. Phelps - 609 (13%)
A.M. Keith - 4212 (87%)

Esther Tomljanovich (I) - 4062 (85%)
Mark Douglass - 717 (15%)

Alan Page - 2162 (46%)
Kevin Johnson - 2579 (54%)

1994

Court of Appeals

Fred C. Norton - 1922 (67.5%)
Roger A. Peterson - 923 (32.5%)

1996

Edward Stringer (I) - 3375 (75%)
Roger A. Peterson - 1125 (25%)

Paul Anderson (I) - 4050 (90%)
John Remington Graham - 450 (10%)

1998

Alan C. Page (I) - 2674 (75%)
Roger A. Peterson - 907 (25%)

2000

Kathleen A. Blatz (I) - 3290 (91%)
Burton Randall Hanson - 339 (9%)

Russell Anderson (I) - 3371 (94%)
Tom Strahan - 201 (6%)

James H. Gilbert (I) - 3413 (95%)
Greg Carlson Wersal - 197 (5%)

Joan Ericksen Lancaster (I) - 3245 (91%)
John Hancock - 325 (9%)

Court of Appeals

Gordon W. Shumaker (I) - 3343 (94%)
David Ole Nathan Johnson - 229 (6%)

¹ 1970 plebiscite results are not available.