

Judicial Elections in Minnesota: Past, Present, and Future

COURT DECISIONS CHANGE RULES OF JUDICIAL ELECTIONS

The politicization of the judiciary has been more widespread in recent years. In 2002, the U.S. Supreme Court, in *Republican Party of Minnesota v. White*,¹ ruled that broad restrictions on campaign speech by judicial candidates are unconstitutional. As a result, judicial candidates can now be pressed for their opinions on hot-button issues, such as abortion, gay marriage, and the death penalty. Judges who do take positions on issues may need to disqualify themselves from deciding those issues.

In "Round 2" of the *White* case, the Eighth Circuit Court of Appeals struck down the Partisan-Activities Clause and the Solicitation Clause of the Minnesota Code of Judicial Conduct.² The court



George W. Soule
Contributing Author

Mr. Soule is a founding partner of Bowman and Brooke LLP in Minneapolis. He is a trial lawyer in cases involving products liability, contract and commercial issues, and personal injury. Mr. Soule is former Chair of the Minnesota Commission on Judicial Selection.

Portions of this article are excerpted from Mr. Soule's prior articles and presentations on judicial elections.

invalidated rules that judicial candidates could not:

- Identify themselves as members of a political party;
- Attend or speak at political gatherings; or
- Seek, accept, or use political party endorsements.

The court also invalidated the Solicitation Clause to the extent that it prohibited candidates from soliciting contributions by speaking to a large group or in signing a campaign letter. The plaintiffs had not challenged the restriction on a candidate personally soliciting a contribution from an individual.

Minnesota's judicial campaigns in 2002 and 2004 were not much different from prior years. There was little partisan activity and judicial candidates principally focused on their qualifications and experience. Observers of judicial elections waited to see if political activities increased in 2006.

2006 ELECTIONS IN MINNESOTA

There were only eight contested judicial elections in Minnesota this year; 66 judges were not challenged. Details about the candidates and election results are on page 8.

Five appellate judge positions were up for election in 2006: those held by Justice G. Barry Anderson and Judges Christopher Dietzen, Jill Flaskamp Halbrooks, Gordon Shumaker, and Renee Worke. By the end of July, only Judge Dietzen had a challenger. Republican governors appointed all of these judges. Since most partisan

challenges to judges have come from the Republican Party or other conservatives, it was unlikely that 2006 would see significant partisan campaign activities.

Challengers filed against four district judges appointed by Gov. Tim Pawlenty: Judges Michael Savre (1st Judicial District), Elena Ostby (2nd), and Shaun Floerke and Mark Starr (6th). Three of the challengers were politicians: State Representative Scott Newman, St. Paul City Council Member Jay Benanav, and Duluth City Council Member Timothy Little. The fourth, Gordon Coldagelli, a Commission on Judicial Selection finalist, ran against the governor's appointee.

Judge Terrance Holter (9th) faced a challenge from his law clerk, John Melbye, who had little or no experience as a practicing lawyer. Perennial candidate Kevin Kolosky ran against Judge John McShane (4th). There were no open seats.

The Republican Party of Minnesota endorsed Justice Anderson and Judges Dietzen and Shumaker, but each of these judges declined the endorsements. Only two judicial candidates sought political party endorsement: Mr. Newman in the First Judicial District and Child Support Magistrate Tim Tinglestad in the Ninth Judicial District. Mr. Newman was endorsed by 19 Republican delegates, despite Governor Pawlenty's plea for no endorsement. Mr. Tinglestad came in third in the primary election, ending his candidacy.

There was little partisanship in the 2006 election campaigns. Mr. Newman rarely featured his Republican endorsement. Mr. Benanav said that he would not run a partisan campaign, but reminded voters in the DFL-heavy Second Judicial

NAME	POSITION	MONEY RAISED*	PLEBISCITE	VOTE
Minnesota Court of Appeals				
Christopher Dietzen	Judge, appointed 2004	\$27,690.00	90%	56%
Daniel Griffith	Private practice	\$2,225.00	10%	44%
First Judicial District				
Scott Newman	State representative, private practice	\$36,061.39	6%	44%
Michael Savre	Judge, appointed 2004	\$29,510.07	94%	56%
Second Judicial District				
Jay Benanav	St. Paul City Council, private practice	\$34,142.72	20%	41%
Elena Ostby	Judge, appointed 2004	\$26,818.95	80%	58%
Fourth Judicial District				
Patricia Karasov	Judge, elected 1994	\$5,652.41	68%	59%
Dee Rowe	Private practice	\$3,948.34	32%	40%
Kevin Kolosky	Private practice	No report	5%	39%
John McShane	Judge, appointed 1998	\$3,845.00	95%	60%
Sixth Judicial District				
Shaun Floerke	Judge, appointed 2004	\$19,130.30	93%	68%
Timothy Little	Duluth City Council, bank vice president and trust officer	\$3,239.98	7%	32%
Gordon Coldagelli	Assistant county attorney	\$6,040.31	23%	36%
Mark Starr	Judge, appointed 2004	\$20,963.94	77%	64%
Ninth Judicial District				
Terrance Holter	Judge, appointed 1980	\$17,755.00	88%	49%
John Melbye	Judicial law clerk	\$55,903.49	12%	51%

*Through Oct. 23, 2006

District of his DFL background, and called his opponent, Judge Elena Ostby, a "Republican appointee."

The 2006 judicial campaigns were not high-dollar affairs. Through Oct. 23, only seven candidates had raised over \$20,000. The highest fundraising totals were \$55,903.49 for Mr. Melbye, \$36,061.39 for Mr. Newman, and \$34,142.72 for Mr. Benanav. Several candidates made significant contributions or loans to their own campaigns, including Mr. Melbye's entire fundraising total, \$20,000 from Mr. Newman, and \$13,700 from Judge Starr.

Most campaign funds were spent on traditional judicial campaign strategies: brochures, mailings, lawn signs, and radio. Significantly, Mr. Newman and Mr. Benanav placed advertisements on cable television, believed to be the first

television advertisements for judicial candidates in Minnesota.

In Hennepin County, a committee—Citizens for an Impartial Judiciary—placed expensive advertisements in the *Star Tribune* on the weekend before the election, urging the defeat of Judge Patricia Karasov and election of her challenger Dee Rowe. By election day, the committee had not registered with the Campaign Finance Board, or filed financial disclosures, so it was not known who financed this effort.

All of the incumbent judges won their elections on Nov. 7, except for Judge Holter, who lost to Mr. Melbye by 1,505 votes out of 121,733 votes cast.

The bottom line for Minnesota's judicial elections in 2006: few contests, little partisanship, low-dollar campaigns, lack

of success for politicians, and "judges, watch out for your law clerk!"

JUDICIAL ELECTIONS IN OTHER STATES

Political parties and special interest groups have turned to judicial elections as battlegrounds in many states. They spend vast sums of money to elect judges friendly to their interests. Business interests often square off against unions and trial lawyers in these races. These groups and others invested over \$10 million in the race for one Illinois Supreme Court seat in 2004.

In 2006, there were other judicial election battleground states. In Alabama, for example, races for the Supreme Court are always expensive, partisan free-for-alls. In June, a slate of "pick-and-choose" candidates ran against Republican incumbent justices. The challengers contended that the Alabama Supreme Court should not obey rulings of the U.S. Supreme Court with which the Alabama justices disagreed. In particular, they urged defiance of the U.S. Supreme Court decision that banned the death penalty for people convicted of murders committed when the defendants were minors. The challengers were led by Justice Tom Parker, a follower of former Chief Justice Roy Moore.

Campaign messages based on hot-button political issues were common in the Alabama races. Chief Justice Drayton Nabers, for example, told voters that "[i]ssues relating to the right to life and the sanctity of marriage are in the soul of Alabamians, and they want a judge who shares their conservative views."³

The pick-and-choose candidates all lost in the June primary, but the Republican incumbents faced Democratic challengers in the general election. Reports indicate that candidates spent \$7.3 million in the Supreme Court races. Chief Justice Nabers alone spent \$4.5 million on his campaign, but he lost in the general election to his Democratic opponent.

State ballots also contained referenda on proposed constitutional amendments

that would restrict judicial tenure or authority. In Colorado, a proposed constitutional amendment would have placed term limits on appellate judges. If passed, judges could have served only three four-year terms and the limits would have applied retroactively, ousting nearly half of Colorado's appellate judges. Proponents were inspired by "unpopular decisions" of the Colorado courts. *The Colorado measure was defeated by a 57 percent to 43 percent margin.*

The most notorious ballot proposal was termed "JAIL 4 Judges," a constitutional amendment considered by voters in South Dakota. The amendment would have permitted citizens to convene special grand juries to decide whether to indict judges for "deliberate disregard of material facts," "judicial acts without jurisdiction," and "blocking of a lawful conclusion of a case." After three "convictions," the judge would be fired and docked half of his or her retirement benefits. *The South Dakota proposal was defeated by a 90 percent to 10 percent vote.*

THE FUTURE OF JUDICIAL ELECTIONS IN MINNESOTA

In response to the *White* decisions, a new group—Minnesota Citizens Commission for the Preservation of an Impartial Judiciary—was formed. The commission is chaired by former governor Al Quie and has 32 members. The goals of the commission are:

- To identify and assess current and prospective threats to the preservation of an impartial judiciary in Minnesota in the wake of the U.S. Supreme Court and Eighth Circuit Court of Appeals decisions in *Republican Party of Minnesota v. White*;
- To identify and assess current options available for preserving an impartial judiciary; and
- To recommend the optimal means for preserving a fair and impartial judiciary in Minnesota.⁴

The commission plans to issue its report in early 2007 and may recommend changes to Minnesota law or the Constitution.

The two principal alternatives to the present system of judicial selection being examined by the commission are an appointment system with a process for periodic review and reappointment, and a "Missouri plan" retention election system. In the latter, judges would be appointed by the governor, but would be up for periodic retention elections. If a judge does not receive a threshold vote for retention, the office would be vacant and the governor would appoint a new judge.

Time will tell whether Minnesota's judicial elections will become more politicized. In 2008, three Supreme Court justices are up for election: Chief Justice Russell Anderson, and justices Paul Anderson and Lorie Gildea.

Officials of Minnesota Citizens Concerned for Life (MCCL), an anti-abortion organization, have stated that the group plans to be active in judicial

elections. The group has announced that it will support a challenger to Justice Paul Anderson in 2008. In February, an MCCL official was quoted in *Minnesota Lawyer*: "We'll be working to replace him with someone who will not be an activist, will not legislate from the bench, and will uphold the constitution in its text and history." In response, former Justice James Gilbert stated: "Paul Anderson is one of the most well-respected jurists in the state, a role model, and a fighter."

The 2008 campaign will begin soon. As day-to-day participants in and observers of the judicial process, lawyers understand the importance of a process unfettered by partisan politics and staffed by the best judges. While we each have our own legal agenda, our common special interest is in having such a process. Minnesota lawyers should fulfill our special responsibility by being advocates for an independent and qualified judiciary. 

¹ 536 U.S. 765 (2002).

² *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005), cert. denied, 126 S.Ct. 1165 (2006).

³ *The Atlanta Journal-Constitution*, June 5, 2006.

⁴ <http://www.keepmjusticeimpartial.org/index.htm>.

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