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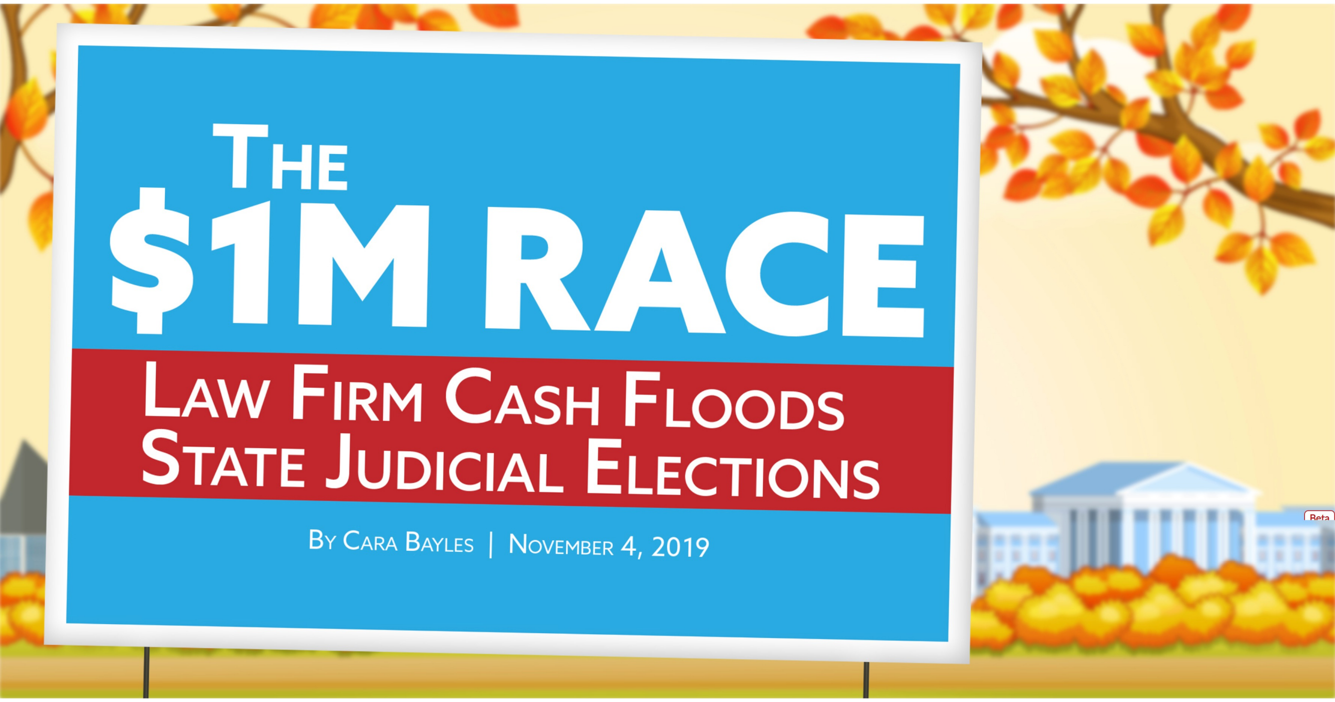

THE $1M RACE

LAW FIRM CASH FLOODS STATE JUDICIAL ELECTIONS

BY CARA BAYLES | NOVEMBER 4, 2019

Every year, Douglas Keith performs the unglamorous job of sifting through television ad buys to track the influence of money on state supreme court elections.

As counsel for the Brennan Center for Justice's Democracy Program, Keith advocates for an impartial judiciary by researching how top state court races draw in cash. The Brennan Center reports that at least 20 of the 38 states that elect justices have seen a campaign worth $1 million.

But recently, he noticed something new: Supreme courts weren't alone. Lower court candidates in Arkansas and West Virginia also drew big bucks for TV ads in 2018. Could spending on judicial elections be trickling down the ballot?

"It's not something I'd seen a lot of previously, but it very well may happen," he said.

A Law360 analysis of direct contributions to intermediate appellate court candidates suggests that's already the case. In the last 10 years, spending on those races has soared, from $19.5 million in the 2007-2008 election cycle to $33.5 million in the last cycle, which was the highest on record. There have already been four $1 million intermediate appellate campaigns — three in Pennsylvania and one in Illinois. Two of them occurred during the last election cycle.

LAW360 IN-DEPTH

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Campaign cash will keep flowing next year, when 281 races in 36 states will coincide with a presidential contest that could boost voter turnout, partisanship and spending down the ballot. History suggests the biggest chunk of cash — 30% of all donations — will come from lawyers.

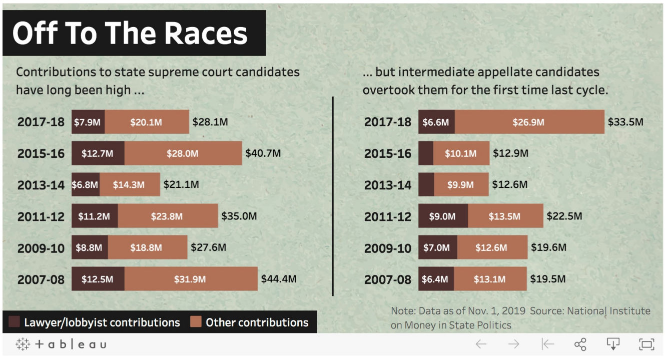
In states like Pennsylvania, Texas and Louisiana, where campaign contributions are part of law firm culture thanks to partisan judicial elections and a robust legal industry, attorneys will no doubt feel the pressure to participate in a donation arms race.

That pressure can come not just from judges, but clients, too, says Alfred Putnam Jr., the former chairman of Drinker Biddle & Reath LLP, who practices trial and appellate law out of the firm's Philadelphia office. In Pennsylvania, appellate judicial races raked in $13 million from attorneys over the last decade.

Putnam doubts campaign donations ultimately sway judges' decisions in litigation, but it can still be difficult to tell a client that opposing counsel is a judge's benefactor.

"Your client might say, 'Well, do you contribute to Judge So-and-So?'" he said. "Now I can tell you I don't think it makes any difference. Judges care more about their reputations in the long run, and the reason people give big amounts of money is they actually care about policy. They're not trying to buy the guy; they want to elect the guy who feels the same way they do about strict liability. But how does your client feel?"

As more state supreme courts move to discretionary dockets, lower appellate panels are increasingly becoming the last resort for litigation in the U.S. That means that as money flows into lower court elections, the candidates aren't the only ones with something to lose.



Off To The Races

Contributions to state supreme court candidates have long been high ...

... but intermediate appellate candidates overtook them for the first time last cycle.

Note: Data as of Nov. 1, 2019 Source: National Institute on Money in State Politics

'If the Stakes Warrant It'

Once elected, judges might ignore such contributions. They may turn a blind eye to what their campaign staff raises, and even if they know who their donors are, it might not enter into a decision. But an attorney-donor in the courtroom can still undermine confidence in the judiciary because there's a "perception of impropriety," says Maida Milone, president of Pennsylvanians for Modern Courts, a nonpartisan judicial watchdog.

And that perception can form the basis of a recusal motion, regardless of whether the donations actually factor into a judge's decisions.

Plaintiffs attorney Constantine Economides, who practices civil litigation in Pennsylvania and New Jersey, said he checks a judge's campaign contributions "if the stakes warrant it," something he says "more and more attorneys are doing."

Economides handled a case in Pennsylvania Superior Court in 2015 that he thinks could have required recusal. Judge Anne Lazarus, one of three judges hearing his client's appeal in an $18 million inheritance dispute, was running for state Supreme Court at the time. She received a $5,000 campaign contribution from opposing counsel at Mannion Prior LLP while the appeal was pending. Another colleague at the firm also donated $5,000, a third spent $500, and the firm itself spent nearly $9,000 on a campaign event.

Tipping The Scales?

There's been no comprehensive study of how campaign finance affects the country's 27,000 elected judges. But a 2006 New York Times investigation found Ohio Supreme Court justices voted in favor of contributors 70% of the time. A 2007 study published in State Politics & Policy Quarterly suggested campaign contributions directly affect Georgia justices' decision-making. And in 2015, political scientists found North Carolina justices who'd renounced large donations by opting for public financing were 60% more impartial.

Economides, whose client lost the appeal a month after the donations were made, told Law360 he would have asked Judge Lazarus to step away from the case had he known about the donations at the time. But such requests require careful consideration.

"If she says, 'No, I'm not going to recuse myself,' I would have to take it up with the state," he told Law360. "And if I'm proven wrong at that level, then I've really burned a bridge, to the detriment of my client."

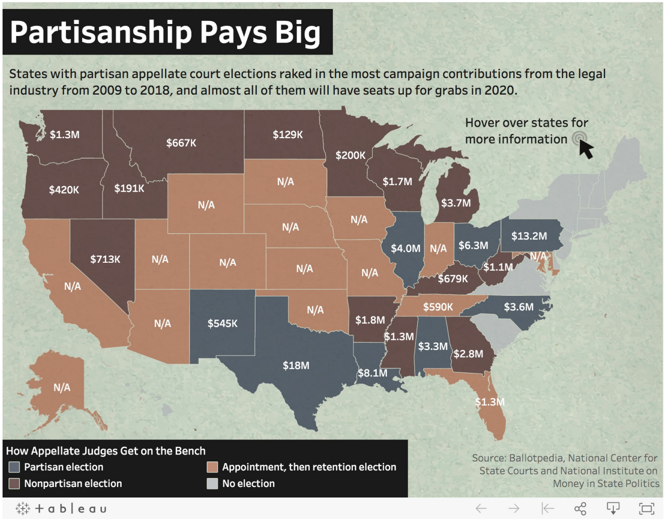
Judge Lazarus lost her Supreme Court bid but still sits on the Superior Court and is up for a retention election Tuesday. She told Law360 she compiles a list of big donors and either steps away from their cases or notifies opposing counsel of their gifts so they can seek recusal. But she doubted that the $19,500 would have been a large enough slice of her supreme court campaign contributions — which totaled nearly $539,000, according to her state campaign finance report — for her to step away from the case.

"Until the end of the campaign, you don't know whether somebody's given you more than a threshold, but $20,000 probably would not have made that threshold for me," she said.

'I Know It When I See It'

Like other states with judicial elections, Pennsylvania has long grappled with the question of how much money should trigger recusal.

In 1999, the American Bar Association drew up a fill-in-the-blank model code of conduct that instructed judges to recuse when a party, lawyer or firm made campaign contributions that reached a certain limit, but it left the amounts up to the states it hoped would adopt the code. Only six of the 42 states that hold any type of judicial elections have implemented a rule with a strict dollar-figure recusal threshold.



Partisanship Pays Big

States with partisan appellate court elections raked in the most campaign contributions from the legal industry from 2009 to 2018, and almost all of them will have seats up for grabs in 2020.

How Appellate Judges Get on the Bench

- ■ Partisan election
- ■ Nonpartisan election
- ■ Appointment, then retention election
- □ No election

Source: Ballotpedia, National Center for State Courts and National Institute on Money in State Politics

Pennsylvania flirted with enshrining a stricter rule. In 2014, a local ABA committee there suggested setting the limit at $2,500 from individuals and $5,000 from organizations.

Instead, the Pennsylvania Supreme Court adopted a proposal from a court-appointed working group chaired by Judge Lazarus that barred donations raising “a reasonable concern about … fairness or impartiality,” but stopped short of setting a specific dollar threshold.

Judge Lazarus told Law360 that a one-size-fits-all rule didn’t make sense. Instead, she thinks judges should consider recusing when a party’s contributions exceed 3%-5% of their campaign warchest.

“In a small county, you might raise $50,000. In a large county, you might have to raise $150,000. And in a statewide election, you might have to raise significantly more, it goes into the millions, perhaps,” she said. “You have to look at the percentage that any particular donation was to make a determination that it’s of such magnitude that a reasonable litigant appearing in front of you would think that’s not right.”

Abraham Reich, a partner at Fox Rothschild who co-chaired the ABA committee, likened the “reasonable concern” standard to former Supreme Court Justice Potter Stewart’s definition of pornography: “I know it when I see it.” But that ambiguity has its uses, Reich said.

“The fact that there isn’t a number allows you to argue any number is improper,” he said. “If you put in $2,500 and I give $2,400, is there a difference? You begin slicing the issue pretty thin.”

After the ABA’s House of Delegates and the Conference of Chief Justices urged more states to adopt transparent recusal rules, the Pennsylvania Judicial Conduct Board issued its own recusal guidelines in 2016, saying “several thousand dollars” should “almost always” trigger a recusal analysis. But that guideline lacks “the force and effect of law.”

“It’s supposed to provide a measure of guidance,” the board’s chief counsel, Robert Long, told Law360. “Judges are entrusted by the citizenry to exercise good judgment.”

That points to the paradox of recusal: It often relies on an honor system.

“People have a dispute about a judge, and that judge is the one who in the first instance makes the judgment call,” Reich said.

‘We Don’t Know Where That Line Is’

That paradox was made famous in the Supreme Court’s 2009 Caperton v. Massey decision, which found that sometimes “due process requires recusal.”

Massey Coal Co. CEO Don Blankenship had poured about $3 million into the race for West Virginia Supreme Court in 2004 while his company was fighting a $50 million jury verdict. The donations went to a political action committee that accused incumbent Justice Warren McGraw of being “too soft on crime.”

After McGraw lost his seat to contender Brent Benjamin, Massey Coal appealed the $50 million verdict and won. The newly minted Justice Benjamin was the deciding vote. He waved off recusal requests, insisting there was “no objective information … to show that this justice has a bias for or against any litigant.”

In 2009, the U.S. Supreme Court disagreed in a 5-4 ruling, finding “a serious risk of actual bias based on objective and reasonable perceptions.”

Regarded as the first time the high court ruled that campaign money could harm due process, the ruling inspired states to rethink recusal standards for elected judges. But it was also vague, says Bill Raftery, an analyst with the National Center for State Courts.

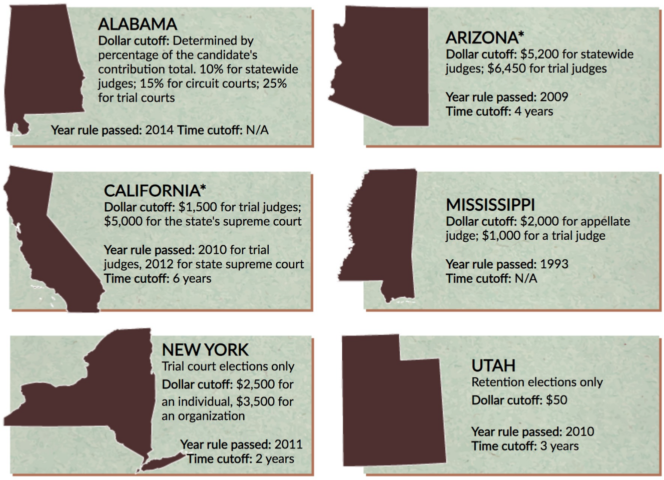
“In Massey, they did not say, ‘A million bucks is the threshold,’” he said. “They were of the opinion, ‘We don’t know where that line is, but it got crossed.’”

Some states drew their own lines, setting limits on how much a party or attorney could give to a judge without triggering automatic disqualification from a case. But those rules vary wildly. Arizona trial judges must recuse for a contribution over $6,450. The cutoff is $50 in Utah, where judges go up for retention elections after they're initially appointed.

The shelf life of a donation's taint also varies. In California, judges wait six years before they can hear cases involving generous benefactors. In New York, influence expires after two.

Recusal Rules By The Numbers

Six states have set caps on how much donors can give a judicial candidate's campaign without automatically triggering that judge's recusal from their court cases.



ALABAMA
Dollar cutoff: Determined by percentage of the candidate's contribution total. 10% for statewide judges; 15% for circuit courts; 25% for trial courts

Year rule passed: 2014 **Time cutoff:** N/A

ARIZONA*
Dollar cutoff: $5,200 for statewide judges; $6,450 for trial judges

Year rule passed: 2009
Time cutoff: 4 years

CALIFORNIA*
Dollar cutoff: $1,500 for trial judges; $5,000 for the state's supreme court

Year rule passed: 2010 for trial judges, 2012 for state supreme court
Time cutoff: 6 years

MISSISSIPPI
Dollar cutoff: $2,000 for appellate judge; $1,000 for a trial judge

Year rule passed: 1993
Time cutoff: N/A

NEW YORK
Trial court elections only
Dollar cutoff: $2,500 for an individual, $3,500 for an organization

Year rule passed: 2011
Time cutoff: 2 years

UTAH
Retention elections only
Dollar cutoff: $50

Year rule passed: 2010
Time cutoff: 3 years

* State's intermediate appellate and supreme court judges are appointed, then up for retention election. Trial judges are elected and reelected.

Alabama, New York, California, Utah, Arizona and Mississippi are the only states to set bright-line caps, Raftery says.

Wisconsin almost joined that list in 2017, when 54 retired judges petitioned the state Supreme Court to adopt recusal triggers ranging from $10,000 for justices to $500 for municipal judges. But the justices voted 5-2 against the proposal, citing contributors' First Amendment rights.

The reluctance to codify something stricter reflects a sea change in Wisconsin, where judicial elections were historically tame affairs, according to Jay Heck, executive director of Common Cause Wisconsin, a citizen watchdog organization. Then special interest groups started pouring money into high court races, Heck said, because "it's cheaper to buy a court than it is to buy an entire legislature."

'A Terrible Process'

Many judges agonize over recusal. Benjamin, the former West Virginia justice at the center of the Caperton decision, chose to stay on in that case partly because of West Virginia's "duty to sit." That doctrine was meant to keep judges from unnecessarily disqualifying themselves from controversial cases, especially for political reasons. Benjamin said he always started with that analysis, then worked through the merits.

"It's a decision that requires searching in the judge's mind, asking, 'Can I be fair? Am I going to follow the law, apply the facts to the law?'" he said. "It's not unlike how judges decide cases."

Strict ethics rules could make those assessments easier, but they're fraught with pitfalls, too.

Some states add up the donations of individual lawyers at a corporate firm when calculating the organization's campaign contribution. That can mean working in BigLaw affects lawyers who never gave to a judicial candidate, let alone sought to buy influence.

"Let's say the firm Alpha Beta Gamma LLC hires me straight out of law school and I'm an associate, and I'm 20-something years old, and I've never given a campaign contribution in my entire life," Raftery said. "Now I'm not allowed to practice law in front of a judge for something I did not do and had no part of, and I wasn't even a member of the firm when it happened."

Some attorneys may game the system. They'll avoid judges they don't like with contributions designed to trigger recusal as a "poison pill."

Recusal can raise philosophical quandaries, too: If each side gave to the judge, do the two gifts cancel each other out? What if one attorney donates slightly more than the other?

Solving The Problem

In 2011, **New York** took donation-fueled recusal out of human hands. Now, the state's **automated docketing system** scrapes from its campaign contribution rolls to ensure there are no conflicts when it assigns cases to trial judges. Jonathan Lippman, who served as New York's chief judge when the technology was implemented, says it "promoted public confidence" by preventing judges from having to say they could or couldn't decide a case impartially. "I wish, to tell you the truth, that other states would look at this in the same way," he said.

Tennessee has earned praise for its recusal rule, which doesn't set a specific campaign limit, but **provides a checklist** of detailed questions to help determine whether there's "a reasonable question as to a judge's impartiality." Those track with the due process concerns raised in the U.S. Supreme Court's ruling in Caperton v. A.T. Massey Coal Co., including outside spending.

Some advocates, like Catherine Turcer of Common Cause Ohio, say more states should follow **Georgia**'s example and require that both sides file a **campaign contribution disclosure report** in state court, something akin to the corporate disclosure statements required at the beginning of a federal appellate brief. If either side made contributions to a judge, it triggers a hearing. "Nothing is worse than one party having to say, 'I'd like you to recuse yourself, Justice,'" Turcer said.

Some states' recusal rules trigger disqualification when a judge "knows or learns by means of a timely motion" about a contribution. That puts the responsibility on attorneys to question a judge's impartiality and on judges to track donations. Both can be awkward.

Some candidates remain ignorant about who their donors are, a “dark curtain” shielding the judge from monied influence, Raftery says. But in other states, judges are encouraged to remain vigilant about impropriety. The Pennsylvania Judicial Conduct Board, for example, notes in its policy that while judges aren’t required to track their donors, “that may be the prudent practice,” because judges “may not remain purposely ignorant … in order to avoid compliance.”

“They are absolutely in a bind,” says Milone of Pennsylvanians for Modern Courts. “Which is why I think eliminating the election process is the cleanest and easiest way of dealing with this.”

Robert Rose, former chief justice of Nevada’s high court, echoed that sentiment. He personally solicited contributions when he ran for office. Given the price of TV and radio ads, he couldn’t afford to take a backseat.

“I think it’s a terrible process,” he said. “It’s something that is always with us, as members of the judiciary. You have to make a lot of decisions, some of them are unpopular, and raising the money has a pernicious impact on the whole system.”

Cara Bayles is a features reporter for Law360. She ***last wrote*** *about the barriers Native Americans face accessing the U.S. legal system.* ***Follow her*** *on Twitter. Editing by Pamela Wilkinson, Jocelyn Allison and Haylee Pearl.*

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