

MUD AND MONEY

TERRY CARTER

JUST WEEKS BEFORE THE NOV. 2 ELECTIONS, COAL COMPANY executive Don L. Blankenship issued a statement saying he had contributed “approximately \$1 for every West Virginian” in the contest for a supreme court seat. Blankenship was responding to the buzz over his spending \$1.7 million of his own money to bring down an incumbent justice he believed was bad for business.

By election day, he had ponied up nearly another dollar per person, bringing the total to an estimated \$3.5 million.

It paid off. Blankenship’s attack ads and automated phone calls are credited with tipping, or pushing, the election to Republican challenger Brent Benjamin.

Before this past year, the biggest known contribution from an individual in a judicial election was \$250,000 in the early 1980s in Texas, says Roy A. Schotland, a Georgetown University Law Center professor and longtime observer of judicial elections.

“Even adjusted for inflation, what happened in West Virginia beats that by far,” he says. For that matter, much of what happened around the

Judicial
Elections
Turn to
Big Bucks
and Nasty
Tactics

ILLUSTRATIONS BY GIANPAOLO PAGNI

Terry Carter is a senior writer for the ABA Journal. His e-mail address is terryPcarter@cox.net.

country in the 2004 judicial election season went beyond earlier races by far.

The money and mudslinging are affecting attitudes. In a 2001 survey by the Justice at Stake Campaign, 76 percent of voters surveyed said they believe money has at least some influence on judicial decisions—and other surveys by the group indicate that 26 percent of state justices agree with them.

In the 2004 judicial elections, national organizations ramped up their efforts in the bench wars and took them to more states—and with them more nastiness. Until recently, court races were mostly sleepy affairs compared to more compelling and high-profile campaigns for legislative and executive offices.

In 2000, television ads promoted or attacked candidates and issues in supreme court elections in just four states. In 2004, they appeared in all 15 states where 29 supreme court seats were in play.

As the contentiousness has spread around the country, coordinated efforts have been launched to clean up judicial elections and try to restore public confidence in the judiciary. Those efforts in some states include:

- Financial disclosure laws that shine spotlights on special-interest money.
- Campaign conduct committees that advise and police candidates, created as arms of the courts or bar associations or voluntary citizens groups.
- Voter guides with basic information about judicial candidates.
- A newly implemented law in North Carolina for the public financing of judicial elections, which helped keep all third-party advertisements out of the 2004 races.

But it's still a game of cat and mouse. Or dog-eat-dog.

November's bench battles worsened in part because of the U.S. Supreme Court's ruling in 2002 that Minnesota judicial candidates could not be prohibited from "announcing" their views on "disputed legal or political issues." The court did not, however, address another portion of the state code barring judicial candidates from making "pledges or promises" about their conduct in office other than that they would perform their duties impartially. *Republican Party of Minnesota v. White*, 536 U.S. 765.

But the driving forces are special-interest funding and negative advertising, primarily for supreme courts and mostly concerning tort reform and values issues such as abortion and gay rights. Often, however, those ads ad-

ressed what might be called tort reform or family values with other examples: attacks on candidates for their decisions in criminal matters, usually with misleading accusations of turning loose sex offenders or violent criminals.

"Sometimes the ads begin in such a way that you believe the candidate actually committed the crime," says Deborah Goldberg of the Brennan Center for Justice at the New York University School of Law, which closely monitors television ads in judicial

campaigns.

Special-interest cash flowing into judicial elections has increased exponentially since the late 1990s, and three-fold since the 2002 elections, according to the Brennan Center. A lot of the money goes into television advertisements for supreme court races, with expenditures reaching a high of more than \$21 million last year, including contributions from candidate and political party funds.

The approximately \$10 million raised for two candidates running for an Illinois Supreme Court vacancy also set a new national record, eclipsing the \$4.4 million figure for a 1996 Alabama race. With tallies still

coming in, 2004's expenditures for state supreme court seats overall may surpass the high of \$45 million in 2000.

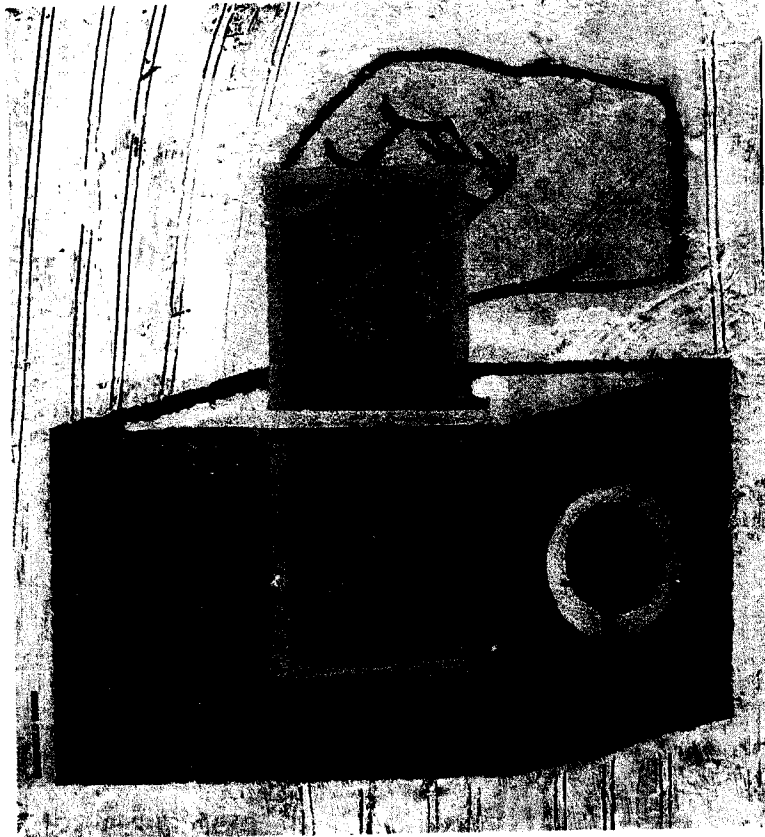
The number of attack ads in 2004 was double the 2000 total—what had previously been the nastiest judicial election season—and four times that of 2002.

"Until recently, an unwritten truce protected judicial elections, based on the understanding that courts are different from the other branches where candidates can make promises and keep them or not keep them," says Bert Brandenburg, acting executive director of the Justice at Stake Campaign. The group was launched in 2002 as an umbrella organization for a broad coalition of about 40 groups, including the ABA, working to reform judicial elections. "These wars are threatening to engulf the states." The elections of 2000 were a turning point, and 2004, Brandenburg says, was a tipping point.

"No state is safe."

ENTER THE CHAMBER

LEADING THE PRO-BUSINESS AGENDA, THE U.S. CHAMBER OF Commerce has spent scores of millions of dollars in various judicial and attorney general races around the country since the late 1990s, as have its local affiliates and other business interests. The chamber says it is only responding to the



longer-running flow of money into those races by plaintiffs lawyers.

And the chamber won big in 2004. In 15 of 16 key judicial races around the country, the chamber's so-called "pro-legal reform candidates" won. Some of the most significant victories were in Alabama, Illinois, Indiana, Mississippi, Ohio and West Virginia.

Other new forces were at work in the 2004 judicial elections. Encouraged by the Supreme Court's 2002 ruling on freedom of speech for judicial candidates in the *White* case, special-interest groups rushed through that open door with questionnaires. They tried to pin candidates down on issues ranging from limiting jury awards to displaying the Ten Commandments in public buildings.

Some bar disciplinary officials have issued advisory opinions suggesting candidates should not give answers that might violate state judicial canons requiring them to refrain from making pledges or promises about their conduct in office, or from making statements that appear to commit them to decisions in cases likely to come before them. In response, religious conservative groups behind the questionnaires filed suit in Alaska, Indiana, Kentucky and North Dakota. They claim the canons are unconstitutional in light of the Supreme Court's ruling in *White*.

Many candidates declined to answer even when they were permitted to do so. A few used the questionnaires to their advantage, such as listing membership in anti-abortion organizations.

But tort reform battles have loomed largest in election brawling, especially in Illinois and Ohio since their supreme courts overturned tort reform legislation in the late 1990s. Both rulings came in litigation brought by the Association of Trial Lawyers of America. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999); and *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997).

THE LAWSUITS OF MADISON COUNTY

IN NOVEMBER, ILLINOIS UPSTAGED OHIO IN WHAT CRITICS call the race to the bottom.

The two candidates for a seat on the Illinois Supreme Court who set a national record by raising nearly \$10 million between them were seeking to represent a district of 37 mostly rural counties in the southern part of the state. The region's newfound significance stems from one jurisdiction in particular, Madison County, which recently topped the American Tort Reform Association's "Judicial Hellhole" list for the second year in a row.

In 2003, more than 100 class actions, most with nationwide implications, were filed in the county. And a \$10.1 billion verdict by a Madison County jury against tobacco giant Philip Morris is expected to come before the state's high court this year.

Also swirling in the foreground was the issue of rising rates for medical malpractice insurance, which is more easily understood by voters who have been bombarded with ads saying physicians are leaving the state.

Anticipating harsh tactics in the supreme court race, the Illinois State Bar Association persuaded both candidates, Democrat Gordon Maag, an appeals court judge, and Republican Lloyd Karmerier, a trial judge, to appear at a news conference and pledge to keep their campaigns clean.

When attack ads broke out, the bar asked the candidates to disavow them, which they refused to do.

In early October, the Democratic Party of Illinois ran one television ad that accused Karmerier of giving probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death, and another that accused him of giving probation to a man who molested a young girl and her brothers.

A tort reform group hit back with an ad claiming Maag voted to turn loose a man convicted of sexually molesting a 6-year-old girl.

The Illinois State Bar Association's nine-member Committee on Supreme and Appellate Court Election Campaign Tone and Conduct reviewed the ads, determined they were inflammatory and misleading, and wrote to both candidates asking them to hold to their pledge and renounce them.

Both declined, saying they believed what the ads said.

Maag certainly didn't approve of what was said about him. In December, he filed suit against organizations—including the Illinois State Chamber of Commerce—and individuals behind flyers criticizing his handling of criminal cases as an appellate judge. *Maag v. Coalition for Jobs, Growth and Prosperity*, No. 04L1395 (Madison Co. Cir. Ct.).

"Despite everything a lot of us tried to do, this was the worst supreme court election we've ever had," says Cindi Canary, director of the Illinois Campaign for Political Reform. "We managed to make Ohio look good."

Ohio had looked pretty bad for its 2000 supreme court race. The Ohio Chamber of Commerce, with help from the U.S. Chamber, bought television ads targeting Justice Alice Resnick, who had written the court's controversial 1999 opinion striking down legislation that limited employers' liability.

The ads depicted Lady Justice peeking from behind her blindfold to watch as piles of money from trial lawyers and unions tip her scales.

The chamber is unrepentant in what it believes is a battle against waves of litigation that harm its members.

"We're taking a hard, close look at these races to make sure there are more state supreme court justices and attorneys general who are fair and balanced, and look at ways to restrain liability rather than expand it," says Sean McBride, vice president for communications for the U.S. Chamber's Institute for Legal Reform.

Litigation continues over disclosure of funding sources for \$4 million behind ads attacking Justice Resnick, as well as other ads. The Ohio Chamber of Commerce paid for them with the help of the U.S. Chamber, but has refused to reveal who gave the money to the business groups. Critics say the ads backfired and helped keep Resnick on the bench.

Since the 2002 elections, the Ohio Chamber has disclosed all funding sources, even in instances not required by law. But it is continuing the battle to keep secret the identities of donors in the 2000 elections. The Ohio Election Commission fined the U.S. Chamber \$1,000 in the matter for engaging in illegal corporate spending to influence an election. On Sept. 30, an appeals court upheld a subpoena seeking a list of funding sources. *Ohio Elections Commission v. Ohio Chamber of Commerce and Citizens for a Strong Ohio*, 817 N.E.2d 447 (Ohio Ct. App. 2004).

This last election season, more money and greater intrigue—as well as increased outside interest—visited Illinois. The U.S. Chamber and ATRA reportedly contributed at least \$1 million to Karmeier, the eventual winner in the Illinois Supreme Court race. That was on top of money they gave to other groups involved in the campaign and money from other state and local business interests. And plaintiffs lawyers lined up with checkbooks on the other side for Maag.

By midsummer, 99 percent of contributions to the Democratic Party of Illinois, which ran a big ad campaign for Maag, had come from plaintiffs lawyers, according to a report released recently by ATRA. That included four checks from plaintiffs firms for \$100,000 each—three of them

based in Madison County—and another \$100,000 check from a lawyer in one of those firms, Randall A. Bono of the SimmonsCooper Law Firm.

The SimmonsCooper firm handles a lot of asbestos cases in Madison County, where Bono retired as a trial judge in 2000.

“The galvanizing thing for us was the prospect of state supreme courts being actively encouraged by the plaintiffs bar to nullify tort reform,” says Sherman R. Joyce, ATRA’s president. “Ohio and Illinois gave flight to this approach of making policy through the courts.”

Rebutting that, Association of Trial Lawyers of America spokesman Carlton Carl says the U.S. Chamber’s and ATRA’s “constituents decided they aren’t winning enough

REFORMS THAT WORK

As big money and mean-spirited advertising have quickly spread in judicial elections around the country, cleanup efforts have picked up, too—with some successes.

North Carolina led the way in 2002 with a law establishing the first publicly financed judicial campaigns since a similar try in Wisconsin, which languished after being launched in the late 1970s. The North Carolina statute, the Judicial Campaign Reform Act, requires state supreme court and appellate judges who participate in elections to accept fund-raising and spending limits. The law also made these judicial races nonpartisan for the first time.

More recently, the state enacted a new law on electioneering communications, modeled after the federal McCain-Feingold measures for reining in outside influence on elections. Like federal law, the North Carolina statute imposes a blackout period for broadcast ads that refer to candidates for statewide office or for the state legislature.

The period is 30 days prior to primaries and conventions, and 60 days before general and special elections. The blackout applies to ads sponsored by both corporations and unions, with special 24-hour reporting requirements for individuals and other organizations.

One result is that in this last election season, there were no advertisements by special-interest groups, which usually set the tone and pace for nastiness.

“We’ve actually changed how they campaign for judgeships,” says Chris Heagarty, director of the North Carolina Center for Voter Education, which helped push for public financing and other reforms. “Instead of

spending so much time fund-raising, candidates were attending civic events, political rallies and bar association events. There was much more personal contact [in 2004].”

One way to battle the forces of money in judicial elections is transparency—requiring disclosure of funding sources. North Carolina’s new law goes even further than McCain-Feingold’s restrictions on television and radio advertising, limiting mass mailings and telephone banks as well.

Illinois also enacted a version of McCain-Feingold, though critics say some groups might already have found ways around it. (See main story.)

“We learned [in 2004] that transparency is not a picture; it’s a mosaic,” says Bert Brandenburg, acting executive director of the Justice at Stake Campaign. “We still don’t have all the mechanisms to get 100 percent transparency. There’s a variety, but we need to improve.”

Campaign conduct committees—some as creatures of the supreme courts or bars, some as civic groups—have roughly doubled in number in recent years. Now, about a dozen monitor judicial elections statewide, while a few others monitor local judicial elections, according to David B. Rottman, a researcher with the National Center for State Courts.

While these committees sometimes censure candidates, most of their work is responding to queries from candidates or campaigns about the right and wrong ways of doing things.

After Ohio’s supreme court races lowered the bar nationwide for negative ads in the 2000 elections, the Ohio State Bar launched a campaign conduct committee

in 2002. That measure and stepped-up efforts in the Ohio Supreme Court’s mandated training in ethics and finance for judicial candidates were credited with keeping the Ohio races relatively clean and calm despite the continuing flow of big money into them.

“There is a good deal of momentum in developing these committees,” says Rottman, who points out they were recommended by U.S. Supreme Court justices on both sides in the controversial 2002 opinion allowing greater freedom of speech to judicial election candidates. *Republican Party of Minnesota v. White*, 536 U.S. 765.

Another key tool for reformers are voter guides, which can give solid, unvarnished information about candidates. Such communication is important in an era when abysmally low turnout in judicial elections leaves a vacuum for special interests that want to tip elections with their message and money.

North Carolina sent voter guides to every household in the state—4 million of them—with basic information about candidates in the statewide judicial races. The guides were created in part to offset the expected decline in turnout because the races were nonpartisan for the first time. That meant the candidates weren’t listed on sample ballots issued by political parties, which a lot of voters rely on.

“We’re doing a study of the effectiveness of the voter guides,” Heagarty says. “Preliminary analysis shows people were satisfied with them.”

“And overall, these elections were a big success as far as reform efforts were concerned.”

—Terry Carter

in court, aren't winning enough in legislatures and aren't winning enough in public opinion, so they decided to try to get rid of judges who are fair and elect judges beholden to those industries."

And so the conflict goes.

"One side can point at the other and say, 'He started it,' but the fact is we're in an arms race," says Brandenburg of the Justice at Stake Campaign.

In that arms race, Illinois recently saw the introduction of stealth weapons by both sides that circumnavigated campaign finance disclosure legislation modeled after the federal Bipartisan Campaign Reform Act of 2001, which is known as McCain-Feingold.

Illinois has no campaign funding limits but does require disclosure of the identity of anyone who donates more than \$150. It does not require that of the so-called nonprofit 527s that receive tax-exempt status to raise money for political activities under section 527 of the Internal Revenue Service Code.

The two newly created nonprofit corporations, one backing each candidate in the Illinois race, in turn funded political action committees that happened to be located at the nonprofit organizations' addresses. More than \$500,000 went to the Karmeier and Maag campaigns during the furious few weeks before the election.

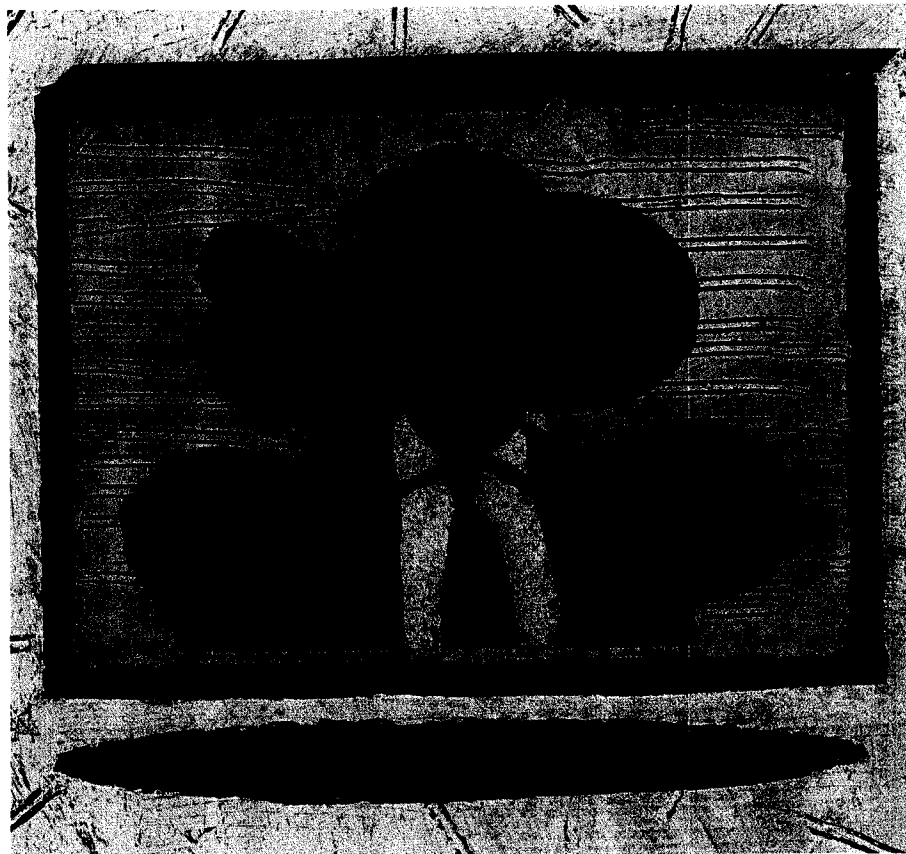
Maag's money came from the Justice For All PAC, located in the offices of the Justice For All Foundation, and most of the funds came from plaintiffs lawyers. On the other side, business interests put money into the Coalition for Jobs, Growth and Prosperity, which in turn made contributions to Karmeier's campaign through the Jobs Coalition PAC located in its offices.

The PACs must identify their funding sources, and they named the nonprofit foundations. The nonprofits are not required to name their contributors.

"There's no question they wanted to obscure the sources of money," says Kent Redfield, a political scientist at the University of Illinois at Springfield who specializes in state campaign finance law. "It looks illegal, and I assume that at some point we're going to sit down with the Illinois Board of Elections to see if it's a matter of interpretation or if we need a statutory fix."

There was no missing the bright green trail of money in the successful bid to oust sitting Justice Warren McGraw of the Supreme Court of Appeals of West Virginia. Don Blankenship, president of Massey Energy Co., based in Richmond, Va., put up an estimated \$3.5 million of his own money to send McGraw back to his country-lawyer practice.

Much of his money moved through an organization called And for the Sake of the Kids, a 527 nonprofit interest group not bound by campaign finance limits. The *Charleston Daily*



Mail called it "West Virginia's version of Swift Boat Veterans for the Truth."

The most damaging ad bought by And for the Sake of the Kids accused McGraw of casting the deciding vote to let a sex offender take a job in a school. The ad was misleading, critics say.

One such critic is former supreme court justice Richard Neely, who represents McGraw in a libel suit filed just weeks after the election against Blankenship and others, including a Huntington television station. *McGraw v. Blankenship*, Wyoming Co. Civil Action No. 04-c-317.

"These guys took what was a very complex case concerning someone who was young and is no longer an active sex offender," Neely says. "And there's no question the election was lost because of those ads."

Neely considers himself the top expert on West Virginia libel law, especially on the case used to bolster McGraw's suit. In that case, a candidate for public office was awarded \$250,000 for a misleading newspaper headline over an otherwise accurate story. Neely, who spent 22 years on the state's high court, wrote the opinion. *Sprouse v. Clay Communications*, 158 W.Va. 427 (1975).

Blankenship did not respond to an interview request.

The West Virginia State Bar has named a 20-member Judicial Selection Review Committee to consider changes in the electoral process. It is chaired by former bar president John P. Bailey and held its first meeting in early December.

Recommendations from the committee are expected in the spring and would be passed along to the state legislature.

"Now you sit down with the election over and the dust settled, and wonder how much damage was done to the public's confidence in the judiciary," Bailey says. ■