

Campaign Finance Talk

The Voice of the Michigan Campaign Finance Network

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A Toxic Michigan Supreme Court Campaign (again)

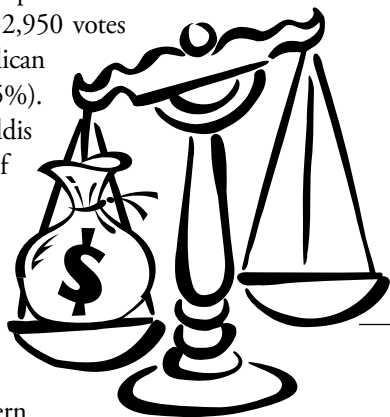
“Motivated interest groups are pouring money into judicial elections in record amounts. Whether or not they succeed in their attempt to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions.”

— Sandra Day O’Connor, retired Justice, U.S. Supreme Court
Wall Street Journal, November 15, 2007

To most political observers it was the biggest surprise of Election Day 2008 in Michigan: Judge Diane Marie Hathaway of Wayne County’s Third Circuit Court defeated incumbent Michigan Supreme Court Chief Justice Clifford Taylor in his third election campaign as a justice. As it turned out, the election wasn’t particularly close. Hathaway, the Democratic Party nominee for the non-partisan position on the state’s highest court, received 1,852,950 votes (49.3%), compared to the Republican nominee Taylor’s 1,483,668 (39.5%). Libertarian nominee Richard Roddis captured the remaining 11.2% of the vote.

Whether you view the election outcome as cause for celebration or cause for grief, there is plenty in the conduct of the campaign that should give you cause for reflection. Once again, in a pattern that has become a norm for Michigan Supreme Court elections, the greatest share of the finances for this campaign was off the books.

Chief Justice Taylor’s candidate committee set a fundraising record for a Michigan Supreme Court campaign by taking in \$1,842,000. That broke Taylor’s own record from the 2000 campaign, when he raised \$1,333,000. Including the \$986,000 he raised for his 1998 campaign to complete the term for the seat to which he had been appointed, Justice Taylor raised a total of \$4,161,000 over the past decade.



Judge Hathaway’s campaign committee went from a position of no money on September 9th to \$638,500 by Election Day. The combined total of \$2,480,000 for the two candidates was exceeded only by Taylor’s 2000 campaign, when he and his opponent, Marietta Robinson, raised a total of \$2,529,000.

The Undisclosed Campaign

While the candidates were engaged in a robust campaign of their own, the greater share of the action belonged to the Michigan Chamber of Commerce, the Michigan Democratic Party and the Michigan Republican Party. The Chamber and the political parties engaged in a gritty television “issue” campaign that topped \$3.8 million – 50% more than what the candidates spent. Being masters of the election game, these organizations understood that

“The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today.”

they could spend without limit on commercials that sought to define the character, qualifications and records of the candidates; and as long as they didn’t explicitly exhort a vote for or against one of the contenders, none of the advertising activity would have to be disclosed in any campaign finance report.

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The Michigan Campaign Finance Network collected the records of these advertising campaigns from the political public files of the state's broadcasters and cable systems. This year's activity is only the latest in a run that began in 2000. From 2000 through 2006, the Chamber and the parties spent some \$10.5 million for Supreme Court television issue ads, while the candidates' committees raised \$10.4 million during the same period. It should be recognized that television spending is a conservative representation of undisclosed spending because there are radio issue ads, direct mail and ground campaigns that MCFN is unable to estimate.

The ethical hazard in this is the fact that an individual or interest group with a case on appeal can route a million dollars or more through the Chamber or one of the political parties to market its preferred candidate, and the public will never know. Furthermore, if the interest group's favorite candidate wins election and participates in the interest group's case, its opponent is ignorant of an apparent conflict of interest that compromises due process. The impartiality of the judiciary is undermined.

The advertisements that were aired by the Chamber and the parties were not subtle and they were generally regarded to be highly influential in the campaign. Among the most memorable:

- The Michigan Democratic Party spot that featured a dramatization of a sleeping judge and testimony of a litigant who claimed that Chief Justice Taylor slept during oral argument of her case.
- The Michigan Chamber of Commerce spot that encouraged viewers to contact Judge Hathaway and tell her not to be soft in sentencing sex offenders, as an unnamed assistant prosecutor asserted she had been in the past.
- The Michigan Republican Party spot that showed a bikini-clad woman frolicking on a beach and said that Judge Hathaway previously had pursued a seat on the Court of Appeals so she could have a light work load and enjoy leisure time on the beach.

The only real issue in these advertisements was the candidates' suitability or unsuitability for office.

A National Problem

Earlier this year the nonpartisan Justice at Stake Campaign published a report in its series on *The New Politics of Judicial Elections* that identified the Great Lakes basin as ground-zero for judicial election campaigns of the sort that Justice Sandra Day O'Connor lamented in the quotation at the introduction of this article. In addition to Michigan, such campaigns have occurred in Ohio, Indiana, Illinois and Wisconsin. Similar campaigns also have left a mark outside this region, notably in Alabama, Mississippi, Georgia and West Virginia.

A case from West Virginia created such a controversy that the Supreme Court of the United States recently agreed to hear it. In *Caperton v. Massey Energy*, West Virginia Justice Brent Benjamin refused to recuse himself from the case, even though the CEO of

the lead defendant, Massey Energy, had invested \$3 million in supporting Justice Benjamin's reelection campaign – 60% of all his financial backing – while preparing to appeal a \$50 million damage judgment against his company.

According to Theodore B. Olson, former Solicitor General of the United States and counsel of record for the Petitioners, "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge. We certainly believe that, in this case, acting Chief Justice Benjamin crossed that line."

There is no telling how many other such cases have gone undetected because campaign supporters' contributions paid for issue advertisements that were not subject to disclosure.

Fixing a Broken System

The Michigan Campaign Finance Network recommends three policy measures to reform Michigan Supreme Court campaigns and bolster public trust and confidence in the impartiality of the Court:

- Require full disclosure of the receipts and expenditures for campaign advertisements that feature the name or image of a candidate, whether the ads mention voting or not.
- Update disqualification standards for the Michigan Supreme Court to acknowledge the potential for conflict of interests when justices hear cases that involve major financial supporters of their election campaigns.
- Develop a system of public financing for Supreme Court campaigns, so candidate committees have a viable alternative to soliciting financial support from interest groups and attorneys who may be involved in future cases.

The American Bar Association's Model Code of Judicial Conduct recommends that state supreme courts should consider campaign finance support in developing recusal standards, and the ABA recommends public financing for supreme court campaigns in states that select justices through contested elections. The Representative Assembly of the State Bar of Michigan also has taken a position in support of public financing.

The Bottom Line

Michigan's 21st Century Supreme Court campaigns should be a source of shame to the entire state. This is not a matter of any one justice, any one candidate or any group of justices. It is much bigger than that. At the center of our Supreme Court campaigns is a bizarre 'don't ask, don't tell'-policy that hides the sources of the money behind most of the advertising. We have a systemic problem that undermines public trust and confidence in the impartiality of our state's highest court and it demands a systemic correction.

2008 Michigan Supreme Court Television Advertising by Market (\$s)

	Detroit	GR/K'zoo	Lansing	Flint/Saginaw	Traverse City	Marquette	Total
Taylor campaign	434,620	354,620	164,635	168,615	102,680	84,001	1,309,171
MI Chamber of Commerce	675,650	375,230	243,090	141,995	117,555	117,565	1,671,085
MI Republican Party	304,890	176,651	79,455	49,455	46,925	43,170	700,546
Taylor and supporters	1,415,160	906,501	487,180	360,065	267,160	244,736	3,680,802
Hathaway campaign	232,865	114,580	57,035	91,020	0	0	495,500
MI Democratic Party	732,070	263,056	104,981	133,386	131,436	67,563	1,432,492
Hathaway and supporters	964,935	377,636	162,016	224,406	131,436	67,563	1,927,992
Total	2,380,095	1,284,137	649,196	584,471	398,596	312,299	5,608,794

Source: Data collected from the public files of MI broadcasters and cable systems



At a time when so many of our fellow Michiganders are in need of assistance to meet their basic human needs, it is almost embarrassing to ask for your support for the Michigan Campaign Finance Network. But I must ask.

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We believe that the work we are doing is vital to a healthy democracy. Ask yourself:

Where else will you see the kind of reporting you have read in this newsletter?

There is a very real threat to the impartiality of our state's highest court in the way its election campaigns are financed. It is not simple or easy to define the problem. It is not simple or easy to inform policymakers about the problem. And if MCFN doesn't do it, who will? If we don't even recognize a problem, how can we solve it?

We understand that these are trying times for nearly everyone in our state. We believe that better politics will lead to better policies to address the challenges we face together. That is why we dedicate our effort to shining a light on the dark corners of Michigan politics. Please help us to continue doing that important work.

No contribution is too small. No contribution is too big.

Best wishes to you for the holiday season and the New Year ahead.

Rich Robinson

Rich Robinson
Executive Director

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The voice of the

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All articles were written by Rich Robinson, executive director of the Michigan Campaign Finance Network.

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YES! I support the important work of the Michigan Campaign Finance Network.

(Please check all that apply.)

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 Please send me the *Citizen's Guide to Michigan Campaign Finances - 2006*.

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