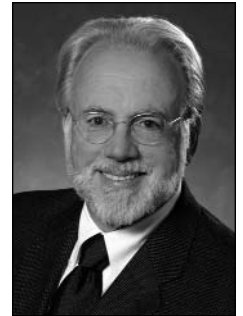


Defending the Judiciary— An Obligation of Bench and Bar

by William E. Walters

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We must never forget that the only real source of power that we as judges can tap is the respect of the people.

—Thurgood Marshall
U.S. Supreme Court Justice (1967–91)

As this issue of *The Colorado Lawyer* arrives on your desk (or inbox), the voters of Colorado either will have cast their ballots by mail or will be on the way to the polls to elect a new President; Congressional delegation for Colorado; and countless other federal, state, and local officials. These persons will make up the legislative and executive branches that form our government. The third branch—the judiciary—will not be subject to the contested election process in Colorado.¹ We are fortunate to have a merit selection and judicial evaluation system that has been ranked among the best in the country by a number of independent groups.²

In recent years, the Colorado Bar Association (CBA) has been called on to defend that system, and almost had to do so this year. Fortunately, Amendment 43 (a proposed initiative that would have term-limited all Colorado judges) did not appear on the 2008 ballot. However, the challenges and attacks on an independent, fair, and impartial judiciary are not going away. To borrow a phrase from Arnold Schwarzenegger, who played the Terminator in the 1984 film: “They will be back.”³

Colorado’s Judicial Selection Process

Colorado has had a merit selection and retention process for judges for more than forty years,⁴ and a judicial evaluation process for the past twenty years.⁵ Coloradans have the opportunity to “retain” or “not retain” their judges on a periodic basis.⁶ This year, two Colorado Supreme Court justices and six appellate judges went through a rigorous review by judicial evaluation committees, as did a number of state court judges who were evaluated by district commissions. Among the arguments against the judicial evaluation process is that only a few judges are not retained, which therefore suggests that the system must not work. However, it may be more accurate to say that the number of judges not retained is low precisely because the system has done an excellent job in both selecting and evaluating the judiciary.⁷

Nationwide Efforts to Undermine a Fair and Impartial Judiciary

Other states have witnessed proposals that would strip judges of their judicial immunity and subject them to civil and criminal actions.⁸ For example, a few years ago, there was a concerted effort to remove all of the judges standing for election in Pennsylvania.⁹ In another effort, groups are working to achieve partial abolishment of

the Missouri plan of merit selection in (of all places) Missouri.¹⁰

Other groups are using “surveys” of judges seeking election or retention.¹¹ One recent survey from Florida asked judges who were standing for election such questions as:

- “Do you agree . . . [that] the Florida Constitution recognizes a right of same-sex marriage?”
- “Which of the current Justices of the Florida Supreme Court most reflects your judicial philosophy?”¹²

Finally, in states where judges are elected, millions of dollars have been spent on what largely are seen as misleading advertisements.¹³

The Colorado Bar’s Response

Civic education about our national and state systems of government continues to be the best way to respond to these increasing assaults on a fair and impartial judiciary. Colorado’s lawyers and judges have been actively engaged in such educational efforts for many years.

For example, the CBA has sponsored programs such as the Colorado High School Mock Trial Program, as well as “Colorado We the People.”¹⁴ Attorneys have volunteered to work with educators in elementary school through college classrooms throughout Colorado to promote an understanding of our judicial system. The CBA also has partnered with the Center for Education in Law and Democracy (CELD) for more than a decade. The CBA and CELD have co-sponsored a statewide teachers’ conference on law-related education.

Recently, the CBA collaborated with the Colorado Judicial Institute, Colorado Court of Appeals Judge Russell Caparelli and Judge Steve Bernard, and U.S. District Court Judge Marcia Krieger to initiate and present the *Our Courts* program to civic groups and organizations throughout Colorado. To date, 3,800 Coloradans have taken the opportunity to attend and benefit from this educational program.¹⁵

In the electoral arena, the CBA led the effort to defeat Amendment 40 two years ago. The Bar secured funding for this effort from members of Colorado’s legal profession and the state’s business community.

The Judicial Response

Of equal importance to the Bar’s ongoing efforts is the active participation by the members of the judiciary in expanding civic education to the citizens of Colorado. The success of *Our Courts* is directly related to the involvement of the judges who speak at these programs, explaining our state’s court system to attendees. Time and again, audiences comment that the best part of the program is having the opportunity to speak one-on-one with a “real, live judge.”

In addition, jurists from the Colorado appellate courts travel the state to hear oral arguments before high school audiences. This past year, many members of the judiciary (including judges and administrators) participated in a program sponsored by the Colorado Press Association that enabled judges, attorneys, and members of the media to have frank discussions concerning the issues and problems they encountered when working with one another.

The judiciary continues to work to improve the judicial system in other ways. For example, individual judges around the state have initiated local programs where they can provide assistance for truant school children, establish and supervise teen courts, and sit as presiding judges in mock trials.

In addition to working with the community, many judges participate with local bar associations to conduct “Bench-Bar” retreats (or similar face-to-face meetings), where attorneys and judges have the opportunity to sit down and discuss issues confronting the judiciary. At the recent statewide judicial conference, Colorado Supreme Court Chief Justice Mullarkey called on judges to look for additional ways to improve the administration of justice in Colorado.

A Proactive Role for the Bench and Bar

Although much has been done by the Colorado Bench and Bar to explain how our courts work, more will be required to increase the level of understanding of a fair and impartial judicial system. The CBA is redoubling its efforts to communicate with community leaders and the media before initiatives challenging the Colorado judicial system arise.

In addition, the CBA continues to provide input to members of the Colorado General Assembly by assisting in drafting and reviewing proposed legislation. The *Our Courts* program will receive additional funding this year from the CBA to ensure that more of Colorado’s citizens are exposed to information about the judicial system. The CBA also will be working on improvements to the judicial discipline process to raise the level of public confidence in that component of judicial evaluation.

Whatever the CBA and individual attorneys may contribute to this effort, however, can go only so far. Ultimately, the Bench must expand its community education efforts to improve the understanding of Colorado’s citizens of the vital role of our third branch of government.

I recognize that Canon 7 of the Colorado Code of Judicial Conduct (Code) proscribes “active involvement in politics” by our sitting judges.¹⁶ Clearly, judges must avoid even the “appearance of impropriety.” However, Canon 4 is worth examining by those judges who may have removed themselves from any such involvement in the past. Canon 4 recognizes the obligation of the judiciary to “engage in quasi-judicial activities to improve the law, the legal system and the administration of justice.”¹⁷ It goes on to encourage a judge to

“speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice, *including the role of the judiciary as an independent branch within our system of government.*”¹⁸

As the Commentary to Canon 4 observes:

[A] judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice.¹⁹

The Code also recognizes that involvement by a judge in civic activities “does not reflect adversely upon the judge’s impartiality or interfere with the performance of judicial duties.”

The Long and Winding Road Ahead

Maintaining a fair and impartial judiciary through ongoing civic education is a marathon, not a sprint. The organized Bar and the Bench must work together to raise the level of understanding of our third branch of government. Having judges engage with the public as integral members of the community is a key part of that challenge.

In addition, the Bench and Bar must maintain an open channel of communication with one another to address issues that confront judges, attorneys, and parties. For example, if judges are having problems in the courtroom, the Bar needs to take whatever measures it can to remedy those problems. By the same token, if attorneys are to be affected by court rules, fees, or processes, the judiciary needs to have open discussions about those issues as they are being developed.

We have a considerable challenge ahead of us in educating our fellow citizens about our system of justice. The League of Women Voters of Colorado Education Fund and the Institute for the Advancement of the Legal System recently reported that “there is a significant link between voters who don’t understand the way the courts work and support for proposals that would limit judicial authority and independence.”²⁰ The CBA and its members are prepared to work toward providing additional civic education to maintain a fair and impartial judiciary. I call on our judges to continue their efforts to engage in community education—not for political purposes, but so that the public can better understand and respect our system of justice. Together we can and must continue to earn the respect of the people—the only real source of power for our judicial system.

Notes

1. However, the names of 103 jurists will be on the 2008 ballot for the public’s vote to “retain” or “not retain.”

2. See, e.g., Institute for the Advancement of the American Judicial System (Institute), “Shared Expectations: Judicial Accountability in Context” (2006), available at www.du.edu/legalinstitute/pubs/SharedExpectations.pdf, which cited Colorado as one of the leaders of the comprehensive Judicial Performance Evaluation movement; Institute, “2007 Colorado Voter Opinions on the Judiciary,” available at www.du.edu/legalinstitute/pubs/ExecutiveSummaryFinal.pdf, which reported that 88 percent of Coloradans with court experience said that the judge was fair in their case; 2008 U.S. Chamber of Commerce State Liability Systems Ranking Study (April 15, 2008, Harris Interactive), available at www.instituteforlegalreform.com/states/lawsuitclimate2008/pdf/FullHarrisSurvey.pdf, which ranked Colorado courts ninth in the country.

3. With apologies to the originator of the phrase “I’ll be back,” uttered by the title character in the 1984 science fiction/thriller film *The Termini-*

Readers are encouraged to send me their comments, thoughts, and feedback at bill.walters@cobar.org.

nator, co-written and directed by James Cameron. After the defeat of Amendment 40 in 2006, Limit the Judges campaign chairman John Andrews wrote:

We scared the bench and bar witless, diverting over \$1 million of their resources away from other races and setting the stage for legislative gains next year. . . . Please stay with us—we'll be back!

See www.limitthejudges.com/statement.php.

4. Colo. Const. art. VI, § 24.

5. CRS §§ 13-5.5-101 *et seq.*

6. Colo. Const. art. VI, § 25.

7. For a thorough analysis of term limits, see Gabriel, "Term Limits for Judges Still a Bad Idea," at www.coloradojudicialinstitute.org/downloads/Term%20Limits%20Still%20a%20Bad%20Idea%202%206%2. See also Snider, "Term Limits for Judges: A Solution in Search of a Problem," 37 *The Colorado Lawyer* 43 (Feb. 2008); Starrs, "Protect Colorado Courts," 35 *The Colorado Lawyer* 5 (Oct. 2006).

8. See "Q & A on J.A.I.L. for Judges" (proposed ballot initiative in South Dakota), *Your ABA* (Dec. 2006), available at www.abanet.org/media/youraba/200612/article06.html.

9. See "Judicial Clean Sweep" (Pennsylvania recall effort of all sixty-six judges on the ballot in 2007), available at www.pacleansweep.com/cgi-bin/judges.cgi.

10. See "The Next Missouri Plan," available at www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,679.

11. Coyle, "Judicial Surveys Vex the Bench," *Nat'l L.J.* (Sept. 8, 2006), available at www.law.com/jsp/article.jsp?id=1157629870187.

12. "The Florida Family Policy Council's 2008 Statewide Judicial Candidate Questionnaire," available at spacecoastfreethought.org/docs/vg/FFPC_Judges_2008_sm.pdf.

13. In the last four election cycles, candidates for state high courts have raised nearly double the amount of money as that raised by candidates in the 1990s. The New Politics of Judicial Elections 2006 (Justice at Stake Campaign, 2007) from "Judicial Selection in the States" (2007), Institute for the Advancement of the American Legal System, available at www.justiceatstake.org/partnerViewer.asp?breadcrumb=9,905.

14. Colorado We the People is

a national civic education program . . . designed to enable students to develop a comprehensive understanding of the Constitution and Bill of Rights and to foster greater appreciation of the rights and responsibilities of citizens in our constitutional democracy.

The program is coordinated and directed in Colorado by the Center for Education in Law and Democracy. It is funded by the U.S. Department of Education, under the Education for Democracy Act approved by the U.S. Congress. See www.lawanddemocracy.org/wtpnew.htm.

15. The *Our Courts* program is one of the very few such adult education programs in the country. See www.ajs.org/pe/pe_models.asp.

16. Canon 7 of the Colorado Code of Judicial Conduct (Code) states: "A Judge Should Refrain from Political Activity Inappropriate to His or Her Judicial Office."

17. Canon 4 of the Code states: "A Judge is Encouraged to Engage in Quasi-Judicial Activities to Improve the Law, the Legal System and the Administration of Justice."

18. *Id.* (emphasis added).

19. *Id.*

20. League of Women Voters of Colorado and the Institute for the Advancement of the American Legal System, "2007 Colorado Voter Opinions on the Judiciary," available at www.du.edu/legalinstitute/pubs/ExecutiveSummaryFinal.pdf. ■