F I S C A L I M P A C T R E P O R T

SPONSOR Adair **ORIGINAL DATE** 2/21/09 **LAST UPDATED** **HB**

SHORT TITLE Judicial Candidate Campaign Contributions **SB** 646

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Unknown See Below	Unknown See Below		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 99, HB 151, HB 244, HB 252, HB 253, HB 272, HB 495, HB 535, HB 550, HB 553, HB 614, HB 686, HB 808, HB 850, HB 891, SB 49, SB 94, SB 116, SB 128, SB 139, SB 140, SB 163, SB 258, SB 262, SB 263, SB 269, SB 296, SB 346, SB 451, SB 521, SB 535, SB 555, SB 557 SB 606, SB 611, SB 652, SB 676 & SB 693

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Judicial Standards Commission (JSC)
Secretary of State (SOS)

SUMMARY

Synopsis of Bill

Senate Bill 646 adds a new section to the Campaign Reporting Act that restricts the conduct of judges, and particularly lawyers, in judicial campaigns.

The proposed restrictions are as follows:

- Judges or judicial candidates may not personally solicit campaign contributions; they must establish a campaign committee to solicit and accept funds.
- The committee cannot solicit or accept contributions from lawyers.
- Lawyers cannot make a contribution to a judge or judicial candidate.
- Lawyers cannot endorse a judge or candidate for judicial office, or allow themselves to be used in any media endorsing the candidate.

FISCAL IMPLICATIONS

Judicial education resources will be devoted to ensuring these restrictions on campaign fundraising are understood. Additional judicial resources will be required to handle new litigation and hearings that will result from this prohibition.

SIGNIFICANT ISSUES

The AOC provided the following:

> The new heightened restrictions on judicial candidates and lawyers likely raise important constitutional issues. Most significantly, prohibiting lawyers from endorsing judicial candidates and from contributing to the campaigns of judicial candidates will implicate the First Amendment. Limits on candidates' spending have been found to be an unconstitutional violation of free speech. Attorneys and litigants have the right as citizens to participate in the electoral process of public officers, including judges, and have the right to support and make contribution to candidates for judicial office.
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> Under the Code of Judicial Conduct, Rules 21-700 and 21-800 NMRA, judges may contribute to political organizations, and may solicit contributions for their own campaigns, including soliciting contributions from lawyers. Rule 21-800(F) prevents judicial candidates from soliciting or accepting contributions from any attorney or litigant involved in a case pending before the candidate. Rule 21-800(B) prohibits candidates from engaging in fundraising activities, or accepting contributions, that have the appearance of impropriety.

The JSC provided the following:

> This bill proposes to codify in law a provision of the New Mexico Code of Judicial Conduct (Code), prohibiting judicial candidates from personally soliciting or accepting campaign contributions. As an alternative, and as provided by the Code of Judicial Conduct, this bill provides that judicial candidates may establish a campaign committee, which may engage in campaign related activities not prohibited by law.
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> The bill, however, further prohibits a judicial candidate's campaign committee from soliciting or accepting campaign contributions from any lawyer licensed to practice law in New Mexico. This specific prohibition does not appear in the Code of Judicial Conduct as such, but rather is a modification of the related provision of that Code, which provides that candidates for judicial office, in both partisan and retention elections, shall not personally solicit or personally accept campaign contributions from any attorney, or from any litigant in a case pending before the candidate. The proposed statutory prohibition is more restrictive than the cited Code provision.
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> This greater restriction is in conflict with recent federal cases from two different federal circuits that have struck down code provisions that prohibit judges from personally soliciting campaign funds, including from people likely to be litigants or lawyers in their courts. Some believe that the standard for judicial election should be the same as the standard for legislative and executive elections

This bill proposes to prohibit a lawyer licensed to practice law in the state of New Mexico from making a campaign contribution to a judge or judicial candidate or to a campaign committee for a judge or judicial candidate. These provisions of this bill also propose to prohibit a lawyer licensed to practice law in the state of New Mexico from endorsing a judge or judicial candidate in campaign literature, personal letters, paid advertisements or in other similar ways.

As a separate matter, because this bill proposes to codify into law, and in some cases further restrict, certain aspects of the New Mexico Code of Judicial Conduct, thus potentially crossing into the New Mexico Supreme Court's powers of superintending control over state courts and its constitutional authority to discipline judges, there is a possibility that this bill may run afoul of Art. VI, Sect. 32 of the New Mexico Constitution establishing the Supreme Court's authority to discipline judges pursuant to violations of the Code of Judicial Conduct, and Art. III, Sect. 1 of the New Mexico Constitution, which provides that the powers of the government are divided into three distinct departments--legislative, executive, and judicial and that no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others.

ADMINISTRATIVE IMPLICATIONS

The affected agencies should be able to handle the enforcement of the provisions in this bill as part of ongoing responsibilities.

RELATIONSHIP

SB 646 relates to the following ethics bills:

HB 99, Prohibit Former Legislators as Lobbyists
HB 151, State Ethics Commission Act
HB 244, Prohibit Contractor Contribution Solicitation
HB 252, Political Contributions to Candidates
HB 253, Quarterly Filing of Certain Campaign Reports
HB 272, Quarterly Campaign Report Filing
HB 495, Political Candidate & Committee Donations
HB 535, Lobbyist Identification Badges
HB 550, Local School Board Governmental Conduct
HB 553, Disclosure of Lobbyist Expenses
HB 614, State Ethics Commission Act
HB 686, AG Prosecution of State Officer Crimes
HB 808, Tax-Exempt Election Contributions & Reporting
HB 891, Election Communication Contribution Reporting
HB 850, Governmental Conduct Act for All Employees
SB 49, Governmental Conduct Act For Public Officers
SB 94, Prohibit Former Legislators as Lobbyists
SB 116, Limit Contributions to Candidates & PACs
SB 128, Require Biannual Campaign Reports
SB 139, State Ethics Commission Act

SB 140, State Ethics Commission Act
SB 163, Prohibit Former Legislators as Lobbyists
SB 258, Contribution from State Contractors
SB 262, Political Contributions to Candidates
SB 263, Contractor Disclosure of Contributions
SB 269, State Bipartisan Ethics Commission Act
SB 296, State Contractor Contribution Disclosure
SB 346, Political Contributions to Candidates
SB 451, Contributions to PERA Board Candidates
SB 521, Campaign Contributions in Certain Elections
SB 535, Election Definition of Political Committee
SB 555, Public Employee & Officer Conduct
SB 557, State Ethics Commissions Act
SB 606, Expand Definition of Lobbyist
SB 611, Investment Contractor Contributions
SB 652, Campaign Reporting Private Cause of Action
SB 676, School Board Candidate Contributions
SB 693, Prohibit Certain Contributions to Candidates

OTHER SUBSTANTIVE ISSUES

There is a significant debate within the judicial community over the popular election of judges for state judicial official. This debate centers around at least two competing issues: (1) The harmful effects of money on judicial races with associated and potential undue influence on the judge, along with the erosion of the independence of the judiciary, with (2) The democratic notion that judges, like other state officials, ought to be selected by popular vote of the citizens.

The fact that New Mexico selects most judges at least in part by political elections gives rise to this bill.

Unlike the federal system of judicial selection, in which federal judges are selected by Presidential appointment with Senate confirmation, the methods employed for selecting state judges varies among all fifty states relying on variations of merit selection, appointment and confirmation, political election, and retention election. Despite this variation between the states, most hold popular election to choose at least some judges to some benches at some point during a judge's tenure on the bench. And in many cases, judicial candidates run with the explicit label and endorsement of a political party. With this in mind, and in the wake of some jurisdictions' unsuccessful attempt to move away from political election to merit selection, the National Conference of Chief Justices issued a resolution in 2007 declaring that whatever one's view of the desirability of judicial elections, a generation of experience makes it clear that judicial elections will stay in many and perhaps all of the states that have the system.

Elections by their very nature share the common theme that voters are presented with alternative choices for the same office. It is the burden of each candidate to present the electorate with sufficient information to cast an informed vote. This process is requiring greater and greater sums of money, even for down ballot races like judicial races.

New Mexico and two other states have public financing schemes for at least some judicial races, but those schemes are voluntary, and do nothing to diminish the potentially huge sums of money spent by independent or private sources to influence the outcome of judicial races. In the 2006 Supreme Court election in Washington, independent expenditures totaled more than $2.7 million, nearly doubling the amount raised by the candidates. Increasingly, independent expenditures are dwarfing the amounts raised and spent by the candidate's individual campaigns. And these large independent expenditures give rise to the need for candidates to raise and spend more and more money to counteract the effects of independent spending. The historical view that judicial campaigns ought to focus their solicitations for funds on members of the bar" has been overtaken by the need for candidates to raise as much money as possible, from as many and wide range of donors as possible because of the huge expenditures made to influence the election by organized interest groups.

These more expensive, more visible judicial campaigns push candidates to the limit of accepted norms of judicial conduct as defined by a state's judicial code of conduct. Moreover, as judicial races take on the trappings of executive and legislative races, the candidates and the public both lose site of the fundamental distinction between the neutral role of the judiciary, and the policy role of the executive and legislative branches of government.

While the prohibitions contained in this bill that disallow judicial candidates from soliciting funds from lawyers and that disallow lawyers from contributing to and publicly endorsing judicial candidates, seem to be a reasonable attempt to abate the erosion of judicial independence, this approach appears to run afoul of the current state of the law.

The legal balancing act thus appears to be between the judicial candidate's and individual contributor's First Amendment rights to free speech and association, with the due process rights of a litigant appearing before a judge whose impartiality could be reasonably questioned on the basis of campaign contributions received from opposing litigants/attorneys, or from independent interest groups.

ALTERNATIVES

The JSC offered the following:

> New Mexico adopted a "Modified Missouri Plan" for judicial selection, which provides for the selection of judicial candidates via the Judicial Selection Commission, but which also requires that judges run one political race for election after appointment, and then run for retention thereafter. This model of selection applies to Metropolitan, District, and Court of Appeals Judges, and Justices of the State Supreme Court for a total of 122 judges and justices. Magistrate, Probate, and Municipal judges may be selected, but then must run and be elected for office thereafter in political races for a total of 181 judges. As such, and as recognized by much of the case law addressing contributions to judges for political and retention races, judges must raise campaign funds. An alternative to this framework of judicial selection and retention will be to institute a pure merit selection process for judges in New Mexico, thereby eliminating political elections for judicial office.

Another alternative to political fundraising will be to expand the amount of public financing available to judges who opt into the voluntary public financing scheme for judicial races in conjunction with placing significant limits on individual contributions to judicial candidates, similar to the process used for Public Regulation Commission races.

From another perspective, the principal safeguard against judicial campaign abuses, the erosion of judicial independence, and a judge's failure to maintain impartiality in light of campaign contributions, exists in every state by virtue of the state's code of judicial conduct, and in the bodies that enforce those codes. Every state Supreme Court has adopted a code of judicial conduct, and every state government has a judicial disciplinary agency charged with enforcing the code. Within this framework as well as the framework of court rules allowing a litigant to peremptorily challenge a judicial assignment to that litigant's case, judges are required to recuse themselves from cases in which their impartiality may reasonably be questioned.

Thus, cases in which a judge has received large contributions from a litigant or attorney appearing before that judge may require the judge to recuse from that case. This process of mandatory recusal, found in New Mexico's Code of Judicial Conduct pursuant to Rule 21-400, has long governed judicial conduct in New Mexico, and is becoming increasingly important in light of successful constitutional challenges to code provisions attempting to do exactly what this bill seeks to do.

POSSIBLE QUESTIONS

Finally, as a practical matter, the JSC asks how will the restriction of Subparts B & C impact New Mexico lawyers who either volunteer for, or are employed by, a political party, when that political party by its very nature endorses in campaign literature, advertisements, and through other mechanisms including monetary support judicial candidates for office?

DW/mt