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In This Issue: [Legal Article](#) [Interview](#) [News & Notes](#)



News About the Firm

Improving the Way to Select State Court Judges

by [Norman Greene](#)

Note: [Norman Greene](#) is a Partner in the [Litigation Practice](#) and is also known for his work on judicial selection reform. Norman is well published on this topic, and the following is an example of his analysis.



As state court elections have become costlier, nastier and noisier, the movement toward judicial selection reform has gained momentum. At the core of the movement is a profound concern for judicial impartiality. Certainly, the millions of dollars poured into some of today's judicial races raise questions about how judges, who have raised or need to raise such money, are or can be perceived as impartial when litigants in their courtrooms are their campaign contributors. Also, with the expansion of the types of campaign speech allowed judicial candidates under the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, many are troubled that judges may be compromising their impartiality by stating their policy positions before their selection. A separate concern is that many voters know little, if anything, about judicial candidates, rather than too much. Even willing voters may find it difficult if not impossible to obtain important knowledge, such as the candidate's legal abilities, temperament, and mastery of rules of evidence and substantive law. Citizens frequently vote without any knowledge of the candidate other than the candidate's name or party, preventing an informed choice of judges - just "voting blind."

In some locations characterized by one-party domination, voters may not have a meaningful role in judicial elections for other reasons. Political leaders nominate and in essence choose the judges, leaving the voters no choice except to ratify the choices-- if they bother to vote at all. For example, voters may be asked to vote for three candidates (to select a number at random), and only three candidates appear on the ballot. Political control over judicial elections was the subject of the United States Supreme Court decision in *Margarita Lopez Torres v. New York State Board of Elections*. Decided in 2008, the Supreme Court denied a challenge on federal constitutional grounds to New York's process for nominating trial court judges selected through New York's unique convention system. The plaintiffs alleged that the nomination process was so tightly controlled by political party leaders that the rights of voters and candidates were unconstitutionally infringed. The Supreme Court held that even under these facts, the system met federal constitutional standards, and if New York wished to change its system for nominating judges, it should do so legislatively. Two lower New York federal courts, however, had held that very system to violate the federal constitution.

Judicial elections are not the sole way that state court judges are selected in the United States. They also may not be the predominant way that most judges are first selected. Many judges are first appointed to fill out the unexpired terms of other judges and then run as incumbents. Nor is there a single mode of appointment of judges. The best method is commission-based appointments where an independent commission presents a limited number of candidates for an executive such as a governor

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Trial

Scharf Co-Counsel in Jury
Win Based on Scientific
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to select. The executive is limited to the selection of one of the offered candidates. At the expiration of her term, the appointed judge either reappears before a commission for reappointment or runs in a retention election where the only issue before the voters is whether the judge should be retained or not. (All commission-based systems are not alike but rather have significant variables, requiring each state to adopt the variations best-suited to its needs.) Such commission-based appointment systems are in effect for some or all courts in a number of states, including New York for the New York Court of Appeals and New York City courts. New York has no retention elections, and candidates seeking reappointment for these courts go before the commissions for reconsideration. Well-designed selection systems using retention elections, such as in Colorado and Arizona, have been using judicial performance review to provide voters with some informed basis for determining whether the judge should be continued in office or not.

Replacing judicial elections with commission-based appointment systems typically requires a state constitutional amendment. In most states, changing the state constitution requires the state legislature to pass the amendment twice in different years or sessions, with the voters to approve it in a subsequent general election. Although changing a state's judicial selection system requires the political process to work and takes time, preserving a fair and impartial court system is well worth the effort.

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For a recent discussion of some of these issues, see Dorothy Samuels, [The Selling of the Judiciary: Campaign Cash 'in the Courtroom'](#), New York Times, April 15, 2008.

An Interview with Mary L. Smith

Trends & Developments in Securities Litigation and Internal Investigations

Note: [Mary L. Smith](#) is a Partner in the Firm's [Litigation and Corporate Governance, SEC Defense and Investigations Law Practices](#). Based in the Chicago office, Mary was recently interviewed about emerging trends in securities litigation and internal investigations.



What are trends and developments in the area of securities litigation and internal investigations?

There are several new trends and developments. In the area of internal investigations, there is a major development for corporate clients. On August 28, 2008, the U.S. Department of Justice revised the 2006 "McNulty Memorandum." Under the new guidelines, announced by Deputy Attorney General Mark Filip, cooperation in criminal investigations will no longer depend on a corporation's waiver of attorney-client privilege or disclosure of attorney work product. The American Bar Association and the Association of Corporate Counsel had vigorously fought for more than two years to reverse the old Justice Department policy that has threatened the attorney-client privilege and the work product doctrine.

Another major revision is that the guidelines now bar prosecutors from evaluating a corporation's cooperation depending on whether it is covering attorney's fees for its employees. Interestingly, the Department of Justice announced this change on the same day that the Second Circuit affirmed the district court's dismissal of charges against former executives at accounting firm KPMG on the basis that prosecutors improperly pressured KPMG to break its practice of funding the legal defense of its employees.

Another development is that the Financial Accounting Standards Board (FASB) has proposed to expand the disclosure requirements for loss contingencies, including those related to litigation. Over 200 comments were filed in response to this proposal. As a member of the board of managers for the Chicago Bar Association and as Co-Chair of the D.C. Bar Litigation Section Steering Committee, I am proud to say that both the Chicago Bar Association and the D.C. Bar Litigation Section submitted comments on the possible erosion of the attorney-client privilege and the work product doctrine. One comment by Stanford Law School Professor Joseph Grundfest presented empirical evidence on whether the current disclosure system requires enhancement and shows that the stock price response to a defendant firm publicly announcing the settlement of litigation, on average, is statistically insignificant. For instance, for securities class action settlements resolved between January 2007 and June 2008, as well as for the fifty largest class action settlements announced since 1996, the market's average reaction to a defendant firm's announcement of a settlement was not statistically significant.

In the area of securities litigation, while the hot topic last year was options back-dating cases, this year there has been a wave of litigation related to the subprime credit crisis. A report by Navigant earlier this year showed that the number of subprime-related cases filed in federal courts surged in the first quarter of 2008. The total filings are close to surpassing the savings-and-loan (S&L) crisis litigation of

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Beth Kaufman Appointed to Mayor's Advisory Committee on the Judiciary

David Austin Lectures on Human Rights at John Marshall Law School

Stephanie Scharf Writes for FDLI on Proposed Revision to FDA Rules

Norman Greene Speaks at The American Constitution Society for Law and Policy

Stephanie Scharf Speaks on Developing Medical Products Based on Nanotechnology

the early 1990s. Over a 15-month span ending March 31, 2008, the number of subprime-related cases filed totaled 448. These cases were comprised of borrower class actions, securities cases, and commercial contract disputes. These types of cases will continue to be filed against corporate clients.

What trends are of interest to clients?

Having worked in-house, I know first-hand that clients are increasingly concerned about litigation costs. Clients are expecting outside counsel to serve as partners to come up with a solutions to skyrocketing legal bills. Clients are utilizing alternative fee arrangements and early case assessment in order to curb costs. As a women-owned firm, we utilize alternative billing and have developed an early case assessment protocol, which is an extremely useful tool. Clients are also interested in efficiently and effectively managing e-discovery. With the changes to the Federal Rules of Civil Procedure in 2006 to make electronically stored information (ESI) discoverable and require that ESI be preserved and produced just like paper documents, it is imperative to have in place a comprehensive document and ESI retention/destruction policy.

What was your favorite case?

My favorite cases have been ones in which I am able to think creatively and outside-the-box against unfavorable odds and obtain favorable rulings for my clients. For instance, while in-house counsel, I crafted a unique strategy that permitted my client to release over \$70 million in liability. My client was confronted with a situation where it still had to carry its former CEO's excessive life insurance policy on its books, despite the fact that a criminal court had convicted the former CEO of receiving unauthorized compensation. Under accounting guidance, without an explicit court order or release from our former CEO, the Company had to carry the liability for the life insurance policy on its books. I devised a strategy whereby my client brought litigation in Bermuda, as the insurance contract was governed by Bermuda law, to seek the Bermuda equivalent of a declaratory judgment that the insurance policy was void as the result of fraud by the former CEO at the time of contract formation by his looting of the Company to unlawfully inflate his compensation. Without the filing of this action in Bermuda, the Company would have had to wait until related federal litigation was adjudicated, which would have been several years in the future. While I believed that we had a meritorious claim in Bermuda, I also assessed that litigating in Bermuda would be procedurally burdensome. After the case was pending less than a year, I was able to negotiate a settlement with lawyers for the former CEO, the insurance company, and the Bermuda trust company, which was very advantageous to my client.

What do you do when not working on litigation and internal investigations?

As a Native American, I continuously work on issues that will improve the lives of Native Americans across the country. Recently, as the National Native American Bar Association's delegate to the American Bar Association's House of Delegates, I worked to pass a resolution, which is now official ABA policy, to support stable, long-term funding for tribal courts, which are the front-line institutions for the administration of justice in tribal communities. In addition, I am Chair of the Women of Color Committee of the ABA's Commission on Women in the Profession, and we are working on new research that will study women of color in corporate and government settings.

New York: 60 East 42nd Street, New York NY 10165
Chicago: 333 West Wacker Drive, Chicago IL 60606

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