

**JUDICIAL ELECTIONS ARE NOT NECESSARILY A MORE EFFECTIVE WAY THAN MERIT SELECTION
FOR ATTORNEYS OF COLOR TO ATTAIN A SEAT ON THE BENCH
-- AT LEAST NOT IN MINNESOTA TO DATE.**

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*An argument for
Merit Selection with Judicial Performance Evaluation
and Retention Election
[SF 70 & HF 224 (MN 2009)]¹*

by
Leo I. Brisbois
President
Minnesota State Bar Association

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The American Judicature Society has recently conducted a national survey regarding how attorneys of color first attained seats on the bench. The results of this survey show that where merit selection or gubernatorial appointment are utilized, attorneys of color were appointed to the bench in statistically significantly greater numbers nationally than through nonpartisan elections:

On state supreme courts, 85.7% of the sitting Justices of color first attained their seat through either merit selection or gubernatorial appointment, while only 2.9% first attained their seat through a nonpartisan election;

On state intermediate courts of appeal, 63.3% of the sitting Judges of color first attained their seat through either merit selection or gubernatorial appointment, while only 3.3% first attained their seat through a nonpartisan election; and

On state trial courts of general jurisdiction, 60.8% of the sitting Judges of color first attained their seat through either merit selection or gubernatorial

¹ SF 70 and HF 224 (MN 2009) proposed to amend the Minnesota Constitution, Art. VI, section 8, to replace nonpartisan, contested judicial elections with retention elections (following initial appointment through merit selection under existing law (Minn. Stat. Ch. 480B) and public Judicial Performance Evaluations conducted prior to retention election).

appointment, while only 8.8% first attained their seat through a nonpartisan election.

The present circumstances in Minnesota suggest even more strongly that attorneys of color are less likely to first attain a seat on one of our state courts through a nonpartisan election process as opposed to the *de facto* quasi-merit selection/gubernatorial appointment process which presently exists in Minnesota.

In Minnesota, all members of the Supreme Court, the Court of Appeals, and the District Courts are constitutionally required to stand for open, nonpartisan elections every six years. However, the Governor is specifically empowered constitutionally to appoint someone “learned in the law” to fill any judicial vacancy which occurs mid-term, and for vacancies that occur on the District Court, a statutorily [Minn Stat Ch. 480B] created merit selection commission (with members appointed by both the Supreme Court and the Governor) is in place to recruit, interview, and recommend finalists to the Governor for consideration for appointment to fill a mid-term vacancy.

Because of mandatory retirement for state court Judges upon reaching the age of 70, most judicial positions will become vacant mid-term requiring the Governor to fill them by appointment as required by the state Constitution. This has resulted in well over 90 % of all Judges in the state (regardless of race or ethnicity) having first attained their seat on the bench through a mid-term gubernatorial appointment. Moreover, once appointed to fill a vacancy mid-term, at the first general election following their appointment (as well as during their successive six year election cycles), most Judges do not ever draw a challenger and consequently run for re-election unopposed. By way of illustration: there are at present @ 310 state court Judges (at all levels) in the State of Minnesota (with 5 trial court seats left currently vacant due to fiscal constraints), and out of those 310 judgeships, during the most recent 2008 election cycle, there were contested nonpartisan elections in only 12 judicial races (2 state Supreme Court seats, 1 state Court of Appeals seat, and 9 state District Court seats (2 of which were open seats)).²

If by the foregoing one were to surmise that attorneys of color might not historically have fared well in Minnesota in obtaining Judicial seats through the nonpartisan election process, one would be correct. There are at present only 3 people of color in

² The current number of state court Judges (all levels), the number of current authorized Judgeships that are vacant, and the number of uncontested as well as contested judicial races in the 2008 general election are public information available through the State Court Administrator’s Office and the Office of the Secretary of State.

Minnesota serving in the judiciary who first attained a Judicial position in the state courts through the contested election process [- - Justice Alan Page (MN Supreme Court); Judge Susan Burke (4th Judicial District Court (Hennepin County)); and Judge Gayle Chang-Bohr (2nd Judicial District Court (Ramsey County))]. I would submit that it is not too hard to infer that because of the demographic make-up of the population of Minnesota, as well as, the geographic disbursement of people of color within that demographic matrix, with the exception of Ramsey County and Hennepin County, there is an insufficient critical mass of voters from communities of color in any of the 85 out-state Minnesota counties to successfully support the candidacy of an attorney of color in a contested election for a judicial seat.

However, the *de facto* quasi-merit selection/gubernatorial appointment process which is used to fill judicial vacancies on the state court in Minnesota at all levels has worked much better at providing attorneys of color an avenue by which to first attain a seat on the bench.

At present in Minnesota, there are 22 Judges of color (3 on the intermediate Court of Appeals and 19 on the District Court) who first attained their seats on the bench through mid-term gubernatorial appointments. The breakdown of attorneys of color appointed to the Minnesota state courts during the last three executive administrations are:

<u>Governor</u>	<u>Asian</u>	<u>African American</u>	<u>Hispanic</u>	<u>American Indian</u>
Arne Carlson (1991 – 1999)	1	5	2	1
Jesse Ventura (1999 – 2003)	1	6	1	1
Tim Pawlenty (2003 – present)		3	4	2 ³

Governors often use an *ad hoc* mini-merit selection commission to vet their mid-term appointments to fill Court of Appeals and Supreme Court vacancies. And, one of the reasons that people of color have done better under the *de facto* quasi-merit

³ Information regarding race/ethnicity of Judges appointed by the Governor to fill judicial vacancies is kept by the Director of Judicial, Board, and Commission Appointment in the Office of the Governor, State of Minnesota.

selection/gubernatorial appointment process in Minnesota, as opposed to contested nonpartisan elections, may be that the statutorily created merit selection commission process established under Minn. Stat. Ch. 480B to provide the Governor with potential finalists for appointment to fill mid-term judicial vacancies on the District Court specifically contemplates the need for attorneys of color to be appointed to the state courts:

Minn. Stat. sec. 480B, subd. 2(f) requires that [women and] persons of color be permanent members of the merit selection commission;

Minn. Stat. sec. 480B, subd. 7 requires the commission to seek out and encourage qualified individual [women and] persons of color to apply for judicial vacancies; and

Minn. Stat. sec. 480B, subd. 8 requires the commission to give consideration to [women and] persons of color; requires the commission to solicit written recommendations regarding judicial applicants from organizations that represent people of color [and women] within the judicial districts being considered.⁴

Finally, accountability, either of the appointing Governor or the Judges initially appointed under a merit selection process such as contemplated in SF 70 and HF 224, would not be diminished, but would in all probability be enhanced, by use of retention elections following judicial performance evaluations.

Under a retention election model, the Judges would be held more accountable for their work ethic, their judicial demeanor and the respectful treatment of persons appearing before them, and the competent discharge of their duties because the results of their Judicial Performance Evaluations would be public information, and every vote cast would weigh directly on the question of whether the Judges standing for election were retained. In contrast, as previously noted above, well over 90% of Judges standing for re-election under the present nonpartisan election system run unopposed, and in those races, less than 1 % of voters even ever bother to write-in a challenger.

Further, any future sitting Governor who were to attempt to engage in blatant racial or ethnic discrimination in their judicial appointments under a merit selection/retention

⁴ Minn. Stat. sec. 480B, subd. 11 does provide, however, that the Governor may entirely disregard the merit selection commissions' recommendations and appoint anyone of their own choosing to fill a mid-term Judicial vacancy on the District Courts.

election model or who sought to engage in excessive political cronyism or nepotism in their judicial appointments under a merit selection/retention model would be called to account for such an abuse of office because surely it would be fair fodder for public, political debate in any partisan, gubernatorial re-election campaign.

I am not saying that there cannot be racial and ethnic discrimination in a future appointive system/process, but the merit selection system as contemplated under SF 70 and HF 224 (MN 2009) is no more and no less susceptible to discriminatory [“good ole boy” networking] abuse than is the current [contested nonpartisan election/] *de facto* gubernatorial appointment system which now exists in Minnesota. Moreover, while it is true that attorneys of color would no longer be able to seek a judicial office through the nonpartisan contested election process in the first instance under the constitutional amendment embodied in SF 70 and HF 224 (MN 2009), as the foregoing discussion of actual circumstances and experience in Minnesota shows, the prospects for attorneys of color to successfully attain a seat on the state court bench would actually seem to be significantly better under the merit selection approach than the contested nonpartisan election system.

In the end, regardless of what elective/appointive model is in place for future judicial selection in Minnesota, it is ultimately up to each member of the bar and the judiciary to continue to make increasing the level of racial and ethnic diversity on the state court bench (at all levels) a personal and public priority.