



JUDICIAL ELECTIONS: WHAT'S ETHICS GOT TO DO WITH IT?

Two important elections affecting the judiciary of our state are coming up this year. The first is on August 7, 2014, when Tennesseans will vote to retain or not retain most of the state's appellate judges, including three of the sitting Justices of the Supreme Court. The second is on November 4, 2014, when Tennesseans will vote on a constitutional amendment changing the way appellate judges are selected.

In August, Justices Gary Wade, Sharon Lee, and Cornelia Clark will be voted up or down. (Justice Janice Holder and Justice William Koch have both announced their retirement from the Court and are therefore not on the ballot.) According to a story by Nashville's News Channel 5 posted on May 6, 2014, and available here: <http://www.newschannel5.com/story/25434821/plan-outlines-attack-on-supreme-court-justices>, an organized campaign against the three sitting Justices is being mounted by Lt. Gov. Ron Ramsey, a nonlawyer, who wishes to replace these three Democrats with Republicans. News Channel 5 also reports that money from outside Tennessee is flowing into the state to support Ramsey's effort to defeat the three Justices.

In November, Tennesseans will vote on whether to approve an amendment to the Tennessee Constitution reading as follows:

Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session. The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.

This amendment is currently being promoted in an organized campaign by Gov. Haslam called "Vote Yes on 2." This amendment, which is also supported by the Tennessee Bar Association, is being promoted as the only alternative to popular election of appellate judges.

Perhaps because of these developments, the National Association of Women Judges has named Tennessee one of 8 pilot states for its "Informed Voters" project, which seeks to educate the public about the necessity of a fair and impartial judiciary. A statewide coordinating committee has been appointed, with Knoxville represented by TBA President-Elect Jason Long, Tasha Blakney, Bruce Anderson, and me. The members of the coordinating committee, along with other lawyers who have volunteered to help in the educational effort, are travelling around the state, presenting information to voters about the role of the judiciary in a democracy and the means by which citizens can best ensure that our state has a fair and impartial judiciary. If you belong to a civic, community, school, or church group who would like to hear the Informed Voters presentation, just contact one of us.

As citizens, we have the duty to get out and cast informed votes for judges. As lawyers, we have special ethical duties with respect to judicial selection. Tenn. R. Prof. Conduct 8.2 Provides as follows:

- (a) A lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the following persons:
 - (1) a judge;
 - (2) an adjudicatory officer or public legal officer; or
 - (3) a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment [3] to Rule 8.2 counsels: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized and to responsibly speak out when necessary to prevent or rectify injustice or to promote needed improvements in the judicial system.

The upshot of Rule 8.2 is that lawyers cannot lie knowingly or with reckless disregard about the qualifications or integrity of a judge or a candidate for a judgeship. According to Nashville's News Channel 5, Lt. Gov. Ron Ramsey is touring the state with a slide presentation about the Tennessee Supreme Court. You can find the presentation here: <https://www.documentcloud.org/documents/1154361-supreme-court-presentation.html>. One of the slides is headed: "Tennessee Supreme Court: Soft on Crime." Two examples of reversals are then given to prove the "soft on crime" proposition. Of course, as a non-lawyer, Lt. Gov. Ramsey is not bound by the Rules of Professional Conduct, but would the statement "soft on crime" violate Rule 8.2? First of all, is the phrase "soft on crime" a statement about the Justices' qualifications or integrity? If so, is the statement "false or made with reckless disregard of its truth or falsity"? Arguably, the statement that the Supreme Court is "soft on crime" is an opinion and therefore neither true nor false. This may explain the rationale behind Comment [3] to Rule 8.2

According to Comment [3], lawyers must also "defend judges and courts unjustly criticized." Many lawyers in our state are already speaking out in defense of Justices Wade, Lee, and Clark. For example, in a *Chattanooga Times Free Press* article published on May 8, 2014, both former Supreme Court Justice Mickey Barker and former Court of Appeals Judge Lew Connor criticized Ramsey's campaign, noting that the judicial branch is nonpolitical and that the three Justices under attack were recommended for retention by the Judicial Evaluation Commission.

So as we move forward into election season, remember, don't lie about judges, defend judges who are unjustly criticized, and if you would like to educate your non-lawyer friends about the importance of a fair and impartial judiciary, contact **Bruce Anderson**, **Tasha Blakney**, **Jason Long**, or me to schedule an Informed Voters Project presentation.