How Should We Select Our Judges?

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August is the historical, though not meteorological, last month of summer. Until 2005, when the legislature banned a pre-Labor Day start date for K–12 public schools, many students returned to school in August. Most colleges and universities still resume in August. Also in August of even-numbered years are primary elections. Did you participate in a primary election for a judge this month? In Michigan, 110 seats are up for election this year—including circuit, district, and probate courts—with 228 candidates running for those seats. Even if you did not participate by voting in a primary, as an attorney, chances are you were solicited for judicial campaign contributions.

Election years are logical times to think about the propriety of electing judges. If you avoid thinking about it in August, it will be hard to avoid the subject in November. Thirty-nine states elect at least some of their judges.[1]

Although all state judges are elected in Michigan, 43.4 percent of current judges were appointed to their first judicial seat.[2] Under Michigan law, judges who are appointed must stand for election at the next general election to retain their seats. As a sitting judge, the appointed judge will appear on the ballot as an incumbent, a constitutional perquisite that some have estimated to be worth as much as 10 percentage points at the polls. Michigan is unique among all states in having our Supreme Court candidates appear on a nonpartisan ballot even when they are selected at a partisan convention rather than by nominating petition or through self-selection by filing an affidavit of candidacy.

Even in the not-too-distant past when judicial elections were restrained, relatively inexpensive, and largely conducted with civility and dignity, the question of whether judges should be elected has been a subject of intense interest to the bar. In recent years, however, the transformation of judicial election battles into full-scale partisan warfare has broadened interest in the issue. Consequently, Michigan is among a growing number of states in which there is active debate about the issue of judicial independence, particularly with respect to the election and selection of state Supreme Court justices. The principle of judicial independence encompasses the fundamental need for individual judges and the judicial branch as a whole to work free of political pressure and conflicts of interest.

Photo by Mary Jane Murawka

Left to right: SBM President Charles Toy, retired United States Supreme Court Associate Justice Sandra Day O'Connor, and Michigan Supreme Court Chief Justice Marilyn Kelly

As judicial election campaigns have become more rancorous and expensive, more and more think tanks and public advocacy organizations have taken up the issue of how best to select judges. An example of this was a February symposium hosted by Wayne State University titled "Options for an Independent Judiciary in Michigan." The symposium was presented in partnership with the American Board of Trial Advocates to provide a platform to discuss judicial reform options in Michigan. The nonpartisan symposium explored options for election and selection that promote an independent judiciary. It presented various potential reforms to the process of electing or selecting Michigan's justices in 2020 and beyond.

The symposium's keynote speaker, retired United States Supreme Court Associate Justice Sandra Day O'Connor, advocated a system similar to that in Arizona, her home state, in which the Arizona Commission on Appellate Court Appointments creates a slate of nominees. The governor appoints from that slate, and the Arizona Senate confirms or denies that appointee. O'Connor said that elected judges and the need for the massive escalation of campaign donations creates an "arms race" that can taint and politicize the American judiciary—robbing citizens of an independent judiciary where politics prevail. The chief criticism of the Arizona

system is that the commission process does not remove political considerations from the selection process, but rather shifts them from the electorate to an elite group of appointed individuals.

Another speaker at the symposium was former Colorado Supreme Court Justice Rebecca Love Kourlis. She was a founding member and now serves as executive director of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver. IAALS is a nonpartisan organization dedicated to improving the process and culture of the U.S. civil justice system, including as a core issue advocating "for the adoption of an informed judicial selection system in states that currently elect their judges, in order to maintain the strongest judiciary possible."[3]

Kourlis described the Colorado judicial performance evaluation system that collects data on judges from those who appear before them. Attorneys and litigants are asked, in the courtroom, to respond to questions about whether the judges are prepared, respectful, attentive, and timely in their rulings. The information is made available to every voter in the judicial district through a website and a "Blue Book" that contains the data. Colorado judges have been assessed on their judicial performance since 1987. Kourlis calls the Colorado system the "gold standard" because judges are chosen on the basis of qualification and not political affiliation. Some Colorado judges think the evaluations have enhanced their performance.

History shows that regardless of the system used to elect and select judges,[4] good, bad, and average judges will take the bench. The principle objective is to maximize the number of good judges who take the bench, improve the performance of judges who need improvement, and have a method to remove the bad ones. For egregious conduct, the Judicial Tenure Commission can make recommendations to the Michigan Supreme Court, which may censure, suspend, retire, or remove a judge.

Attorneys have a special responsibility to help maintain and improve the caliber of the bench. We are the practitioners in front of judges. Attorneys should participate in the debate on crafting a system to ensure judicial independence and abate the growing cynicism of our citizens. Attorneys can be instrumental in providing nonpartisan information to voters so informed decisions are made at polling places. This information may be provided in candidate forums, judicial qualification reviews, campaign conduct and oversight functions, or voter guides. As attorneys, we should be working toward a system that minimizes or, if possible, eliminates the factors in judicial selection that serve only to undermine public trust in the integrity of the judiciary.

We may not all agree on what is best or even on what is possible, but each of us should be active in promoting an independent judiciary that is essential to the maintenance of public trust and confidence in the administration of justice. ■

FOOTNOTES

1. Brennan Center for Justice at NYU School of Law, State Judicial Elections <http://www.brennancenter.org/content/section/category/state_judicial_elections>. All websites cited in this article were accessed July 21, 2010.
2. Personal interview with Laura Hutzel, statistical research director for the State Court Administrative Office, July 26, 2010.
3. See Institute for the Advancement of the American Legal System <http://www.du.edu/legalinstitute/coreissues.html>.
4. For a listing of state methods to select judges, see the compilation by the American Judicature Society <http://www.judicialselection.us>.