Judicial Elections: A Broken System

By Jack D’Aurora

We have come to the point where we need to examine the practicality of judicial elections. Name recognition has become more important than qualifications, and the potential increases for politics and money to have a greater role and negative impact in judicial elections. Some think we need to amend the process by which we elect judges. I think the problems are too numerous to be fixed. It’s time to give serious consideration to a merit appointment/retention election system.

Here are the three reasons why we need to change. Look for additional reasons in part two of this article, to be published in the next edition of Lawyers Quarterly.

1) The parties care more about name recognition and fundraising ability than qualifications.

Admittedly, my experience is limited to Franklin County, but I suspect that what happens here is typical of what goes on throughout the state. That point aside, the first problem with judicial elections is that they are controlled by the parties, and qualifications are not a high priority for the parties. The two most important things for a candidate are an ability to raise money and a likelihood of being elected, which usually means having a recognizable name.

I understand from a friend who screened for a common pleas court seat in last November’s election that the first question asked was, “How much money can you raise?” There was little discussion about qualifications.

There is a big disconnect between what the parties and practicing lawyers want. The Columbus Bar Association evaluates candidates on their qualifications and rates them as either “highly recommended,” “acceptable” or “not recommended,” but the CBA can only vet candidates who are “highly recommended,” but the CBA can only vet candidates who made it to the ballot.

If the parties were concerned about qualifications, then every judicial candidate running in a Franklin County election would be rated “highly recommended” by the CBA, but that doesn’t happen. In last November’s elections, three trial judge candidates endorsed by the two major parties—plus a sitting trial judge—were only rated “acceptable.” Two candidates—one for the appellate and one for the trial court—were actually “not recommended” by the CBA. The incumbent trial judge was appointed by Gov. John Kasich over a much more experienced trial lawyer. If qualifications matter, why would that have happened?

Yes, the CBA vetting system is subjective and, therefore, subject to error, but it’s an honest attempt to rate candidates on their qualifications. Besides, aren’t lawyers in the best position to determine who will make good judges?

What’s worse, the parties make deals as to who they will run, to the detriment of voters. For example, in 2008, the Democratic Party agreed not to run candidates against three incumbent Republican judges in exchange for the Republican Party not running anyone against incumbent Democrat Judge Tim Horton. A study conducted years earlier confirmed that the parties make these deals. How do unopposed candidates serve the public good?

2) Names matter more than anything in judicial elections.

To illustrate the importance of names, let’s look at one race in particular from last November and compare the candidates, who I’ll refer to as Candidates A and B. Before going further, I have to tell you, Candidate A is a good friend and someone I think highly of. I have never met Candidate B but assume he is a good lawyer, a good person and a hard worker.

Candidate A has been practicing law since 1987. He has tried over a hundred jury trials in a variety of civil cases, received the “Respected Advocate Award” from the Ohio Association of Civil Trial Attorneys in 2011, and regularly serves as a mediator. Candidate B has been practicing law since 2005 and has tried 30 felony cases. The CBA “highly recommended” Candidate A. Candidate B was rated as “acceptable.”

Based on these qualifications, you would assume Candidate A won, but that’s not what happened. Candidate B won, and it’s likely he won because of something that was given to him: a common last name that resonates with voters who have no other basis upon which to vote.

I don’t mean to be critical of Candidate B. My focus here is not about people but about the process.

The problem with judicial races being determined on the basis of last names is hardly a newswflash. Plenty has been written about the name game in judicial races. Voters in Cuyahoga County are attracted to names such as Corrigan, Gallagher, McMonagle, Russo and Sweeney. The name Cook works well in Summit County. In Franklin County, names like O’Neill, Kennedy and Brown draw voters like a moth to flame.

3) We should not conclude the public is adamant about voting for judges.

The 1987 referendum in which Ohioans rejected an appointment/retention election system is regarded as conclusive proof the public will reject change. I don’t think this nearly three-decade-old referendum fairly reflects how voters feel today. Before I explain why, let’s look at what happened in the referendum.

The OSBA, the Ohio League of Women Voters, and the insurance and business communities promoted a ballot proposal for an appointment/retention election selection system, known as Issue 3, which called for establishing nominating commissions for the Supreme Court and each appellate court. Each commission, composed equally of lawyers and non-lawyers, would screen candidates and propose three names to the governor for appointment. Once appointed, a judge would be required to receive at least a 55 percent approval vote in regular retention elections to stay in office.

The unions and political parties opposed Issue 3, casting it as anti-democratic and elitist. They preyed on voters’ fears and claimed the commissions and governor would be less attuned to the interests of the common person. They ran television ads that featured voting booths encircled by chains and the sound bite, “Don’t let them take away your right to...
vote.” The scare tactics were successful. Issue 3 was soundly defeated.

More recently, Quinnipiac University conducted a poll in Ohio and asked: “Which do you prefer: A) Keeping the current system of electing Ohio Supreme Court judges; or, B) Changing to a system in which new judges would be appointed by the governor and confirmed by the legislature?” Eighty-one percent of respondents preferred the current system, which should not be surprising, considering that Kasich’s approval rating was just 41 percent four months prior. Who wants a governor, much less an unpopular one at the time, to control the judiciary?

What voters say in response to polls and how they conduct themselves, however, are two different things. Voters may say they want to retain the right to vote for judges, but many don’t exercise that right. According to the League of Women Voters, 40 percent of voters in Ohio’s November 2012 elections did not vote for judges. In the 2014 Ohio Judicial Election Survey, conducted by the Ray C. Bliss Institute of Applied Politics, University of Akron, 30 percent of respondents stated they voted for judges “most” or about “half the time;” 20 percent said “not very often,” “rarely,” or “never.”

When responding to a referendum or poll about voting rights, people are dealing with a question in the abstract, but when you talk with people about how they feel about the system, you hear something quite different. I’ve talked to a number of non-lawyers about judicial elections, and I hear cries of frustration. Voters don’t know who they should vote for, and the reason is that they don’t have meaningful information about the candidates.

Ask your friends how they feel about voting for judges. Even lawyers who don’t litigate will tell you they don’t have enough information when voting for judges—unless they ask their litigator friends for help. I think people are ready for change.

In the next edition, I’ll cover how politics and money will likely play a greater role in judicial elections—to everyone’s detriment.

4. The name game still vanquishes all else in Cuyahoga County judicial elections, Cleveland Plain Dealer (Sept. 05, 2014).
5. When electing judges, it’s justice in name only, Akron Beacon Journal (Oct. 15, 2014).
7. Ibid.