

Ethics – Abusing Discretion “But I don’t want to!”

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Agenda

- Standards for sanctions
- Importance of deadlines
- Disqualification or recusal
- Discretion
- Violating ethics by helping people
- Commenting on legal issues
- Declaring laws unconstitutional
- Elections

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Resources

- Texas Code of Judicial Conduct, available at <https://www.txcourts.gov/media/1457109/texas-code-of-judicial-conduct.pdf>
- Texas Judicial Ethics Opinions, available at <https://www.txcourts.gov/media/678096/JudicialEthicsOpinions.pdf>
- Officeholding & Ethics Deskbook

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Questions?

- The State Commission on Judicial Conduct and provide information and guidance about ethics and the canons.
- Main number:
- 512-463-5533

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Real life examples are used in this presentation.

- This is not about embarrassing well-meaning people but about illustrating the issues judges face every day.

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Judicial ethics rules derive from contradictory concerns

- On the one hand, judges have tremendous power in making factfinding determinations and resolving specific conflicts. The people in your precinct have the right to make sure that power is used fairly and responsibly.
- On the other hand, judges have limited power because they are not legislators. They have no power to create law, only the right to apply the law to the facts as presented.

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Why are ethics important?

- The legal system is based on the principle that an independent, fair, competent judiciary will interpret and apply the laws.
- Public confidence is the cornerstone of the judicial system.
- Justices should be diligent to ensure their actions are beyond reproach and not subject to criticism due to any conflicts, real or perceived.

8

SB 293 was passed to increase judicial pay for some and impose new disciplinary measures
SJR 27 proposed a constitutional amendment "to more effectively sanction judges and justices for judicial misconduct."

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Standards for sanctions
"But I only did it once"

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**Tex. Const. Art. V, § 1-a(6)
(1/4)**
Any Justice ... may, subject to the other provisions hereof, be removed from office for **willful or persistent violation of rules promulgated by the Supreme Court of Texas,**

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(2/4)**
Any Justice ... may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, **incompetence** in performing the duties of the office,

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Any Justice ... may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, **willful** violation of the Code of Judicial Conduct,

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Tex. Const. Art. V, § 1-a(6)
(4/4)

Any Justice ... may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or **willful or persistent conduct** that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

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Definition of “willful”

The improper use or wrongful use of the power of the office by a judge acting intentionally, or with gross indifference to his conduct.
“Gross indifference” is indifference that is flagrant, shameful and beyond all measure and allowance.

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A showing of bad faith is not necessarily required in every judicial misconduct case.

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SB 293 amended Tex. Gov't Code § 33.001(b)

The definition of "willful or persistent conduct that is clearly inconsistent with the proper performance of a judge's duties" now includes:
The failure to meet deadlines, performance measures or standards, or clearance rate requirements set by statute, administrative rule, or binding court order.
Persistent or willful violation of Art. 17.15 [rules for setting bail]

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Many portions of your job, like evictions, are sad, but the law doesn't give you many tools for delay

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Case study: Judge “Roy Bean”

“But I don't want a jury trial”

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Judge “Bean” (1/2)

On the morning of a jury trial in an eviction case, the landlord filed a motion for summary disposition.

The tenant, a lawyer, informed the Judge Bean that the motion for summary disposition could not be ruled on for 14 days.

Judge Bean granted the motion anyway. He later claimed that the parties had agreed to waive the 14-day requirement, and that the tenant had declined a continuance and chose to move forward.

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Judge “Bean” (2/2)

Judge Bean was publicly reprimanded for:

- (1) Failing to comply with and maintain professional competence in the law by violating Rule 503.2 by granting the summary disposition without waiting 14 days.
- (2) Failing to accord the tenant the right to be heard according to the law.

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Remember that summary disposition is more feasible against squatters

Court may grant summary disposition in forcible entry and detainer case unless:

(1) Not later than the 4th day after the date the tenant is served with the sworn petition, the tenant files a response setting out supporting facts; and

(2) There are genuinely disputed facts that would prevent judgment in favor of the landlord.

Tex. Prop. Code § 24.005106(a).

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Under Rule 510.10(b)

A motion for summary disposition may be filed in mere forcible detainer case but is still governed by Rule 503.2.

In those cases, the court still must not consider a motion for summary disposition until it has been on file for 14 days.

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What else could the judge have done?

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Disqualification or Recusal

"But I can rule fairly on this matter:"

25

Tex. Const. Art. 5, § 11

No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.

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Law prohibits consanguinity
or affinity within 3rd degree

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Ex parte Vivier, 669 S.W.2d 862
(Tex. Crim. App. 1985) (per curiam)

Trial court did not have jurisdiction over the case because the trial judge was related to the defendant within three degrees of consanguinity, even though the judge was not aware of the relationship until after the trial was over.
That meant the conviction of rape after a plea of guilty was void.

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Code of Judicial Conduct
Canon 2B

A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

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Rule 18b(b) Grounds for
Recusal (1/4)

- (1) The judge's impartiality might reasonably be questioned;
- (2) The judge has a personal bias or prejudice concerning the subject matter or party;
- (3) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
- (4) the judge or lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;

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Rule 18b(b) Grounds for Recusal (2/4)

- 5) The judge participated as counsel, advisor, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
- 6) The judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

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Rule 18b(b) Grounds for Recusal (3/4)

- 7) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (A) Is a party to the proceeding or an officer, director, or trustee of a party;
 - (B) Is known by the judge to have an interest that could be substantially affected by the outcome of the case; or
 - (C) Is to the judge's knowledge likely to be a material witness in the proceeding.

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Rule 18b(b) Grounds for Recusal (4/4)

- 8) the judge or the judge's spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

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If you are thinking about
recusing, you probably should.

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When a statute says that a court
“may” do something, can the
court reject that option entirely?

“But I don’t want to.”

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Reason One: Texas Code of
Judicial Conduct

Canon 2A: A judge shall comply with the law and should act at all
times in a manner that promotes public confidence in the integrity
and impartiality of the judiciary.

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If a potential juror said, "I COULD find someone guilty if there was evidence beyond a reasonable doubt, but I won't" you would strike that juror. How are you different?

37

Reason two: sometimes the legislature takes judicial discretion away

Example: SB 38 added Prop. Code § 24.0061(b-1), effective January 1, 2026.

"The issuance of a writ of possession is a ministerial act not subject to review or delay ..."

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Possible Concern: Omni

- The defendant must be released from Omni upon payment of the reimbursement fee (unless waived) and, in part:
- Payment or discharge of the fine and costs owed on an outstanding judgment; **OR**
- Other suitable arrangements to satisfy the fine and costs with the court's discretion.

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If judges refuse to use their discretion to make arrangements so that defendants can get their Omni hold released, they give ammunition to interests groups fighting to take Omni away from you

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But is it “may?” Enforcing civil judgments

- Tex. Civ. Prac. & Rem. Code § 31.002(b) states that the court **MAY** issue a turnover order, “otherwise apply the property to the satisfaction of the judgment” or appoint a receiver.
- However, § 31.002(a) states that “A judgment creditor **IS ENTITLED** to aid from a court of appropriate jurisdiction, including a justice court ... to obtain satisfaction on the judgment if the judgment debtor owns property ... that is not exempt.”

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That said, receivership is not a gimme.

In order to get a turnover order or receiver, there must be some evidence that the judgment debtor has nonexempt property that is not readily subject to attachment or levy, even if the statute doesn't specify the manner in which that evidence is received or how much evidence is necessary.

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The problem with always requiring a hearing before a default, even if not disallowed by the rules

1. Potentially raises question of impartiality towards the prevailing plaintiff
2. Increases risk that that this discretion will be removed.
3. Increases cost for the plaintiff, which means increased costs for the defendant down the line.

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Case study: Judge “Wapner”

“But I want to help people”

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Judge Wapner (1/4)

On a video posted online, a constable introduces Judge Wapner, who discusses a fundraiser for supporting a local Marine veteran battling cancer. The fundraiser would occur at a location owned by the judge. The judge denied receiving any personal, professional, direct, or indirect benefit from the event.

[No indication that the constable was disciplined at all.]

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Judge Wapner (2/4)

Judge and his staff accepted food from local businesses or organizations.

[Personally, I've seen a district clerk accept pastries without consequence.]

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Judge Wapner (3/4)

Administrative manager posted on the court website advertisements for fundraisers—like a food drive—for local organizations.

Judge's personal Facebook page included advertisements for local establishments.

Judge denied personal gain, indicated he was participating in community involvement.

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Judge Wapner (4/4)

After receiving commission's inquiry, judge implemented policy that he and staff would not accept gifts, that only public notices would be posted on the office Facebook page, and that they would no longer promote businesses or fundraisers on the judge's personal Facebook page.

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Canons violated by Judge Wapner (1/2)

- Canon 2B, in part: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."
- Canon 4A(1), in part: "A judge shall conduct all of the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge."

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Canons violated by Judge Wapner (2/2)

- Canon 4C(2), in part: "A judge shall not solicit funds for any educational, religious, charitable, fraternal, or civic organization."
- Canon 4D(4), in part: "Neither a judge nor a family member residing in the judge's household shall accept a gift, bequest, favor, or loan from anyone."

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Commenting on legal issues

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Poll Question No. 1

May a justice of the peace respond to news media inquiries concerning inquest proceedings prior to a final ruling on a death certificate?

- a. No.
- b. Yes.
- c. The JP may answer questions about the court's procedure, but may not discuss the facts or other aspects of the case during the investigation or while the matter is pending.

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Tex. Code of Jud. Conduct 3B(10)

- This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.
- A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.

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Poll Question No. 2

May a candidate for justice of the peace say "I am the pro-choice/pro-life candidate?"

- a. No.
- b. Yes.

54

Poll Question No. 3

May a candidate for justice of the peace ethically list in political advertising the endorsement of special interest groups with an obvious political agenda, like Pro-Life Texans or Texans for Choice

- a. No.
- b. Yes.

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Declaring a statute to be unconstitutional

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Tex. Code Jud. Conduct 2A

• A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

57

Peraza v. State, 467 S.W.3d 508) (Tex. Crim. App. 2015)

Courts are to presume that a statute is valid, and that the legislature has not acted unreasonably or arbitrarily in enacting a statute.

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Tex. Gov't Code § 402.010

- The party challenging the constitutionality of a statute must file a particular notice. If the attorney general is not a party to the suit, the court must serve the notice on the AG.
- A court may not enter a final judgment holding a statute is unconstitutional before the 45th day after the notice is served on the AG.

Challenge to Constitutionality of a State Statute
initiated by a party filing a petition, motion or other proceeding to challenge the constitutionality of a state statute. The completed form must be filed with the clerk of the court under section 402.010 (a) (1), Texas Government Code.

Court (if known) _____

All American Insurance Co., et al v. Mary Ann Jones, In Re: Matter of the Estate of _____

Party challenging the constitutionality of a state statute: (1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____
(7) _____
(8) _____
(9) _____
(10) _____

Telephone: _____
Fax: _____
State Bar No. (if applicable): _____

Is: Attorney for Party Unrepresented Party Other.
If Other, you have filed challenging the constitutionality of a state statute.
Specify type: _____

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In re Ginsberg, 630 S.W.3d 1 (Tex. Spec. Ct. Rev. 2018).

Page 10 – A court generally should not address a constitutional issue *sua sponte*, that is, on their own.

Page 12 – A trial court abuses its discretion in holding a statute unconstitutional less than 45 days after providing the required notice to the attorney general.

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It is hard to see how a justice of the peace could both: (1) find that an eviction statute was unconstitutional AND (2) comply with the statutory deadlines.

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Rules for Elections

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Poll Question No. 4

"Attorney Mark" calls his friend "Judge Mark." The attorney says, "There's a guy running for state bar president from your neck of the woods. What do you think about him?" The judge indicates that he likes the candidate. Did Attorney Mark con Judge Mark into violating the Code of Judicial Conduct?

- A. Yes
- B. No

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Canon 5(2)

A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10) [commenting on something that might come before your court].

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Tex. Jud. Ethics Op. No. 2 (1975)

A Texas judge would not violate the Code of Judicial Conduct by privately introducing candidates for judicial office to his friends and recommending that such friends vote for such candidates.

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Tex. Jud. Ethics Op. No. 13 (1976)

Holding is extended

A Texas judge would not violate the Code of Judicial Conduct by privately introducing candidates for any elected office to his friends and recommending that such friends vote for such candidates.

66

However,

A public endorsement of a candidate for elective office in the State Bar of Texas might be construed as the lending of the prestige of judicial office to advance the private interests of others.

Tex. Jud. Ethics Op. No. 31 (1978).

67

After President Bush nominated Harriet Miers to the U.S. Supreme Court, then-Texas Justice Hecht said she "would make a good justice" and has a "sterling character." This was no more than support or praise, not a request for others to support her nomination. No endorsement.

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Judge "Judy" (1/7)

I obtained reference letter from this judge. This is because I respected this judge and believed that the legal community thought highly of her. I still like this judge.

Judge Judy announces her retirement from the bench. "X" and "Y" are candidates in the primary to replace her.

69

Judge “Judy” (2/7)

Judge Judy invited X to several meetings, including a criminal justice committee, the county bail bond board, the county behavioral leadership team, the Kiwanis Club, the Rotary Club, and a meeting of women from their political party. At these meetings, X was introduced as a judicial candidate. Judge Judy was present while members of these organizations endorsed X.

Judge Judy invited X to serve meals at a local nonprofit, where a photo of the two of them was posted on the nonprofit’s Facebook page.

70

Judge “Judy” (3/7)

Judge Judy texted friends about the election, including the current county party chair, the former county party chair, the local D.A., the current county judge, and the former county judge. The texts were critical of Y’s personal life. Judge Judy believed that these were matters of public concern and related directly to one’s qualifications as a judicial candidate. Some of those texts were factually incorrect.

Judge Judy denied authorizing her name to endorse X for judge.

71

Judge “Judy” (4/7)

State Commission on Judicial Conduct concluded that Judge Judy should be publicly admonished for:

1. Allowing relationship with X and Y to influence her judicial conduct or judgment when she sent those texts about Y.

72

Judge “Judy” (5/7)

State Commission on Judicial Conduct concluded that Judge Judy should be publicly admonished for:

2. Lending the prestige of her judicial office to advance the private interest of X in the election by
 - a. Sending negative texts about Y;
 - b. Inviting X to meetings where X would be endorsed; and
 - c. Invited X to serve a meal with her for nonprofit, where their picture could be taken together.

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Judge “Judy” (6/7)

3. Failed to be patient, dignified, and courteous to Y when Judge Judy sent the texts;
4. Knowingly or recklessly misrepresented facts about Y in those texts;

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Judge “Judy” (7/7)

5. Authorized her name to endorse X for judge when she
 - a. Invited X to attend community meetings with her;
 - b. Allowed X to be endorsed at those community meetings; and
 - c. Took a photo with X that was published on the nonprofit’s Facebook page.

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Elections and your spouse

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Poll Question No. 5

Rebecca is a district court judge. Her husband, John, wants to run for justice of the peace. Can John's campaign material include a loving picture of Rebecca and John?

- a. No. Rebecca cannot endorse John.
- b. Yes. They're married.
- c. Yes, but only as long as Rebecca is not identified as a judge.

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Opinion No. 295 (2009)

"A judge who is the spouse of a candidate and who attends campaign events with the spouse should be ever vigilant to avoid placing himself in situations where his conduct could be construed as a public endorsement of his spouse."

78

Poll Question No. 6

Rebecca is a judge. Her husband John wants to throw a fundraiser for a different political candidate. Is this allowable?

- a. No. Under no circumstances
- b. Yes, and it can be at their home as long as Rebecca doesn't attend.
- c. Yes, as long the fundraiser is not at their home and Rebecca does not attend.

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Opinion No. 284 (2001)

"While the Committee has long been cognizant of the independent nature of spouses of judicial members, the hosting of the event at the judge's residence crosses the line of permissible conduct. The public perception would be that the event is being sponsored by the judge."

80

Opinion No. 284 (2001)

- "It would be permissible for the spouse of the judge to sponsor the event at another location [i.e. not their home] provided no reference to the judge is made or implied."

81

Canon 5(1)(ii)

• A judge or judicial candidate shall not knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent

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Poll Question No. 7

If a candidate for Justice of the Peace is a former Justice of the Peace, may they use the words "reelect" or call themselves "Judge" in campaign material?

- a. No.
- b. Yes.

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Poll Question No. 8

If current Justice of the Peace runs for a nonjudicial political office, may they use the term "Judge" in the name of the campaign committee.

- a. No.
- b. Yes.

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Tex. Jud. Ethics. Op. 159 (1993)

• “a judge may describe in his or her political literature for a nonjudicial office his or her experience as a judge. In such a situation, the judge must be cautious not to give undue emphasis to his or her present position so as to give the impression he or she is attempting to exploit his or her judicial office.”

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Poll Question No. 9

True or false: a municipal court judge running for Justice of the Peace may use the title “Judge” in campaign literature and may use a photograph of herself wearing a judicial robe in campaign literature.

- a. False. This is misleading.
- b. True. She is a judge, even if she isn't a justice of the peace.

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Thank you

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