

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**May 24, 2018**

**Opinion No. 18-21**

**Trial Court Selection Process**

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**Question 1**

What procedure should the Tennessee Trial Court Vacancy Commission follow to select nominees to fill the three new judgeships created by S.B. 5/H.B. 10, 110th Gen. Assem. (2018 Tenn. Pub. Acts, ch. 974)?

**Opinion 1**

Because the General Assembly has not repealed title 16, chapter 21 of the Tennessee Code, and has specifically referred to it and identified it as providing the appropriate procedure for filling the three new judgeships created by S.B. 5/H.B. 10, 110th Gen. Assem. (2018), the Commission should comply with Tenn. Code Ann. § 16-2-512 to the extent possible, even though the Judicial Council established by title 16, chapter 21, no longer exists. To do so, the Commission should implement the following process to fill the three new judgeships:

- The presiding judges of the Sixteenth, Nineteenth, and Twenty-first Judicial Districts, respectively, will each recommend the type of judge, type of court, and division or part of the court to the Commission. *See* Tenn. Code Ann. § 16-2-512(a).
- The Commission, in place of the Judicial Council, will review and either approve or reject each of the recommendations of the presiding judges. *See* Tenn. Code Ann. § 16-2-512(b).
- If the Commission approves the recommendation(s), the Governor will send notice(s) of vacancy to the Commission in accordance with Tenn. Code Ann. § 17-4-308(h).
- Upon receipt of the Governor's notice of each vacancy, the Administrative Office of the Courts will
  - publish notice of the vacancy and invite interested persons to submit applications in accordance with Tenn. Code Ann. § 17-4-308(d) and (g); and
  - notify the election commission in each of the counties in the affected districts of the type of judge, and type and division or part of court subject to election. Tenn. Code Ann. § 16-2-512(c)
- The Commission will conduct hearings and forward its recommendations to the Governor in accordance with Tenn. Code Ann. § 17-4-308(f) and (g).

## ANALYSIS

When a state trial court vacancy occurs, the Tennessee Trial Court Vacancy Commission is required to screen applicants for the vacant position and recommend three nominees to the Governor. Tenn. Code Ann. § 17-4-308 (Supp. 2017). This selection process begins when the Commission receives written notice from the Governor that a trial court vacancy exists. Tenn. Code Ann. § 17-4-308(h). Within 60 days after receiving this notice, the Commission must screen the candidates, hold at least one public hearing, and then forward its recommendations to the Governor.

The Governor's notice of a trial court vacancy customarily contains a full and specific designation of the court where the vacancy has occurred. For example, rather than just stating that there is a trial court vacancy in a particular judicial district, the notice identifies not only the judicial district but also states whether the vacancy exists for a circuit, chancery, or criminal court and, when applicable, the division of the court. When the Commission receives notice from the Governor of a trial court vacancy, the Administrative Office of the Courts ("AOC"), on behalf of the Commission, publishes notice of the vacancy and invites persons interested in being nominated for the position to submit their applications. Tenn. Code Ann. § 17-4-308(d) & (g). The AOC's published notice contains the specific information identifying the vacancy described in the Governor's notice.

During its recently concluded 2018 session, the 110th Tennessee General Assembly enacted S.B. 5/H.B. 10, which creates three new judgeships in the Sixteenth, Nineteenth, and Twenty-first Judicial Districts. The legislation was signed into law by Governor Haslam on May 21, 2018, and is effective as of that date.

Legislation creating a judgeship customarily specifies the type of judgeship being created. But S.B. 5/H.B. 10 states only that "an additional trial court" is being created in each of the three districts. It then provides that the "type of court," "type of judge," and "part of court" shall be designated as provided in Tenn. Code Ann. § 16-5-512 (2009).

Tennessee Code Annotated § 16-2-512 provides that when a new judgeship is created, the presiding judge of the district shall recommend to the Judicial Council the "type" and "part" of court where the new judge will serve. Tenn. Code Ann. § 16-2-512 (a). The Judicial Council must then either accept or reject the recommendation of the presiding trial judge. Tenn. Code Ann. § 16-2-512(b). If the recommendation is accepted, the statute requires the AOC to notify the election commission in each county of the affected district of the type of judge and part of court that will be subject to election. Tenn. Code Ann. § 16-2-512(c).

The Judicial Council was originally established in 1943. Tenn. Code Ann. § 16-21-101 (2017). However, the General Assembly "terminated" the Council on June 30, 2009, and its "wind-up period" was completed on June 30, 2010. Tenn. Code Ann. § 16-21-101, compiler's notes. Even though the Judicial Council no longer exists, the General Assembly has not repealed title 16, chapter 21, governing the Council.

Because the Council no longer exists, an essential part of the process for identifying trial court vacancies eventually subject to election no longer exists. But because the legislation establishing the Judicial Commission is still part of the Tennessee Code and is specifically referenced by S.B. 5/H.B. 10 as the process to follow in identifying trial court vacancies, there is a question about how the Commission is to proceed with filing the three new judgeships created by S.B. 5/H.B. 10. One option is to construe the reference in S.B. 5/H.B. 10 to Tenn. Code Ann. § 16-2-512 as inoperative since the Judicial Council has been disbanded. Another option is to give effect to the intent of the General Assembly—as evidenced by its express reference to Tenn. Code Ann. § 16-2-512—to the extent possible by following the process in Tenn. Code Ann. § 16-2-512 to the fullest extent possible.

Since the General Assembly has not repealed title 16, chapter 21 of the Tennessee Code and has specifically referred to it and identified it as providing the appropriate procedure, the better option—the one that would give fullest effect to the intent of the legislature—is for the Commission to comply with Tenn. Code Ann. § 16-2-512 to the extent possible. To do so, the Commission should implement the following process to fill the three new judgeships:

- The presiding judges of the Sixteenth, Nineteenth, and Twenty-first Judicial Districts, respectively, will each recommend the type of judge, type of court, and division or part of the court to the Commission. *See* Tenn. Code Ann. § 16-2-512(a).
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  - publish notice of the vacancy and invite interested persons to submit applications in accordance with Tenn. Code. Ann. § 17-4-308(d) and (g); and
  - notify the election commission in each of the counties in the affected districts of the type of judge, and type and division or part of court subject to election. Tenn. Code Ann. § 16-2-512(c).

- The Commission will conduct hearings and forward its recommendations to the Governor in accordance with Tenn. Code Ann. § 17-4-308(f) and (g).

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