

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Campaigning judges are not required to recuse themselves from all proceedings where they have received campaign contributions from the attorneys who are appearing before them. A campaigning judge must assess each situation based on the facts presented and determine whether recusal and/or disclosure is required.

Issue: What are the recusal rules for campaigning judges in proceedings when they have received campaign contributions from attorneys who appear before them?

Answer: While campaigning judges are not required to recuse themselves from all proceedings when they have received campaign contributions from attorneys appearing before them, the campaigning judges must assess the circumstances surrounding each proceeding in determining whether recusal and/or disclosure is required.

Questions presented: The Requestor poses four questions with regard to recusals:

1. Must campaigning judges recuse themselves from ALL proceedings wherein they have received campaign contributions from the attorney who is appearing before them?
2. Is there an obligation to advise opposing counsel in ALL cases?
3. If not, is there a dollar amount over which such disclosure should be made, particularly in cases where the judge has no relationship with the contributor?
4. What is the judge's responsibility of KNOWING (keeping abreast of) who is contributing so that such a disclosure can be made?

(Emphasis in Request for Opinion.)¹

Analysis: Several Rules of the Maryland Code of Judicial Conduct (Maryland Rule 18-101 *et seq.*, "the Code") are implicated in the questions posed in this Request.

Rule 18-101.2 provides:

- (a) Promoting Public Confidence. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
- (b) Avoiding Perception of Impropriety. A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

¹ There were no facts supporting the questions.

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 6

Rule 18-102.7 provides: “A judge shall hear and decide matters assigned to the judge unless recusal is appropriate.”

Rule 18-102.11(a) specifically addresses recusal. It provides in pertinent part that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” and lists examples. None of the examples pertain to a situation where an attorney has contributed to a judge’s campaign, but two comments to the Rule are relevant.

Comment [1] provides:

Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of subsections (a)(1) through (5) apply. In this Rule, “disqualification” has the same meaning as “recusal.”

Comment [4] provides:

A judge should disclose on the record information that the judge believes the parties or their attorneys might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

Specifically pertaining to judges who are running for election, Rule 18-104.4. Political Conduct of Candidate for Election provides in pertinent part:

A candidate for election:

- (a) shall comply with all applicable election laws and regulations;
- (b) shall act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary and maintain the dignity appropriate to judicial office.

...

There is nothing in the Maryland Code of Judicial Conduct, other Maryland statutes, or Maryland case law that specifically addresses the questions presented by the Requestor. Therefore, we have looked to cases from other states in our analysis.

In states where judges are elected, courts have regularly held that the mere fact that an attorney or party has donated to the judge’s campaign is not grounds alone to recuse the judge. *See e.g., Roe v. Mobile County Appointment Bd.*, 676 So.2d 1206, 1233 (Ala.1995), *overruled on other grounds*; *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla.1990); *Cherradi v. Andrews*, 669 So.2d 326, 327 (Fla. App. 4 Dist. 1996); *Depa Adair v. State, Dep’t of Educ.*, 709 N.W.2d 567, 579–81 (Mich. 2006); *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court ex rel. County of Clark*, 5 P.3d 1059, 1062 (Nev. 2000); *Aguilar v. Anderson*, 855 S.W.2d 799, 802

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 6

(Tex.App.1993) (citations omitted). Those states, however, have different codes of judicial conduct and campaign statutes.

Unlike some of the states that have addressed this issue, Maryland does not have a statute that applies specifically to activities of campaigning judges. For example, Alabama's statute clearly sets forth when a judge must recuse based on campaign contributions. Ala. Code, Section 12-24-3 provides:

(a) In any civil action, on motion of a party or on its own motion, a justice or judge shall recuse himself or herself from hearing a case if, as a result of a substantial campaign contribution or electioneering communication made to or on behalf of the justice or judge in the immediately preceding election by a party who has a case pending before that justice or judge, either of the following circumstances exist:

- (1) A reasonable person would perceive that the justice or judge's ability to carry out his or her judicial responsibilities with impartiality is impaired.
- (2) There is a serious, objective probability of actual bias by the justice or judge due to his or her acceptance of the campaign contribution.

(b) A rebuttable presumption arises that a justice or judge shall recuse himself or herself if a campaign contribution made directly by a party to the judge or justice exceeds the following percentages of the total contributions raised during the election cycle by that judge or justice and was made at a time when it was reasonably foreseeable that the case could come before the judge or justice:

- (1) Ten percent in a statewide appellate court race.
- (2) Fifteen percent in a circuit court race.
- (3) Twenty-five percent in a district court race.

Any refunded contributions shall not be counted toward the percentages noted herein.

...

The Supreme Court of Alabama applied Section 12-24-3 in *Startley General Contractors, Inc., et al. v. Water Works Board of the City of Birmingham, et al.*, 2019 WL 4233194 (Ala 2019), in holding that the trial court judge was not required to recuse himself because the campaign contribution at issue was not made in the immediate preceding election. The Court also found that other provisions of the law requiring recusal were not present in that case.

In *Aguilar v. Anderson, supra*, the Texas Court of Appeals held that the presiding judge did not abuse his discretion in refusing to order recusal of a trial judge in a case where the trial judge had solicited and accepted campaign contributions from the attorney and his firm that represented the defendants. The Court reasoned that the contribution was small

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 4 of 6

(\$100 per attorney, for a total of \$300), the trial judge maintained a voluntary policy of accepting only very limited contributions from any single source, and the contributing lawyer was not a lead attorney for defendants in the case, even though he signed an affidavit in support of a pending motion for summary judgment. The Court noted that “Texas courts have repeatedly rejected the notion that a judge’s acceptance of campaign contributions from lawyers creates bias necessitating recusal, or even an appearance of impropriety.” 855 S.W.2d at 802. The decision was not unanimous and one of the justices wrote a blistering dissent:

The majority and separate concurring opinions have this day effectively sanctioned as legitimate judicial conduct, a political campaign strategy by which a jurist can personally put the financial “pinch” on an attorney or party involved in pending litigation in order to fund his re-election campaign so long as it is a pinch and not a “squeeze.”

.....

The line that determines when recusal is required and when it is not required is very fine. However, in the real world, the facts of this case would give the appearance of partiality which would mandate a recusal, notwithstanding the judge’s genuine ability to maintain neutrality.

855 S.W.2d at 807.

In the numerous states that do not address recusal rules for campaign contributions through statute, each case must be examined on the specific facts presented. *See e.g., Dean v. Bondurant*, 193 S.W.3d 744 (Kentucky 2006) (Supreme Court chief justice recused himself where he received numerous campaign contributions from many of the attorneys at the law firm that was a party to the action pending review).

The opinions provided by this Committee are generally based on specific facts – but specific facts have not been presented in the Request. We agree with the dissenter in *Aguilar* that there is a very fine line that determines when recusal is required. But despite the lack of facts provided with the Request, we feel we can answer the first question in the negative. In other words, recusal is not required in **all** circumstances where an attorney has contributed to the judge’s campaign. A judge must determine whether to recuse and/or disclose based on the facts surrounding each particular case.

Our analysis is consistent with those of judicial ethics committees of other states that have determined whether campaigning judges must recuse based on the specific facts presented. *See e.g., California Supreme Court Committee on Judicial Ethics Formal Opinion No. 2013-003* (law firm contributions are not aggregated under law that mandates disqualification if attorney contributes more than \$1,500.00); Florida Supreme Court

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 5 of 6

Judicial Ethics Advisory Committee Opinion No. 2003-22 (judge not disqualified where attorney was a member of judge’s re-election committee); Illinois Judicial Ethics Opinion No. 1996-20 (disqualification of judge if a party is represented by judge’s campaign chairman does not extend to another lawyer from the chairman’s firm); Oklahoma Judicial Ethics Opinion 2007-3, 162 P.3d 986 (2007) (questions regarding disqualification and the duty to disclose depend on the facts surrounding a particular case).

As discussed above, it is the obligation of a judge to hear assigned matters unless recusal is appropriate. In fulfilling the judge’s obligation, he/she may determine that recusal is not required when an attorney has provided a campaign contribution because reasonable minds would not perceive impropriety given the circumstances. But even if the judge believes that recusal is not required, circumstances may be present where the judge has a duty to disclose to adverse counsel the fact of the contribution and/or any other facts concerning the contributing lawyer’s activities in the judge’s campaign. Accordingly, we cannot provide answers to questions two and three (whether disclosure is required in all cases and whether there is a dollar amount over which such disclosure should be made), because whether disclosure is required in a given case would depend on the circumstances presented.

Similarly, we are not able to provide an answer to the last question pertaining to the judge’s responsibility of knowing (keeping abreast of) who is contributing so that such a disclosure can be made because that too would depend on the circumstances presented. While, as stated, this issue is not currently addressed in the Code or other Maryland law, we believe that the answer to that question will depend on the consideration of many facts that may include, but would not be limited to, whether there is a campaign manager/treasurer who is responsible for receiving and reporting contributions, the frequency of any such reports, whether the reports are reviewed by the judge before or after filing, whether the judge is running alone or with a slate so that any contributions would go to an entire slate instead of to one judge, and even if there is a slate, whether any contributions have been earmarked for one candidate. Whether there is a system for flagging larger contributions may also be a relevant concern. These are facts that the campaigning judge must consider, as well as the obligation under Maryland Rule 18-104.4(a) to “comply with all applicable election laws and regulations,” in determining a reasonable and appropriate level of responsibility for knowing who has made contributions to the campaign.

Application: The Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor’s compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this Opinion. Additionally, this Opinion should not be considered to be binding indefinitely.

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-04

Date of Issue: April 07, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page **6** of **6**

The passage of time may result in amendment to the applicable law and/or developments in the area of judicial ethics generally or in changes of facts that could affect the conclusion of the Committee. If the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in the area of judicial ethics and, in the event of a change in that area or a change in facts, submit an updated request to the Committee.