

*Arizona Supreme Court  
Judicial Ethics Advisory Committee*

ADVISORY OPINION 99-01  
(April 6, 1999)

**Solicitation of Support from Attorneys for  
Appointment to Higher Judicial Office**

**Issues**

1. May a judge who intends to apply for a vacancy on another court directly or indirectly solicit references, letters of support and other forms of support such as the making of phone calls and personal contacts from attorneys who are appearing before the judge in a pending case?

**Answer:** No.

2. If the circumstances preclude a judge from soliciting support from attorneys in specific cases, may the judge solicit support from other members of an attorney's firm or agency?

**Answer:** Yes.

3. Is a judge who solicits support from attorneys required to recuse himself or herself in cases involving the attorney?

**Answer:** Yes, during the judge's continuing efforts to obtain the higher position.

4. Does it make any difference if a judge uses an intermediary to solicit support from attorneys?

**Answer:** No.

5. Would a part-time or pro tem judge be subject to the same ethical standards when it comes to the solicitation of support from attorneys?

**Answer:** Yes.

**Facts**

A sitting judge intends to apply for a vacancy on another court. The application form requires references from attorneys who are familiar with the applicant. The judge wants to solicit letters of support from attorneys who appeared before the judge in recent or pending cases. The solicitations will be made through an intermediary and the judge will not solicit anyone directly.

## Advisory Opinion 99-01

### Discussion

The issue raised here relates to how and under what circumstances a judge may solicit letters of support from attorneys to bolster an application to a higher court that is consistent with both the requirements of the merit selection process and the Code of Judicial Conduct. Related issues, such as the propriety of asking lawyers who appear regularly in front of a judge to make telephone calls or personal contact with others to aid the judge's effort to seek a higher court position, are subsumed in this discussion.

The issue arises in the context of Arizona's merit selection and retention system. In this state, superior court judges must campaign for office in all but the two most populated counties. They are permitted to raise money but are prohibited from personally soliciting campaign contributions. Prospective contributors should be referred to the candidate's campaign committee. Canon 5B(2). Superior court judges in Maricopa and Pima Counties and all appellate court judges, however, must apply for office and be nominated for appointment by the governor. The screening and interviewing of applicants is handled by nominating commissions that are governed by rules adopted by the Arizona Supreme Court.

Although the rules require applicants to provide the names of references that the commission may contact about the applicant, they do not require applicants to obtain letters of support. Unif. R. Proc. for Commissions on Appellate and Trial Court Appointments, 7 and 8. Additionally, the application forms instruct applicants to submit the names of references in several different categories. One category on the application form for appellate vacancies, for example, requires "three references who are lawyers or judges, and who are familiar with your professional activities, who would enthusiastically recommend you as qualified to serve on the judiciary."

The practice of obtaining letters and other forms of support has become so widespread that the instructions advise applicants in regard to such practice as follows:

The commission welcomes and needs written assessments of the applicants' skills, expertise, ethics and any other characteristic relevant to an individual's potential for a judgeship. Many applicants solicit letters of reference supporting their efforts at a judgeship. However, applicants are advised "more" is not necessarily "better." The commissioners feel that ten to twelve substantive letters of reference are usually adequate to give the commission an insight into what others think about the applicant.

. . . .

The commission also welcomes telephone calls to individual commissioners where an individual can provide candid insight into the qualifications of an applicant. However, the commission does not need or desire "phone banks" on behalf of applicants and reminds the applicant again that more is not necessarily better.

## Advisory Opinion 99-01

It is clear that the success of the merit selection system, which was adopted by the voters and made a part of the state constitution, relies upon experienced members of the bar and others to provide information, observations and comments about persons who have applied and are under consideration for appointment. References are intended to help the nominating commission to "obtain information on the applicant's life experiences, community activities and background." *Id.*, Rule 8(d).

Within this framework judges, including candidates for higher judicial office, are required by the Code of Judicial Conduct to avoid any situation in which they might be perceived as biased or which suggest the appearance of impropriety. Canon 3E requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In addition, judges are required under both the campaign and the merit selection and retention systems to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary." Canon 5B(1)(a). And at all times, judges must avoid impropriety and the appearance of impropriety in all of the judge's activities. Canon 2. *See Pepsico Inc. v. Hon. Thomas R. Mcmillen*, 764 F.2d. 458 (7th Cir. 1985).

### **Issue 1**

While the decision to solicit letters of support, in the first instance, should be left up to the individual applicant, a judge applying for a higher position should not solicit letters of support from attorneys in a pending case.

Although a judge may believe that he or she is able to separate what is going on in the courtroom from life outside the courtroom, the appropriate inquiry is what would a reasonable person conclude about the judge's impartiality if that person knew the judge had asked one or more of the attorneys in a pending case for a letter of reference or other form of support in the judge's application for a higher court position. A lawyer with a pending matter before a judge faces a serious dilemma when approached by a judge for any form of support, whether the lawyer declines or accepts the solicitation. The other party and other counsel who may not have been solicited and who may not have responded in the exact same way are also put into a difficult position. Moreover, the judge, whatever the response from the lawyers, is always in a difficult position.

The committee is aware that many courts have specialized divisions where attorneys regularly appear before the same judges. In smaller counties regular appearances are more often the rule due to fewer attorneys and judges. In any given court there may be hundreds of cases assigned to a judge. A judge may not even be aware of the nature of each case assigned to him or her or the precise nature of the issues that the judge will be called upon to resolve by way of motions, hearings or trial. However, when there are issues before the judge for resolution which have been briefed, argued, or taken under advisement for rulings, the cases would be considered "pending" for purposes of this opinion and would remain pending so long as the litigation assigned to that judge is unresolved.

## Advisory Opinion 99-01

### **Issue 2**

A corollary issue to be addressed is whether a judge who is precluded from soliciting attorneys in pending matters can properly solicit support from other members of a lawyer's law firm or the public agencies for whom the lawyer is employed. Is the judge, while on a criminal department assignment, precluded from soliciting letters of support from anyone in the office of the county attorney or attorney general or public defender because the judge has matters pending before the court involving attorneys associated with these public agencies?

We are mindful that an appointment to a higher court, especially the Supreme Court, is the most significant employment in the judiciary. The process of applying for appointment to a judicial office is heavily dependent on recommendations of respected lawyers. We must, therefore, be the least restrictive as possible on the issues presented and rely on the fact that "an objective, disinterested, fully informed observer" would not reasonably question the impartiality of a judge who solicited support from other members of a law firm or public agency who were not involved in the litigation pending before the judge. Lawyers who understand the necessity and value of such information to a nominating commission would not find such conduct improper. We also realize that the more restrictions we impose on judges who seek higher judicial office, the more we place them at a disadvantage with lawyers who are not similarly restricted when it comes to soliciting support of their efforts to seek judicial position.

### **Issue 3**

In the event a judge has directly, or through intermediaries indirectly, solicited the support of lawyers for an application to a higher court, the judge should, so long as his or her efforts to seek a position on a higher court are continuing, recuse himself or herself from matters involving that attorney that come before the judge. Although it could be argued that disclosure by the judge would be sufficient, disclosure shifts the responsibility to the lawyer, who then has to decide whether or not to request that a judge recuse himself or herself. If the judge should recuse himself or herself, the parties may still choose to proceed with the judge by using the remittal of disqualification provisions of Canon 3F. When the judge is no longer seeking the higher position or making use of an attorney's letter of support, the judge's obligation may continue as an obligation of disclosure, or nothing at all, depending on the circumstances. Here the analysis would not be significantly different than that used when one is disclosing a personal friendship, recent social interactions, prior affiliations, or common work on committees or organizations.

In any situation in which a judge is soliciting a lawyer for support of the judge's application to a higher court the judge should also inform the lawyer, at the time support is solicited and agreed to, that the judge will, during his or her continuing efforts to obtain the position, be required to recuse himself or herself from such lawyer's cases.

## Advisory Opinion 99-01

### **Issue 4**

The use of an intermediary, with or without disclosure to the judge, would not change any of the analysis of the issues. Canon 5B(1)(C) prohibits a judge from authorizing or knowingly permitting any other person to do what the judge himself or herself is prohibited from doing. Where it is permissible to solicit letters of support or other types of support, however, the committee would encourage the use of an intermediary. Using an intermediary may result in a more comfortable encounter between the lawyer whose support is solicited and the intermediary acting on behalf of the judge. It also minimizes any appearance of impropriety much the same way that a campaign committee does in the raising of funds for a judicial candidate in a contested election.

### **Issue 5**

The application of this opinion extends to all persons who come under the definition of “judge” or “pro tempore full-time judge” as defined in the Application section of the Code of Judicial Conduct. It would also apply to any part time judicial officer or pro tempore judge during the period of service of such person.

### **Conclusion**

A judge who is an applicant for a higher court must be mindful of the appearance of impropriety in approaching attorneys for support and should not request such support when an attorney is involved in a case pending before the judge. In addition, a judge who solicits such support, directly or indirectly, from an attorney not involved in a pending matter must inform the attorney that so long as that attorney’s letter of reference is used in continuing efforts to obtain the higher position, the judge would have to recuse himself or herself from handling matters involving that attorney. Lastly, once the attorney does, in fact, lend his or her support to the judge’s efforts to obtain a higher position, the judge must recuse himself or herself from matters involving that attorney.

It is the continuing duty of all judges, whether elected or merit selected, to avoid situations in which they might be perceived as biased or which might suggest an appearance of impropriety, and at all times to maintain the dignity and integrity of the judiciary.

### **Applicable Code Sections**

Arizona Code of Judicial Conduct, Canons 2, 3E, 3F, 5B(1)(a), 5B(1)(c) and Application Section (1993).

### **Other References**

Arizona Commission on Judicial Conduct, Rules of Procedure, Rule 8(d).

Arizona Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments, Rules 7 and 8.

*Pepsico Inc. v. Hon. Thomas R. McMillen*, 764 F2d. 458 (7th Cir. 1985).