

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 00-04
(August 24, 2000)

Judicial Evaluation of Attorneys

Issues

1. May a judge participate in a formal process of evaluating the performance of attorneys who appear regularly before that judge without the evaluation being disclosed to the attorney being evaluated?

Answer: Yes, but a judge must be sensitive to disqualification issues that may arise as to subsequent cases.

2. If so, does it make any difference if the judge is the primary or sole evaluator?

Answer: No.

Facts

A city contracts with private attorneys to provide public defender services to a municipal court. When the contracts come up for renewal each year, the judges are asked to provide confidential feedback to the city on the contract attorneys' performance by completing an evaluation form for each attorney. The city then uses the information on the form, with other information, to determine whether to offer a renewal contract to an attorney. The evaluation form is not given or disclosed to the attorney.

Contract public defenders are assigned to specific courtrooms where they appear regularly before the same judges. Each judge has direct and frequent contact with the public defender assigned to the judge's courtroom. A judge may have few, if any, cases in which defendants are represented by one of the other public defenders during the duration of a given contract. The effect of this arrangement is that one judge is primarily responsible for the evaluation of the one public defender who appears before the judge, and the evaluation may be substantially based on only one judge's comment.

Discussion

Impartiality

Canon 2A requires a judge to act at all times in a manner that promotes public confidence in the impartiality and integrity of the judiciary. Canon 4A, pertaining to a judge's extra-judicial activities, provides, in part, that a judge shall conduct all such activities so that they do not cast reasonable doubt on the judge's capacity to act impartially. Canon 4B permits judges to participate in extra-judicial activities concerning the legal system and the administration of justice, subject to the code's other requirements. The issue here is whether a judge's undisclosed evaluation of an attorney who regularly appears before the judge would violate either Canon 2A or 4A.

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Arguably, any evaluation of an attorney by a judge may be perceived as casting doubt on a judge's appearance of fairness and impartiality. Judges, however, have historically provided public evaluations of lawyers. Judges rule on such issues as whether attorneys fees or other sanctions should be imposed for lawyer misconduct; whether a criminal defendant should be granted a new trial, or even acquitted, because of prosecutorial misconduct; or whether a criminal defense lawyer gave ineffective assistance of counsel. In addition, lawyers have always been aware that a judge's evaluation may impact the lawyer's career. Consider the civil litigator who habitually is unprepared or violates Rule 11, Arizona Rules of Civil Procedure. Certainly the lawyer cannot claim surprise when this conduct prompts harsh reprisals from the bench, whether it be the awarding of attorney's fees to the opposing side, dismissal of claims or defenses, or the assessment of sanctions. Such outcomes are the stuff of which reputations are made.

All of these examples, however, involve situations that are publicly disclosed. The committee is concerned here with the potential for abuse arising out of the confidentiality of an evaluation that is undisclosed. A judge must be cautious, for example, where an attorney, in an attempt to represent a client zealously, has done things which appear to have made life difficult for the court. In such a situation a judge might believe that making a negative evaluation is a way of taking care of the problem. Such potential for abuse is more likely when evaluations are confidential. (The committee recognizes that there are other opportunities for confidential evaluations, such as Martindale-Hubbell, that are of less concern because of their randomness and infrequency.)

These concerns become greater when the judge's evaluations are the sole or primary basis for the city's decision whether to renew a lawyer's contract. The majority of the committee believes that so long as the judge's evaluation is not the sole basis for the hiring decision, and so long as the evaluation is not abused, Canon 2A's requirement concerning the promoting of the public's confidence in the judiciary would not be undermined. Judges are the guardians of our judicial institutions. The responsibility falls squarely on judges to preserve the rule of law and due process. Judges are perhaps in the best position to observe and evaluate lawyer performance as it relates to the administration of justice. It is the opinion of the majority that the public appreciates the court's integral role in the administration of justice and that there is little danger, unless there is evidence that the evaluation process is abused, that the public's perception of the court's integrity or impartiality will suffer by allowing judges to participate in the formal process of evaluating lawyers who appear before them regularly, even if the evaluations are confidential. Moreover, judicial participation in the evaluation process is consistent with Canon 4B, under which judges are encouraged to participate in activities that are geared toward improving the administration of justice. *See* commentary to Canon 4B.

Another aspect of the confidential nature of the evaluation that may be of concern to some is how it relates to the somewhat unique provision in Arizona that allows for the peremptory challenge of judges. Does a lawyer have a right to know of the evaluation in deciding whether to exercise a change of judge as a matter of right? A majority of the

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committee thinks not. The expression of an opinion on a confidential evaluation form is no different than harboring an unexpressed opinion. In either instance the lawyer does not know the judge's opinion. Yet in the latter, there is no suggestion that the lawyer is at a disadvantage for not knowing what the judge thinks of the lawyer. The lawyer is no better or worse off when the judge expresses an opinion in a confidential manner. Even if the issue relates to disqualification for cause under A.R.S. §12-409, the result would be the same. The statute provides that a judge must be removed if the party has *cause* to believe a judge cannot be fair and impartial on account of bias or prejudice. Unexpressed or undisclosed opinions would not be cause. To demonstrate cause, a judge must manifest his or her bias or prejudice. That bias or prejudice must be against the party, not the lawyer. *Liston v. Butler*, 4 Ariz. App. 460, 421 P.2d 542 (1967).

Disqualification

Canon 3E(1)(a) provides that a judge must disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. Subpart (a) includes among those instances situations where a judge has a personal bias concerning a party's lawyer.

Is it reasonable for a lawyer to question the judge's impartiality simply because the judge participates in a formal, confidential evaluation process? The answer to this question depends on the facts and circumstances of each case. As explained in the above section, judges have historically been called upon to evaluate lawyer performance. A judge's rulings in the case cannot form a basis for removal for cause under A.R.S. §12-409. A judge, in this context, is presumed to be capable of deciding issues in an objective manner. Having ruled against a party, the judge is nevertheless perceived as capable of continuing on the case. That same presumption and perception apply to Canon 3E(1)(a), such that it is not likely in an ordinary situation that a judge's impartiality may reasonably be questioned because the judge participates in an evaluation process.

Nonetheless, when a judge's evaluation is negative and may form the sole basis for a lawyer losing city employment, the lawyer impacted by the decision certainly may reasonably question the judge's impartiality to the lawyer. In these circumstances, the evaluating judge should consider disqualification in later cases in which the lawyer appears, or seek remittal of disqualification under Canon 3F by disclosure to the affected parties. These potential disqualification issues may prompt some judges to avoid evaluations at all.

Conclusion

We believe that judges may evaluate the performance of attorneys who regularly appear before them as long as they recognize that disqualification may become an issue in subsequent cases. We do not believe it makes any difference if a judge is the primary or sole evaluator. The fact that only one judge is involved in the evaluation process does not affect the propriety of the act itself.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canons 2A, 3E(1)(a), 4A and 4B (1993).

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Other References

Arizona Revised Statutes, §12-409.

Arizona Rules of Civil Procedure, Rule 11.

Arizona Rules of Criminal Procedure, Rules 6.2 and 6.5(c).

Liston v. Butler, 4 Ariz. App. 460, 421 P.2d 542 (1967).