SUPREME COURT OF ILLINOIS

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September 24, 2014

Mr. Stephen Matthew Tillery
Korein Tillery LLC
505 North 7th Street
Suite 3600
St. Louis, MO 63101

In re: Philip Morris USA Inc., movant, v. Appellate Court, Fifth District, et al., etc., respondents. Supervisory Order.
No. 117689

Dear Mr. Tillery:

Enclosed is a copy of an order entered September 24, 2014, by Justice Lloyd A. Karmeier in the above-captioned cause.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

CTG:mr
Enclosure
cc: Ms. Lisa S. Blatt
Clerk of the Appellate Court, Fifth District
Mr. Kevin Michael Forde
Ms. Sarah M. Harris
Mr. Larry E. Hepler
Ms. Michele L. Odorizzi
Mr. Joseph Aloysius Power, Jr.
Mr. James Robert Thompson, Jr.
Mr. George A. Zelcs

No. 117689

IN THE

SUPREME COURT OF ILLINOIS

PHILIP MORRIS USA INC., Movant, vs. APPELLATE COURT, FIFTH DISTRICT, *et al.*, Respondents.	)	Motion for Recusal or Disqualification

ORDER

Before the Court is a motion by respondents Sharon Price and Michael Fruth asking that I recuse myself from participating in this matter, which seeks a supervisory order to vacate a recent decision by the Appellate Court, Fifth District, setting aside a judgment entered by the circuit court of Madison County pursuant to a mandate issued by our Court in December of 2006. In the alternative, respondents ask that I be disqualified from further participation in the matter by the other members of the Court.[1]

As grounds for their motion, respondents do not allege that I harbor any actual bias for or against any party to this litigation. Rather, they contend various factors have combined to create "an objective and reasonable public perception" that I am biased in favor of movant, Philip

[1] Although respondents' motion to recuse or disqualify was technically filed only in the proceeding dealing with movant's request for a supervisory order, the motion was phrased generally, and I have assumed that respondents intended for it to also apply to movant's petition for leave to appeal (PLA), which was docketed separately under case No. 117687. My ruling here therefore also governs movant's PLA.

Morris, and that my "impartiality might reasonably be questioned" in this matter. Among the factors invoked by respondents are financial contributions alleged to have been made to my campaign for election to this Court in 2004 by movant and others; media attention at or around the time of the election related to the unprecedented sums that were expended by various groups during the campaign and its implications for my impartiality and the impartiality of the judiciary in general; and my ultimate vote in favor of this Court's judgment ordering dismissal of respondents' complaint. In respondents' view, my recusal is required by Supreme Court Rule 63(C)(1) (Ill.S.Ct. Rule 63(C)(1) (eff. July 1, 2013)) and my disqualification is mandated by the standards articulated by the United States Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009).

Motions to recuse or disqualify members of this Court are rare. Since I joined the Court in December of 2004, I have participated in the disposition of well over 10,000 matters, including motions, petitions for leave to appeal and opinions. So far as I am able to recall, there have been only a few occasions when a motion to recuse or disqualify has been directed at any of us. Moreover, while the legal battle between movant and respondents Price and Fruth was already pending when I was elected to this office nearly a decade ago and has been before the Court on numerous occasions for various reasons since then, most recently in 2011 (*Price v. Philip Morris*, No. 112067, denying Philip Morris' petition for leave to appeal), the present motion marks the first time that any party to this case, including Price and Furth, have questioned the propriety of my participation. Not surprisingly, the development has drawn a strenuous and detailed objection from Philip Morris which contends, among other things, that respondents' motion "is a cynical, dishonest, and hopelessly untimely effort to remove one of only two Justices on the Court who voted against plaintiffs in December of 2005" in the underlying case.

On those infrequent occasions when motions to recuse or disqualify are presented to the Court or individual members thereof, the normal practice has been to decide those motions without comment or explanation. As a result, there is little in our case law to guide lawyers, litigants and members of this Court with respect to the procedures which should be followed. Statutory mechanisms for substitution of judge are in place to assist at the trial court level. See 725 ILCS 5/114–5 (West 2012); 735 ILCS 5/2–1001(a) (West 2012), but those provisions do not apply to judges on our courts of review.

While there is no fixed procedure in Illinois governing motions to recuse or disqualify members of courts of review, it is well-established that a motion challenging a judge's participation in a case must be brought at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim (*Apple v. Jewish Hosp. and Medical Ctr.*, 829 F.2d 326, 333 (2nd Cir.1987)) so as to prevent a litigant from seeking a change of judge only after she has formed an opinion that the judge may be unfavorably disposed toward her cause (see, *e.g.*, *Williams v. Estate of Cole*, 393 Ill. App. 3d 771, 775 (2009)). If a party knows of facts that the party believes are sufficient to warrant disqualification, but does not seek to have the judge removed until a later date, any right to seek disqualification will be considered forfeited. Alfini, *Judicial Conduct and Ethics* 4-67 (LexisNexis 4th ed. 2007); *Walls v. State*, 20 S.W.3d 322, 325 (Ark. 2000). Parties are not permitted to save an objection to a judge's participation as a hedge against losing a case. *Id.* at 4-68; see also *FDIC v. O'Malley*, 163 Ill.2d 130, 140-41 (1994).

As noted above, this litigation has been underway since before I was first elected to the Supreme Court 10 years ago. It has been before us on multiple occasions during the intervening decade. Despite the passage of time and the many procedural and substantive rulings made by

the Court throughout the years, it is only now that respondents question the propriety of my participation in the case. Moreover, even now, at this late date, respondents make no claim and have no basis for claiming that I harbor any actual bias or prejudice against them. Again, their contention is simply that circumstances surrounding my election in 2004 create a situation where my impartiality might reasonably be questioned now. Those circumstances, however, are not new. The information cited by respondents was known or could have been ascertained by them long ago. The request for my recusal is therefore untimely, and respondents' claims regarding the appearance of impropriety have been forfeited.

Even if respondents had properly preserved their claims, their arguments for recusal would fail on the merits. Regardless of their personal backgrounds and experiences in life, judges are assumed by the law to be impartial and capable of considering each case in light of the evidence presented. *People v. Jackson*, 205 Ill. 2d 247, 276 (2001); *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). The burden of overcoming this presumption is on the person claiming that a judge should be disqualified from hearing a case. *Eyechaner v. Gross, supra.* The grounds asserted must be personal rather than judicial and stem from some source other than what the judge has learned through participation in a case. Accordingly, opinions formed by the judge on the basis of facts introduced or events occurring during the course of the current proceedings or prior proceedings will ordinarily not constitute a sufficient basis for seeking the judge's removal from a case. *Id.* at 281.

When a judge's impartiality might reasonably be questioned (see Ill.S.Ct. Rule 63(C)(1) (eff. July 1, 2003)) or circumstances objectively demonstrate a "serious risk of actual bias," *Caperton v. A.T. Massey*, 556 U.S. 868, ___, 129 S.Ct. 2252, 2263-64 (2009), recusal or disqualification are required. However, there is an equal and corresponding duty to not to recuse

when no valid reason to recuse or disqualify is shown. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1204 (10th Cir. 2006); *Peroni v. States*, 358 Ark. 17, 24 (Ark. 2004); *Laird v. Tatum*, 409 U.S. 824, 837, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972) (memorandum opinion of Rehnquist, J.).

Amplifying this "duty to sit" is the "rule of necessity." The rule of necessity provides that a judge will be qualified to decide a case, even if he or she would otherwise be impeded from doing so, when the case could not be heard and decided on the merits otherwise. *United States v. Will*, 449 U.S. 200, 213 (1980); *Switzer v. Berry*, 198 F.3d 1255, 1258 (10th Cir. 2000). The rule has been recognized by the common law for over five and a half centuries and has been consistently followed by both state and federal courts in the United States. *U. S. v. Will*, 449 U.S. at 213-4, 101 S. Ct. at 480, 66 L. Ed. 2d at ___ (1980). It was expressly applied by our Court in *Jorgensen v. Blagojevich*, 211 Ill. 2d 286, 299 (2004), which invalidated an attempt by the General Assembly and the Governor to eliminate the cost-of-living adjustments to judicial salaries. Because all seven members of the Court had a pecuniary interest in the outcome, they would have clearly been disqualified under the normal rules governing judicial conduct. That result, however, would have left the parties without a forum in which to challenge the lower court's judgment. The right to appeal would have been lost. The Court therefore concluded that, under the rule of necessity, it had an obligation to proceed to the merits. [2]

The concerns underlying the rule of necessity are not limited to situations where all members of a tribunal are otherwise subject to disqualification. They are also applicable where, as is the case with our Court, there is no provision under the law for appointment of substitute or replacement judges to participate in determination of the litigation. In such circumstances, the elimination of a judge through disqualification could prevent the Court from achieving the

[2] The rule of necessity likewise permitted us to hear and decide *Maddux v. Blagojevich*, 233 Ill.2d 508 (2009), which raised a challenge to the statute imposing a compulsory retirement age for all judges, including the members of this Court.

number of votes required by the constitution to render a decision, leaving the lower court ruling unreviewed and unreviewable. Such an outcome not only deprives litigants of the full measure of judicial oversight provided by law, but also impairs the ability of this Court to carry out its constitutional responsibility as the ultimate arbiter of Illinois law and leaves the law unsettled. See *Laird v. Tatum, supra.* Accordingly, "it is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, ___, 143 P.2d 652, 656 (1943). See also *Pellegrino v. Ampco Sys. Parking*, 485 Mich. 1134, 1135-1136 (Mich. 2010) (Kelly, C.J., concurring). Where a justice cannot be replaced, recusal and disqualification impair the functioning of the court and reduce the possibility that the majority needed for action by the court can be obtained, creating the possibility that the law for our jurisdiction will be created by default rather than deliberation. See *Laird v. Tatum, supra* at 837-38; *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913, 916 (Scalia, J.).

The standards for overcoming the duty to sit are high. Litigants must not be permitted to create the grounds for recusal by criticizing the judge or casting sinister aspersions (see *Breslin v. Dickinson Twp.*, 2011 U.S. Dist. LEXIS 54411, 12-14 (M.D. Pa. 2011)), nor may a party engage in "judge-shopping" by manufacturing bias or prejudice that previously did not exist. Alfini et al., Judicial Conduct and Ethics 4-19 (LexisNexis 4th ed. 2007). Similarly, rumor, speculation, belief, conclusion, suspicion, opinion or similar non-factual matter are not sufficient. Rather, a judge has a duty to sit unless probative evidence is presented which establishes a reasonable factual basis to doubt the judge's impartiality. See, e.g. *Blizard v. Frechette*, 601 F. 2d 1217,

1221 (1st Cir. 1979); *Laird v. Tatum*, 409 U.S. 824 (1972)(Memorandum of Rehnquist, J.); *Nichols v. Alley*, 71 F. 3d 347, 351 (10th Cir. 1995); Moore's Federal Practice 3d §63.60[1][b], p. 63-62. A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Indeed, where the standards governing disqualification have not been met, disqualification is not optional. It is prohibited. *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001).

Consistent with these principles, the grounds asserted in a recusal motion must be scrutinized with care. *In re Aguinda,* 241 F.3d 194, 201 (2nd Cir. 2001). The standard for recusal is an objective one, but in applying that standard, we must evaluate how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical and suspicious person. *U.S. v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995); *Matter of Mason*, 916 F.2d 384, 385 (7th Cir. 1990). We must also be mindful that attacks on a judge's impartiality may mask attempts to circumvent that judge's anticipated adverse rulings. *Conklin v. Warrington Twp.*, 476 F. Supp. 2d 458, 463 (M.D. Pa. 2007). Accordingly, courts have recognized that litigants cannot be permitted to unilaterally create the grounds for recusal. See *In re Mann*, 229 F.3d 657, 658-59 (7th Cir. 2000) (filing of judicial misconduct charge in reaction to court's decision insufficient ground for disqualification). Similarly, "[a] party cannot cast sinister aspersions, fail to provide a factual basis for those aspersions, and then claim that the judge must disqualify herself because the aspersions, *ex proprio vigore*[, by their own force], create a cloud on her impartiality. [Citations.]". *In re U.S.*, 158 F.3d 26, 35 (1st Cir. 1998). To hold otherwise would transform recusal motions into tactical weapons which undermine the integrity and independence of the courts.

The respondents in this case have failed to meet their burden under the foregoing principles. Respondents' allegations that my continued participation in this ongoing litigation presents an appearance of impropriety is founded on the proposition that movant was responsible for "bankrolling" my election to this office 10 years ago. As movant points out, however, this claim has no factual support.

Illinois law requires campaign committees to register and make periodic disclosures of all contributions they receive from any individual or entity in excess of $150. 10 ILCS 5/9-10, 11 (West 2012). Political action committees or PACs are also required to file periodic reports listing the contributions they receive. *Id.* It is illegal to obscure the identity of contributors to such organizations by, for example, giving money to a third party and directing them to make the contribution. 10 ILCS 5/9-25 (West 2012). This "statutory scheme is intended to preserve the integrity of the electoral process by requiring full public disclosure of the sources and amounts of campaign contributions and expenditures." *Sorok v. State Board of Elections*, 2012 IL App (1st) 112740, ¶ 2.

Campaign records disclose that my campaign received no money whatever from movant, its affiliates, or any of its employees. Although repondents attempt to link movant to three political action committees—JUSTPAC, the Illinois Chamber PAC, and Chicagoland Chamber PAC—that respondents say contributed about $1.5 million to support my campaign, the records do not support this either. According to the materials presented in connection with this matter, neither movant nor any of its affiliates contributed any money to either JUSTPAC or the Chicagoland Chamber PAC in 2003 or 2004. In 2004, Altria Corporate Services, an affiliate of respondent, apparently did contribute $20,000 to the Illinois Chamber PAC. *Id*. However, even if one assumes that the Illinois Chamber PAC decided to contribute the entire $20,000 to

my campaign, that decision was unknown to me and, in any event, the amount represents only 0.4% of the total $4.8 million raised in support of my campaign. Moreover, while campaign records indicate that three of the law firms that represent movant in this ongoing litigation made modest contributions to my campaign prior to my election, those contributions totaled only $16,800—approximately 0.35% of the total raised by the campaign.

Respondents do not argue, nor could they argue, that these kinds of modest contributions provide any basis for recusal, even assuming that they could properly be attributed to movant. The Code of Judicial Conduct specifically allows a judge's campaign committee to solicit and accept "reasonable campaign contributions and public support from lawyers." Ill. Sup. Ct. R. 67(B)(2) (eff. March 24, 1994), and the Illinois Judicial Ethics Committee has long advised that a judge has no obligation "to disqualify himself or herself under Rule 63C(1) merely because a lawyer or party appearing before the judge was a campaign contributor." Ill. Jud. Eth. op. 93-11, 1993 WL 774478, at *2 (Nov. 17, 1993). The law of other jurisdictions where judges are elected is in accord. The Nevada Supreme Court, for example, has held that "a contribution to a presiding judge by a party or an attorney does not ordinarily constitute grounds for disqualification" because "such a rule would severely and intolerably obstruct the conduct of judicial business in a state like Nevada where judicial officers must run for election and consequently seek campaign contributions." *City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Ct. ex ret Cty. of Clark*, 5 P.3d 1059, 1062 (Nev. 2000) (internal quotation marks omitted). Similarly, the Michigan Supreme Court held that a judge's receipt of campaign contributions from a party, attorney or group having common interests with a party or an attorney would not ordinarily be grounds for recusal because that would result in an avalanche

of recusal motions and risk "deepening paralysis on the part of the Court in carrying out its essential responsibilities." *Adair v. Dept of Ed.*, 709 N.W.2d 567, 579-8 1 (Mich. 2006).

In reality, the notion that movant was responsible for financing my run for office ten years ago is just that, a notion. It is based entirely on conjecture, innuendo and speculation which, once started, took on a life of its own for awhile in the press. In the face of the voluminous materials presented by movant to substantiate that it did not provide financial support to my campaign, respondents' lead counsel has, in fact, been reduced to arguing that "the evidence that [movant] made no reportable contributions in Illinois during the 2004 cycle is itself good reason to believe that Philip Morris probably made contributions it was not required to report." In other words, respondents appear to be suggesting that the lack of direct evidence to support their position actually substantiates that what they are claiming is true. This view is, of course, untenable. If no proof qualified as proof, our adversarial system would truly have stepped through the looking glass.

Faced with the complete lack of evidence that movant made any direct contributions to my campaign, respondents argue that my recusal is necessary based on movant's association with or support of a number of other public interest and political entities. This argument must also fail. The claim that a judge may not hear a case because a party may have some association with a public interest group or political party that did support or may have supported the judge's candidacy has no basis in the law, would be unworkable and is contrary to the very notion of an elected judiciary. When judges are elected, as the Illinois Constitution requires, it is inevitable (and entirely appropriate) that interest groups will support judges whose judicial philosophies they believe are most closely aligned with their own views. As movant correctly points out, the system would come to a grinding halt if contributions by organizations and interest groups were

sufficient to force a judge to recuse himself or herself in any case in which a member of the group was a party. An affidavit submitted by noted legal scholars Ronald Rotunda and Charles Wolfram makes the point. Adopting a policy of recusal-by-association would logically require my recusal in each and every additional case in which any member of the organizations which supported my candidacy might appear as a litigant. Similarly, other members of the Court would also be forced to not participate in cases involving members of organizations that contributed to their campaigns, including unions and legal groups. Accordingly, instead of being a rare event, disqualification would be routine and even structural. Members of the court would be prevented from hearing a substantial number of cases for the entire duration of the terms they were elected by the voters to serve, and the court's ability to do its work would be compromised.

In reviewing respondents' contentions, I cannot help but notice that they bear an unmistakable similarity to materials filed by the plaintiffs in *Avery v. State Farm Mut. Ins. Co.*, No. 91494, as part of their ultimately unsuccessful effort disqualify me from participating in that case and to revisit the Court's original judgment against them. *Avery v. State Farm Mut. Ins. Co.*, No. 91494, Nov. 17, 2011 (Motion to Recall Mandate and Vacate Aug. 18, 2005 Judgment Denied by Court , Thomas and Karmeier, JJ., NP; Motion for Recusal of Justice Karmeier Dismissed as Moot by Court, Thomas and Karmeier, JJ, NP). Respondents here repeat the same arguments, cite many of the same newspaper articles, and even rely on the very same contributions by the very same organizations as did the lawyers for the *Avery* plaintiffs. The only difference is that respondents here claim that those same contributions should be attributed to movant rather than State Farm. The "evidence" proved inadequate when considered by the Court in *Avery. Id.* In its recycled form, it remains inadequate here.[3]

[3] Charges that I should have recused myself from this litigation and *Avery* based on contributions to my campaign or to organizations which supported my campaign were also the subject of a complaint filed by Common Cause

It is unfortunate that press accounts may have sensationalized aspects of this case and the campaign which resulted in my election to this office a decade ago. Judicial inquiry may not, however, be defined by what appears in the press. If such were the case, those litigants fortunate enough to have easy access to the media could make charges against a judge's impartiality that would effectively veto the assignment of judges. Judge-shopping would then become an additional and potent tactical weapon in the skilled practitioner's arsenal. *Drexel Burnham Lambert*, 861 F.2d at 1309. The test, as noted above, involves reasonableness, and the appearance of partiality portrayed in the media may be, at times, unreasonable. In such cases, the requirements for recusal or disqualification are not met. *In re Aguinda*, 241 F.3d 194, 201-02 (2d Cir. 2001). That is not only true when the inaccurate depiction is published once. It is equally so when, as was the case here and in *Avery*, inaccuracies and mischaracterizations by one source are republished uncritically by others. Repeating a falsehood does not make it the truth.

I further note that under the Illinois Constitution, the concurrence of four justices is required for a decision of this Court. There are only seven of us. One of our members has been N.P. in the case for most of the life of this litigation and remains so now. The number of justices available to hear the case is therefore reduced to six, as respondents' counsel is well aware. Two of those six dissented from the Court's original judgment, and respondents perhaps surmised that those two would be likely to support their renewed claims. I was one of the judges who voted for the judgment, but specially concurred, relying on a separate theory for why respondents' claims were fatally defective, a theory which did not depend on the legal analysis being challenged in this latest round of litigation. (Another justice joined me in that view, but he has

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and other groups with the Judicial Inquiry Board in 2006. Those charges were likewise rejected. By letter dated March 10, 2006, the Judicial Inquiry Board advised me that it had "considered the allegations raised and determined that the Complaint should be closed without further action." In accordance with that determination, the matter was duly closed by the Inquiry Board and no further action was taken.

since retired.) From this, respondents perhaps surmised that I would continue to vote against them now. That leaves three members of the Court unaccounted for. How those three members would view respondents' claims is something respondents could not have known for sure. What they could be certain of, however, is that three would not be enough to rule against them. Four votes are needed for that and without four, the appellate court's ruling would remain intact, at least for now. Accordingly, while I have not yet formulated an opinion regarding the underlying merits of respondents' claims, removing me from the case would seem, from respondents' position, to be a promising strategy indeed for helping to revive the multi-billion dollar judgment they lost when this Court ruled against them eight years ago. I mentioned at the beginning of this order that movant characterized respondents' motion as "a cynical, dishonest, and hopelessly untimely effort to remove one of only two Justices on the Court who voted against plaintiffs in December of 2005" in the underlying case. Considering the foregoing circumstances, movant's criticism is understandable.

This matter comes before the Court on the eve of my retention election. My decision today may have an effect on my candidacy. That, however, is an occupational hazard in our system for electing judges. It is not and can never be a valid basis for recusal. As our judicial canons expressly provide, "[a] judge should be unswayed by partisan interests, public clamor, or fear of criticism." Ill.S.Ct. Rule 63(A)(1) (eff. July 1, 2013).

A judge's obligation to sit, notwithstanding the risk of criticism, was eloquently expressed in an appellate court opinion from Alabama. The court wrote that

> "[i]t is clear that a judge, otherwise fully qualified and competent cannot avoid his duty to sit in a cause by recusing himself to escape accusation, and unpleasantness, and because he had sat in another case involving the same parties.

> We can understand and sympathize with [the lower court judge's] desire to remove himself from this matter, but we cannot permit him to do so without any legal disqualification. *Every judge, including those of this Court, would like to avoid recrimination and accusation of unfairness. Alas, in proper pursuit of duty we may not do so.*" (Emphasis added.) *McGough v. McGough*, 47 Ala. App. 223, 226-227 (Ala. Civ. App. 1970).

I fully agree with this sentiment.

When I ran for this office a decade ago, I made only one promise. It was a promise to the People of Illinois and the voters of the Fifth Judicial District that if elected, I would decide every case free of outside influence and based solely on the law and the facts. I have honored that pledge, just as I have always honored it since first assuming judicial office in 1986. This case has not been and will not be an exception.

Because I do not believe that respondents have made a sufficient showing to warrant my recusal or disqualification, and for all of the reasons set forth above, I hereby deny their request that I recuse myself.

As noted at the outset of this order, respondents also ask, in the alternative, that I be disqualified from further participation in the case by the other members of the Court. Although this is currently being treated as a single-judge matter, I referred this aspect of respondents' motion to my colleagues for resolution by the full Court. Because this is contrary to this Court's recent practice, I will give my reasons.

In addressing recusal procedures at the trial court level, I observed in a special concurrence in *In re Marriage of O'Brien*, 2011 IL 109039, ¶119, that "[t]he robes of office *** confer no special exemption [on judges] from the very basic human trait that it is difficult for

people to see themselves as others see them" and that judges may often be in the worst position to assess whether their own actions present an appearance of impropriety. *Id.* That is just as true for members of courts of review as it is for trial judges. Persuasive arguments can therefore be made that when, as here, a party contends that a member of this Court should be barred from participating based on the perception that he or she cannot be impartial, the matter should be considered and resolved by the other members of the Court, not the judge whose participation is being challenged.

In the past, our Court did handle motions to disqualify particular members of the Court as full-court matters. See, *e.g.*, *Steinz v. Gordon*, No. 75968 (motion to disqualify Justice Heiple); *Pakk v. Sheahan*, No. 79151 (motion to disqualify Justice Bilandic); *Sarkissian v. Chicago Board of Education*, No. 88530 (motion for recusal of Justice Fitzgerald). That changed, however, in the first case where my own disqualification was requested, *Avery v. State Farm*, No. 91494. Initially, the motion to remove me from the case in Avery was considered as a full-court matter and denied in an order filed by the Court on March 15, 2005 (with Thomas and Karmeier, JJ, both N.P.). Shortly thereafter, however, the Court *sua sponte* vacated that order and entered a new order declaring that the decision as to whether a judge should be disqualified was "exclusively within the determination of the individual judge" whose disqualification was being sought. That principle was subsequently followed in *Pinnick v. Corboy and Demetrio*, No. 107359, a legal malpractice case where plaintiffs sought to disqualify or recuse four members of this Court from the First and Second Districts on the grounds that they or members of their families had received campaign contributions ranging from $1500 to $52,000 from attorneys affiliated with the defendant lawyers and law firm. In the opinion he authored for the majority in *In re Marriage of O'Brien, supra*, ¶45, Justice Freeman repeated the proposition, holding, with

emphasis, that the decision to recuse lies "exclusively within the determination of the individual judge."

Allowing the full Court to determine whether an individual justice should participate in a case can be problematic for a variety of reasons, constitutional and otherwise. Where the justice who is the target of the recusal/disqualification assents to having the matter resolved by his or her colleagues, however, there should be no impediment to having the question considered and resolved by the full Court. Indeed, review by the other members of the court may provide the best and surest way of assuring litigants and the public that the due process values discussed by the United States Supreme Court in *Caperton v. A.T. Massey Coal Co., Inc., supra*, have been observed.

I had no objection to having the full Court consider and decide whether I should be recused or disqualified in *Avery v. State Farm.* I have no objection to its doing so here. Moreover, in other instances where motions are normally handled as single-judge matters, members of the Court routinely refer them to the full Court for consideration and disposition. No rule of our Court prohibits that from being done in this case. Accordingly, I referred respondent's motion to recuse or disqualify to the full Court, indicating that I would not participate in the disposition of that motion and would abide by the Court's ruling. The Court, however, has elected to take no action. Where a motion fails to receive four votes, Court policy requires that the motion be denied. Having received no votes at all, respondent's alternate request that I be disqualified by the full Court is therefore also denied.

It is so ordered.

9/24/2014
Date

Justice