

# The Coming Crisis in Circuit Court

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Ten years ago, I went through the process that led to my becoming a circuit court judge. For that opening, there were 11 applicants, which was a typical number at that time. In 2008, there were 21 applicants for two vacancies on the circuit court; in 2009, 14 applied when Judge Rowan retired; 14 or more applied for vacancies in 2014, 2015, 2016, and 2017. That number has steadily declined over the past four years. In October of 2017, only seven people applied to fill the vacancies when Judges Debelius and Bernard retired. Seven applied in 2018 to fill the Judge Mason vacancy and only five applied in 2019 when Judge Rupp retired.

I retired at age 70 last November and when my opening was finally advertised in April of 2021, there were but three applicants. When it was re-advertised a few months later, two more people applied. Now, upon a second re-advertisement, seven more people have sought the position. This is a good sign, indeed, but what has happened over the past four years to discourage well-qualified attorneys from applying to the circuit court? And what does this trend portend for the circuit court in Montgomery County?

One thing is for sure: it is only going to get worse. My vacancy is but the first of many more that will soon need to be filled. This year alone there are three retirements: Judge Callahan in June, Judge Greenberg in August, and Judge Rubin in November. Next year, Judges Jordan and Salant reach mandatory retirement age. So that makes six openings for certain by the end of 2022. If we are having this much trouble filling one vacancy, how are we going to fill five more?

We are not seeing the same problem with openings on the District Court. Historically, there are more applicants for these positions and typically

these openings are filled by attorneys with fewer years of experience. The nominating process is the same for both levels of trial court judges. The salaries are similar, although a bit lower for the District Court. The status and working conditions are similar, although the circuit court judges generally have a slight advantage given that the county funds some of their support staff whereas the District Court is entirely funded through the State. And, of course, the retirement age is the same for both, so vacancies occur with similar regularity on both courts.

The big difference, as most are aware, is the possibility of contested elections for circuit court positions versus the district court judges whose names we will never see on a ballot. The governor appoints all judges on all four levels of courts, but due to historically disparate treatment, District Court judges get 10-year terms, period. Appellate judges also get 10-year terms, but they stand for retention elections, a simple yes/no ballot shortly after their appointments. Circuit court judges get appointed and, if unopposed, go on to serve a 15-year term of office. But they must stand for election a year or so after they are appointed and any attorney who lives in the county can pay a \$50 filing fee and run against them. Of course, this bypasses the extensive vetting process by the county trial courts nominating commission that has worked quite well for over 50 years but try explaining all of that to the voters of Montgomery County.

Until relatively recent times, there have not been contested judicial races at a general election. From 1958 to 2000, there were but two contested circuit court races in the county—in 1982 and 1986—and both were resolved in favor of the sitting judges at the primary election stage. Since 2002, however, there have been contested elec-

tions five times. In that year, and again in 2014 and 2020, contested elections for judges took place both at the primary and general election. In all three, the sitting judges prevailed. In 2004 and 2018, the challengers were defeated at the primary election stage.

The trend is clear and the elections have been getting closer over time. In this era of social media, it is much cheaper and easier for any attorney who wants to avoid the scrutiny of numerous bar associations and the nominating commission to do so. Most voters don't know much about judicial elections to begin with and with alphabetical ballots not disclosing the status of the incumbent judges, the process is a recipe for disaster. Add in the fact that non-judge attorney challengers are not bound by the same standards of judicial ethics, which leads to judges being unable to respond to many types of spurious attacks on them and their records.

Unfortunately, it does not appear that contested elections are going away anytime soon. Every year the state bar association and the judiciary lobby for a change in the Maryland Constitution that mandates contested circuit court elections, but there never seems to be a consensus on the issue to motivate the General Assembly to do anything about it. In the meantime, here is where we are left.

Fewer and fewer District Court judges are applying for openings on the circuit court. In the past, that was a natural progression that came with experience on the bench and a desire for different judicial challenges. Now, however, the relinquishment of a secure position on the District Court comes with the prospect of a grueling contested election in a year or two and the real possibility of being out of a job entirely. It hasn't happened here

yet, but routinely occurs in other counties and our county certainly could be next. One perennial challenger has already announced that she will challenge the sitting judges yet again in 2022.

Another source of applicants in the past are public sector attorneys such as those in the State's Attorney's Office, the United States Attorney's Office, the Office of the Public Defender, the Office of the Attorney General, and the County Attorney's Office. For most of these attorneys, the position of circuit court judge comes with an increase in salary and with a continued career in public service. Some of these attorneys will continue to apply, but many will not, given the now probability of a contested election.

The final applicant pool comes from attorneys in private practice. They, too, have the same dilemma of facing a contested election. And those in successful practices face a large drop in income, so they must be highly motivated to the calling to apply in the first instance.

There are no easy answers, no magic wand to wave. Until we can get rid of contested elections, we must redouble our efforts to encourage highly qualified attorneys and District Court judges to go through the process to become a circuit court judge. The bar and public of Montgomery County have too much at stake to do otherwise. The complex matters heard in circuit court include juvenile law issues ranging from delinquency to abuse and neglect, and family law cases to determine custody, alimony, marital property division and divorce. Judges in circuit court preside over jury trials in serious civil and criminal cases. They even deal with probate matters involving large estates and appeals from District Court and administrative agencies. Does not com-

mon sense dictate and demand that we have the most highly qualified and ethical people filling the position of circuit court judge?

When I applied to the bench 10 years ago, I gave little or no thought to the prospect of a contested election. As it turned out, I went through one with three colleagues in 2014, and in hindsight, it was quite illumi-

nating, and not all bad by any means. The process takes you out into the community, where you meet and learn from a diverse group of non-lawyers and have an opportunity to inform the community on the good work accomplished by the circuit court bench.

Contested elections may be tougher now, but it takes determination, a strong work

ethic, and courage to accomplish anything important, and ultimately to be a good judge. There is no higher calling for a member of the bar. And after practicing as an attorney (and possibly as a District Court judge) for 20 or 30 years or more, what better way to give back to your community and what more significant capstone to your legal career

than to serve as a circuit court judge (no offense intended to my District Court and appellate judicial colleagues)? Yes, there is a good chance you will have to stand for election, but the history in our county is on your side: a sitting circuit court judge has never lost an election. And don't forget, you will have the strong support of the county bar, as always.