

Maryland Judicial Ethics Committee

Opinion Request Number: 2016-02

Date of Issue: March 14, 2016

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Issue: May a retiring judge consent to a county bar association's commissioning a portrait upon the judge's retirement?

Answer: Yes, subject to the conditions discussed in this opinion.

Facts: The Requestor will reach the mandatory retirement age in a few months. The bar association of the county in which the Requestor resides (the "Association") proposes to commission a portrait of the Requestor and present it to either the Judiciary or the State Archives, whichever is more appropriate. The Association has asked for the Requestor's approval.

The Requestor has asked the Court of Appeals to approve him/her for temporary service as a recalled judge pursuant to Courts and Judicial Proceedings Article § 1-302. This request is now pending with the Court. If approved for temporary service, the Requestor will sit in the District and Circuit Courts in his/her county of residence, as well as other courts. The Requestor adds that he/she is currently a member of the board of the Association.

The Requestor seeks the Committee's advice as to whether he/she can consent to the Association's proposal.

Discussion: How the Requestor should respond to the Association is governed by the provisions of the Maryland Public Ethics Law and the Maryland Code of Judicial Conduct (the "Code"). There is a considerable degree of overlap between the relevant provisions of the Public Ethics Law and the Code, and we will focus our attention on the more restrictive alternatives of each for our analysis.

The Public Ethics Law

The Public Ethics Law is codified as Title 5 of the General Provisions Article ("GP"). Subtitles 5 (Conflict of Interest) and 6 (Financial Disclosure) apply to judges. For the purposes of the Public Ethics Law, judges are "State officials of the Judicial Branch." *See* GP § 5-101(l). The Public Ethics Law restricts a State official's ability to accept gifts and the restrictions vary depending upon the nature of the State official's duties. *See* GP § 5-505(b).

A "gift" is defined as: "the transfer of anything of economic value, regardless of form, without adequate and lawful consideration." GP § 1-101(p)(1). A portrait is an item of economic value, but the Association does not propose to give the portrait to the Requestor. Assuming, for purposes of analysis, that a donation to the State falls

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into the definition of “gift” in the Public Ethics Law, the gift will not be accepted by the Requestor, but rather by the State Court Administrator or the State Archivist, as the case may be. Therefore, we conclude that GP § 5-505(b) does not prohibit the Requestor from consenting to the Association’s proposal. We have been unable to identify any other provision of Subtitle 5 that even arguably applies to the scenario posed by the Requestor’s inquiry.

The Code of Judicial Conduct

The Code does not specifically address a judge’s obligations when a gift is made to the State in honor of the judge. However, Section 1 of the Code sets out standards with which a judge must comply in all situations.

Rule 1.1 requires judges to “comply with the law[.]” As we have explained, the Association’s proposal does not violate the Public Ethics Law.

Rule 1.2(a) provides that a judge “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary[.]”¹ In the Committee’s view, the Association’s proposal will not diminish public confidence in the judiciary—if anything, it might increase it.

Rule 1.2(b) states that a judge “shall avoid conduct that would create in reasonable minds a perception of impropriety.” Comment [5] to Rule 1.2 explains:

The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with competence, impartiality, and integrity is impaired.

This rule is at least arguably implicated in cases where the Requestor presides over an action in which a member of the Association is a party or appears as counsel. The Committee recognizes that the Requestor will undoubtedly be gratified because he/she is being honored by the Association. But the Requestor will receive no economic benefit. Because there is no tangible benefit to the Requestor or any other individual, the Committee concludes that no reasonable person would believe that the Requestor’s impartiality would be affected because a party or counsel is a member of the Association.

1. As a corollary to Rules 1.1 and 1.2(a), Rule 3.13 of the Code prohibits a judge from accepting gifts “if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

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Finally, Rule 1.3 provides that a judge “shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”²

It is not clear how the Association intends to raise the money to pay for the portrait. The Requestor should not participate in the Association’s decision-making process on this matter. Further, if the Association decides to engage in a fund-raising campaign, the Requestor may not directly or indirectly participate in it. Direct participation includes planning. Indirect participation extends to being informed of who will solicit donations, as well as potential and actual donors.

The Requestor should make a reasonable effort to assure that: (1) the Association keeps this information from him/her; and (2) the persons involved in fund-raising, either as solicitors, donors, or possible donors, understand that the Requestor has no knowledge, and will have no knowledge, of the solicitation and the donation. If the Requestor informs the Association’s Board in writing of these conditions, the Requestor has made a reasonable effort and need do nothing more unless and until the Requestor learns that the Association is not honoring the conditions.

In conclusion, it is the Committee’s opinion that:

- (1) the Public Ethics Law, insofar as it applies to judges, does not prohibit the Requestor from agreeing to the Association’s proposal;
- (2) the Code does not prohibit the Requestor from sitting as a recalled judge in proceedings in which members of the Association are parties or counsel on the grounds that the Association commissioned a portrait of the Requestor and donated it to the State; and
- (3) Rule 1.3 requires the Requestor to make reasonable efforts to assure that the Association does not use the prestige of the Requestor’s office in any

2. The Public Ethics Law also prohibits abuse of the prestige of office but does so in language a bit different from that contained in Rule 1.3. *See* GP § 5-506(a) (“An official or employee may not intentionally use the prestige of office or public position for that official’s or employee’s *private* gain or that of another.”). (Emphasis added.) GP § 5-506(a) does not, at least on its face, restrict a public official from allowing someone else to use the prestige of the official’s office for private gain, whereas Rule 1.3 does so in explicit terms.

The Committee believes that compliance with Rule 1.3's broader prohibition should also satisfy GP § 5-506(a).

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fund-raising. The Requestor will satisfy the requirement to make reasonable efforts by taking the actions described previously in this Opinion.

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 letter. 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. 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.