

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2023-05

**Date of Issue:** February 10, 2023

Published Opinion     Unpublished Opinion    Unpublished Letter of Advice

### **Judge may not provide recommendation letter in support of individual nominated by the Governor to be Secretary of an Executive Branch Agency**

**Issue:** May a judge upon request provide a recommendation letter on behalf of persons recently nominated by the Governor to be the Secretary of two separate state agencies?

**Answer:** No.

**Facts:** The Requestor was contacted by individuals recently nominated by the Governor to be the Secretaries for two state agencies. He/she declined the invitation to speak before the Senate Executive Nominating Committee but requests an opinion as to whether he/she may write a letter of recommendation. He/she knows the people professionally, having worked with them for many years prior to his/her tenure on the bench and in a limited capacity as a judge.

**Analysis:** The Maryland Code of Judicial Conduct (the “Code”), Title 18, Chapter 100 of the Maryland Rules establishes standards for the ethical conduct of judges.

Judges are permitted to provide recommendations as long as they do not violate the Code. There are several rules implicated by a judge writing a letter of recommendation:

Rule 18-101.3 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.

Comment [2] of that Rule provides that:

A judge may provide a reference or recommendation for an individual based upon the judge’s personal knowledge. The judge may use an official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

This comment and prior opinions by this Committee make it clear that the one condition that has to be satisfied before a judge may write a letter of recommendation or act as a reference is that the judge must have personal knowledge regarding the person who is the subject of the reference. In *Opinion 1982-12*, we advised that a judge with special knowledge regarding a person’s qualifications is “free, as a citizen, to pass on such knowledge and recommendation.” A judge should not, however, write a letter of recommendation for an acquaintance when the judge does not have special knowledge of

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the acquaintance’s qualifications for a particular position. Without such knowledge, the “judge would simply be lending the weight and prestige of his[/her] name and his[/her] office to benefit the employee.” *Id.*

The second set of applicable rules is as follows.

Rule 18-103.1 provides that:

a judge may engage in extrajudicial activities provided that such participation shall not interfere with performance of the judge’s duties; lead to frequent disqualification of the judge; appear to be coercive; or make inappropriate use of court resources.

Rule 18-103.1 must be read in conjunction with Rule 18-101.2 and Rule 18-104.2.

Rule 18-101.2(a) requires that:

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

Rule 18-104.2(a) provides that:

A judge who is not a candidate shall not engage in any partisan political activity.

We applied Rules 18-101.2(a) and 18-103.1 in *Opinion 2017-12*, where we concluded that judges may not accept free tickets to sit in the Governor’s box at Baltimore Orioles baseball games.

Underlying the tenets of the Code is Rule 18-101.2(a):

A judge shall act at all times in a manner that promotes public confidence in the *independence*, integrity, and impartiality of the judiciary.

(Emphasis added.) See Article 8 of the Maryland Declaration of Rights (“That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other[.]”). Rule 18-103.1(c) directs that judges shall not “participate in [extrajudicial] activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

In *Opinion 2017-12*, we said agencies and employees of the executive branch of government appear in court on a regular basis, whether it be on behalf of an administrative agency for a judicial review of its decision, law enforcement officers in criminal matters, or officials in many matters involving decisions and actions of the executive branch. We stated that, although accepting a gift of tickets to attend a baseball game in a relatively luxurious suite might seem innocuous, an observer might conclude that the boundary

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between the judicial and the executive branches of government is not precise or that members of the Governor’s staff and the guest judges are personally close and trade favors. Litigants must be confident that decisions in their cases are based solely on an independent analysis of the law and the facts of the case, free from any bias toward the state or its agents.

Similarly, seeking a recommendation from the judiciary for an executive branch position may well undermine a reasonable person’s confidence by appearing to be too closely associated with members of the executive branch as well as implying that the judiciary is involved in the hiring or appointment process of government officials.

In analyzing the current request, we looked to opinions from other states. Ethics committees have cautioned against furnishing, in connection with government employment, letters of recommendation that might suggest inappropriate political activity. For example, the Kentucky Judicial Ethics Committee stated that a judge should hesitate before giving a reference in connection with any branch of government and warned against letters where the position sought is a sensitive one that might prove embarrassing to the judge or the judiciary. *Kentucky Advisory Opinion JE-74* (quoting D.R. Fretz, R.A. Peoples, and J.C. Wicker, *Ethics for Judges* 13-14 (1982)).

In New Jersey, judges have been advised that, when writing a letter of recommendation that has been solicited by a public sector employer, the judge “must avoid being perceived as a supporter of or active in any political party or activity or any branch or faction of a party.” *New Jersey Guidelines on Extrajudicial Activities*, Appendix B, Addendum A. A comment to the guidelines goes on to state that “[c]onsultation with such body or official is permitted only on matters concerning the administration of justice and by a judge charged by the rules of court with responsibility for those matters.” *Report of the Supreme Court Committee on Extrajudicial Activities*, which is included in the guidelines.

As we have discussed, a judge generally may write a letter of recommendation if it is based on personal knowledge, as long as the judge complies with other duties of the Code (promoting confidence in impartiality and independence of the judiciary. Rule 18-103.1(c)). A letter, here, however, would violate another provision of the Code. Rule 18-103.2 prohibits a judge from appearing voluntarily at a public hearing before an executive or legislative body, except in connection with matters concerning the law, the legal system or the administration of justice. As the Requestor properly determined, appearing in person before the Senate Executive Nominating Committee would be prohibited because the matter does not concern the law, legal systems, or the administration of justice, except in the most tangential way. . The same would apply to a letter of recommendation because it would be, for all effects and every practical way, a voluntary appearance at a public hearing. The Committee concludes that the writing of letters of recommendation in this situation is not permitted by the Code.

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**Application:** The Maryland 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 opinion. 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.