

Maryland Judicial Ethics Committee

Opinion Request Number: 2007-04

Date of Issue: April 30, 2008

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Issue: What are the requirements of an administrative judge whose court issues a request for bids with regard to conflicts with potential bidders?

Discussion: The requesting judge is currently the chair of the board of directors, as well as a prior member of the board of directors, of a national organization whose purpose is to promote the administration of justice and efficiency of court operations. In response to a request for bids, issued at the direction of the requesting judge, as the administrative judge of a court, the national organization chaired by the judge submitted a bid. Because the requesting judge recognized the conflict, the judge did not participate in the consideration of the bid. However, the judge has requested that the Judicial Ethics Committee provide guidance to judges, judicial appointees, and other officials of the Judicial Branch as to how to avoid conflicts involving other entities to which they belong.

Judges, judicial appointees, and other officials of the Judicial Branch of Government are subject to public ethics established by the Legislature in Title 15, State Government Article, Maryland Annotated Code (Maryland Public Ethics Law). The General Assembly enacted the provisions to provide certain specific requirements and “to set minimum ethical standards for the conduct of State and local business.” Md. Code Ann., State Gov’t § 15-101(b). Subtitle 5 identifies conflicts of interest and sets out specific restrictions, which govern the participation of officials in business transactions. Subtitle 6 requires officials to file annual financial disclosure statements.

The officials to whom the provisions of Title 15 apply are identified by the definition set forth in § 15-102. “Official” is either a State official or a public official. *Id.* at § 15-102(bb). For purposes of this opinion, the Committee identifies the following who are defined as State officials: a judge, a judicial appointee, a clerk of the circuit court. *Id.* at § 15-102(ll). Among those identified as Public officials of the Judicial Branch are those employees who receive compensation at least equivalent to State grade level 16 and who are:

- i. employed in the office of a clerk of court;
- ii. paid by a county to perform services in an orphans’ court or circuit court;
- iii. employed by the Attorney Grievance Commission;

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- iv. employed by the State Board of Law Examiners; or
- v. employed by the Court of Appeals Standing Committee on Rules of Practice and Procedure.

Id. at § 15-103(d).

Application of Maryland Code Title 15 to Judges, Judicial Appointees, Public and State Officials

Section 15-501(a) restricts officials from participating in matters if:

(1) the official ... or qualifying relative of the official ... has an interest¹ in the matter and the official ... knows of the interest; or

(2) any of the following is a party to the matter:

- i. a business entity² in which the official or employee has a direct financial interest³ of which the official or employee reasonably may be expected to know;
- ii. a business entity, including a limited liability company or a limited liability partnership, of which any of the following is an officer, director, trustee, partner, or employee: (1) the official or employee; or (2) if known to the official or employee, a qualifying relative of the official or employee;

¹ "Interest" means a legal or equitable economic interest that is owned or held wholly or partly, jointly or severally, or directly or indirectly, whether or not the economic interest is subject to an encumbrance or condition. Md. Code Ann., State Gov't § 15-102(t)(1).

² "Business entity" means a person engaged in business, whether profit or nonprofit, regardless of form. *Id.* at § 15-102(e).

³ "Financial interest" means:

- (1) ownership of an interest as the result of which the owner has received within the past 3 years, is current receiving, or in the future is entitled to receive, more than \$1,000 per year; or
- (2) (i) ownership of more than 3% of a business entity by, *inter alia*: the official or the spouse of the official;
- (ii) ownership of securities of any kind that represent, or are convertible into, ownership of more than 3% of a business entity by, *inter alia*: the official of the spouse of the official.

Id. at § 15-102(n).

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- iii. a business entity with which any of the following has applied for a position, is negotiating employment, or has arranged prospective employment: (1) the official or employee; or (2) if known to the official or employee, a qualifying relative of the official or employee;
- iv. if the contract reasonably could be expected to result in a conflict between the private interest and the official State duties of the official or employee, a business entity that is a party to a contract with: (1) the official or employee; or (2) if known to the official or employee, a qualifying relative of the official or employee;
- v. a business entity, either engaged in a transaction with the State or subject to regulation by the official's or employee's governmental unit, in which a direct financial interest is owned by another business entity if the official or employee: (1) has a direct financial interest in the other business entity; and (2) reasonably may be expected to know of both financial interests; or
- vi. a business entity that:
 - 1. the official or employee knows is a creditor or obligee of the official or employee, or a qualifying relative of the official or employee, with respect to a thing of economic value; and
 - 2. as a creditor or obligee, is in a position to affect directly and substantially the interest of the official, employee, or qualifying relative.

Id. at § 15-501(a)(2).

The restrictions of § 15-501(a)(2) are qualified by their application to those instances when the official “reasonably may be expected to know” of the interest. The restrictions also apply to “a qualifying relative”⁴ of the official “if known to the official.”

Other restrictions of Title 15 include a prohibition on soliciting or accepting gifts from individuals and entities that do business with the official's governmental unit. *Id.* at § 15-505. Nor shall an official *intentionally* use the prestige of office for that official's private gain or that of another. *Id.* at § 15-506.

If an official would otherwise be disqualified from participation by the restrictions of § 15-501(a), the official may nonetheless act if he or she discloses the conflict and:

⁴ “Qualifying relative” means a spouse, parent, child, brother, or sister. *Id.* at § 15-102(gg).

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- (1) the disqualification would leave a body with less than a quorum capable of acting;
- (2) the disqualified official ... is required by law to act; or
- (3) the disqualified official ... is the only individual authorized to act.

Id. at § 15-501(c).

Application of the Canons of Ethical Standards to Judges and Judicial Appointees

Over and above the specific provisions of Title 15 (“minimum ethical standards”), which require scrupulous adherence, judges and judicial appointees must conform their conduct to the high standards of ethics to which they are subject. Judges are bound by the Code of Judicial Conduct, Maryland Rule 16-813, and judicial appointees are bound by the provision of the Code of Conduct for Judicial Appointees, Maryland Rule 16-814 (collectively, the “Code”). Canon 1 of each of the Rules notes that the codes are necessary to preserve the independence of the “judiciary” and “judicial system,” respectively. The ethical provisions that apply to judges and judicial appointees, for purposes of this Opinion, are essentially the same, and hereinafter the term “judges” is intended to apply both to the judges and to judicial appointees.

Canon 2 illustrates the broader reach of the Code. For example, while the restrictions of § 15-506 apply to *intentional* conduct, judges must not only avoid impropriety, but also the appearance of impropriety. Canon 2A. Beyond refraining from intentional conduct, judges must not allow their conduct to *appear* to be improperly influenced by relationships or employment opportunities. Canon 2B. Nor may judges allow others to *appear* to be able to influence judicial conduct. *Id.*

Further demonstrating the breadth of the ethics requirements of judges is the requirement that a judge stay informed about his or her personal financial interests and those of each member of the judge’s household, including the judge’s spouse, child, ward, and financially dependent parents or other relatives. Canon 3D(2). Canon 3D requires more of a judge than the restrictions of § 15-501, which applies if the official “knows” of the interest or “reasonably may be expected to know.” Judges are charged with being aware of their financial interests.

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Canon 3 also addresses the performance of judicial duties. While Canon 3D(1) pertains to “proceedings” in which recusal may be required, its provisions are instructive. Recusal is required when a judge’s impartiality might reasonably be questioned, including, in part, instances when:

- c) a judge knows that he or she ... or a member of the judge’s family, has a significant financial interest in the subject matter in controversy or in a party to the proceeding;
- d) the judge, the judge’s spouse, an individual within the third degree of relationship to either of them, or the spouse of such an individual:
 - (i) is known to be ... a director, officer, or trustee of a party;
 - ...
 - (iii) is known by the judge to have a significant financial interest that could be substantially affected by the proceeding[.]

Canon 3D(1)(c) and (1)(d).

The Comment to Canon 3D(1)(c) illustrates the heightened duty of judges. While that section requires recusal if the judge knows that he or she, or a member of his or her family, has a significant financial interest in the matter, the Comment notes that “[t]here may be situations that involve a lesser financial interest but nonetheless require recusal because of the judge’s own sense of propriety.”

Canon 4 concerns extra judicial activities. Canon 4D prohibits judges from engaging in business dealings which “would be perceived to violate Canon 2B” (improper influence) or involve the judge in “frequent transactions or continuing business relationships with ... persons likely to come before the court on which the judge serves.” Canon 4C(4)(b) prohibits judges from participating in the governance of an organization “conducted for the economic ... advantage of its members.”

Recommendations

Judges’ annual financial disclosure statements disclose, among other matters, financial interests in real estate and business entities, entities in which each reporting judge holds a position as a director, officer, trustee, or partner, and the names of family members employed by the State, along with the titles and nature of positions held. Md. Code Ann., State Gov’t § 15-607. The information contained in those annual statements identifies those specific interests and entities that potentially could cause a judge to have a conflict in a matter that might come before the judge or that might involve a matter contemplated by the Legislature in Title 15 of the State Government Article.

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The Committee encourages judges promptly to disclose to any entities to which a judge belongs the potential for conflict of interests, in the event that the entity wishes to enter into a contract with the judge or agency for which the judge has administrative responsibility.

Further, the judge should advise the entity that, if it wishes to respond to a proposal issued by or at the direction of the official, or by an agency in which the official is employed, it should notify the official and the agency of its interest before responding to the proposal. Upon receipt of such notice, the official should recuse himself or herself from any further participation in the matter.

In the event that a judge must recuse, he or she should designate another qualified official to act in accepting or rejecting a proposal. If the necessity for a recusal arises before solicitations are published, the recusal should be made known in the solicitation. If the necessity for a recusal arises after bids or proposals have been received, the judge should notify all bidders of the potential issue, the recusal and the identity of the designee. If the conflict becomes evident after the award of a bid or execution of a contract, the Committee recommends that the judge notify all bidders of the issue, the recusal, and identify the official whom he or she has designated and allow bidders to submit any inquiries or appeals to the designee.

In light of the high ideals expressed by the Code of Judicial Conduct and the Code of Conduct for Judicial Appointees, the Committee does not feel that any minimum dollar amount of a bid or transaction should be considered. Conflicts should be avoided when they are identified, regardless of the amount of money involved.

When an official is uncertain as to the appropriateness of participating in a transaction, that official may request an opinion of an advisory body authorized to determine the appropriateness of such participation. Md. Code Ann., State Gov't § 15-501(b). The advisory body authorized to issue advisory opinions regarding questions arising under Title 15 as to the Judicial Branch is the unit designated by the Court of Appeals. *Id.* at § 15-102(b)(1). The Court of Appeals has designated the Judicial Ethics Committee to issue advisory opinions to State officials of the Judicial Branch of Government. Rule 16-812.1(i)(2).

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Application: The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the requestor described in this opinion, 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 you engage in a continuing course of conduct, you 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.