

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2017- 08

**Date of Issue:** April 5, 2017

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Senior Judge's Ability to serve as "Independent Monitor" (Monitor) of Baltimore City Police Department (BPD) pursuant to an Agreement to the entry of a proposed Consent Decree by the United States District Court for the District of Maryland (Court)

**Issue:** May a Senior Judge serve as part of a team serving as Monitor of BPD's compliance with a proposed Consent Decree consented to by the United States Department of Justice (DOJ), the Mayor and City Council of Baltimore (City), and the BPD?

**Answer:** Yes, with qualifications.

**Facts:** Sometime prior to August 2016, the DOJ conducted an investigation of the practices of the BPD. On August 10, 2016, DOJ issued a report detailing its findings of reasonable cause to believe that the BPD engages in a pattern of unlawful conduct, including making unconstitutional stops, searches, and seizures; using strategies that result in racial disparities; using excessive force; and retaliating against people using protected expression. The topics addressed by the report are (1) community oversight; (2) community policing and engagement; (3) stops, searches, arrests and police-community interactions; (4) impartial policing; (5) responding and interacting with people with behavioral health disabilities or in crisis; (6) use of force; (7) interactions with youth; (8) transportation of persons in custody; (9) First Amendment protected activities; (10) handling reports of sexual assault; (11) technology; (12) supervision of officers; (13) misconduct investigations and discipline of officers; (14) coordination with the City school police force; (15) recruitment, hiring, and retention of officers; (16) staffing, performance evaluations, and promotions of officers; (17) officer assistance and support; and (18) implementation and enforcement of the proposed Consent Decree.

Subsequent to issuance of the report, the DOJ filed a complaint in the Court. As stated above, the parties entered into an Agreement to settle the suit with the expectation that a Consent Decree will be entered by the Court. Anticipating the entry of the proposed Consent Decree, the Requestor has asked if the Requestor can participate in the capacity described below.

One of the terms of the proposed Consent Decree is that the parties will select a Monitor, which will include "a team of individuals with expertise in policing, civil rights, monitoring, data analysis, project management," and persons with local experience and expertise with the City's communities. The Requestor has been asked to be part of a team that will apply to be chosen as Monitor. The Requestor advises that members of the team

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will include two “academics,” a former FBI agent, lawyers, several law enforcement executives, an expert in information technology, and others.

The proposed Consent Decree contains provisions governing the selection of the Monitor. The Monitor will serve for an initial period of three years. The Monitor’s service may be extended by the Court beyond the initial period.

Within 90 days after assuming its duties, the Monitor will develop a Monitoring Plan for the first year of the Decree.

The City will compensate the Monitor for its services.

The Monitor will conduct reviews to determine compliance with material terms of the proposed Consent Decree and will provide the parties with the reviews, data, and analysis. The Monitor will also conduct “Outcome Assessments” to measure whether the practices are achieving the purposes of the proposed Consent Decree. It will provide the parties with the assessments, data, and analysis. The “Outcome Assessments” will include (1) conducting an annual community survey that assesses the satisfaction of the community; (2) an annual analysis of response times for calls of service; (3) assessing whether arrests are supported by probable cause; (4) assessing whether officers are using force lawfully; (5) assessing whether officers make stops and detentions based on community policing principles; (6) assessing whether officers conduct searches and frisks in compliance with the Decree; (7) assessing whether officers deliver services without disproportionate impact; (8) assessing whether people with behavioral disabilities receive reasonable modifications; (9) assessing whether officers interact appropriately with youth; (10) assessing whether members of the public are able to express themselves appropriately; (11) assessing whether officers respond to sexual assault in a nondiscriminatory manner; (12) assessing whether the BPD effectively trains officers; (13) assessing whether the BPD is providing effective supervision of officers; and (14) assessing whether the BPD is effectively holding officers accountable.

Two years after the effective date of the proposed Consent Decree, the Monitor will conduct a Comprehensive Reassessment.

The Monitor may make recommendations to the parties regarding measures to ensure compliance with the proposed Consent Decree and its objectives. The Monitor may provide technical assistance to the parties.

The Monitor will file with the Court and post to the Monitor’s website semi-annual written reports with respect to progress. The written reports will include an assessment of the progress made by the parties; a description of the work conducted by the Monitor;

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the findings for each Compliance review, redacted as appropriate; the findings for each Outcome Assessment; a projection of the work to be completed, and the Monitor’s recommendations to achieve full Compliance. The Monitor will maintain regular contact with the parties.

The proposed Consent Decree states that the Monitor is an agent of the Court, “and accordingly the records maintained by the Monitor will not be deemed public records subject to public inspection.”

Under the scheme set forth in the proposed Consent Decree, the Monitor will interact with the parties. The parties may accept the Monitor’s findings and recommendations. If a party disagrees with an action of the Monitor, the party may seek relief from the Court.

Paragraph 477 of the Decree provides:

The Monitor may testify as to its observations, findings, and recommendations before the Court with jurisdiction over this Agreement, but will not testify in any other litigation or proceeding with regard to any policy or practice, act or omission of the City, BPD, or any of their officials, officers, agents, or employees related to this Agreement or regarding any matter or subject that the Monitor may have received knowledge of as a result of its performance under this Agreement. This paragraph does not apply to any proceeding before the Court related to performance of contracts or subcontracts for monitoring this Agreement.

**Discussion:** Based on knowledge and experience, a Senior Judge is well suited to perform the duties of a member of the Monitor. The ethics issues raised by this request, from specific to general, (1) involve extrajudicial activities; (2) consulting with the executive or legislative branches of government; (3) service on governmental committees or similar entities; (4); maintaining independence and impartiality; (5) publicly expressing opinions on legal issues; and (6) the receipt of compensation. We shall address these in turn. The conclusion involves a balancing of relevant factors. Subject to disqualification from service as a Senior Judge discussed below, we conclude that the Requestor may serve as a member of the Monitor.

Rule 18-103.1 of the Code provides:

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Except as prohibited by law or this Code, a judge may engage in extrajudicial activities. When engaging in extrajudicial activities, a judge shall not:

(a) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(b) participate in activities that will lead to frequent disqualification of the judge;

(c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

(d) engage in conduct that would appear to a reasonable person to be coercive; or

(e) make inappropriate use of court premises, staff, stationery, equipment, or other resources.

In recognition of the fact that judges are uniquely qualified to engage in activities that concern the law, such activities are permitted subject to specific requirements. The Requestor advises that the activity in question is not a fulltime position. Nevertheless, a review of the Consent Decree indicates that it likely will require a significant amount of time. A Senior Judge does not have to perform judicial duties on a fulltime basis, however. We conclude that the Requestor can perform the activity without interfering with the Requestor's duties as Senior Judge. *See* Rule 18-103 (a). Disqualification is discussed below, but in this context, we note that as Senior Judge, there is no required minimum amount of judicial activity. *See* Rule 18-103 (b). Independence and impartiality will be discussed below. Lack of integrity is not an issue. *See* Rule 18-103 (c). There is no indication of coercive conduct or inappropriate use of court resources. *See* Rule 18-103 (d) and (e).

Rule 18-103.2 of the Code provides:

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(a) in connection with matters concerning the law, the legal system, or the administration of justice;

(b) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(c) when the judge is acting self-represented in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

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It appears that the activity in question may involve consultation with an executive or legislative body or official. The consultation would be limited to matters that fall within subsection (a), however.

Rule 18-103.4 of the Code provides that a judge “shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.” The primary purpose of the Rule is to avoid violation of the principle of separation of powers among the branches of government.

The Declaration of Rights, Article 8, requires the separation of powers. The Preamble to the code of Judicial Conduct (Code) provides that an “independent, fair, competent, and impartial judiciary” is “indispensable.” Rule 18-100.4. This Committee has issued several opinions with respect to a judge’s service on governmental committees and similar entities. Frequently, the opinions turn on the extent to which an entity concerned with the law was mandated to perform an executive or legislative function, an activity that would interfere with the independence of the judiciary.

The Monitor acts as an agent of the Court. The Monitor is not part of the executive or legislative branches of government. The Requestor’s consultation with the executive or legislative branches of the City would relate to matters that concern the administration of justice. *See* Rule 18-103.2 (a). It appears that recommendations by the Monitor will not relate directly to executive or legislative actions; nevertheless, in order to implement them, the recommendations may require such actions. The recommendations are advisory, however, and will be voluntarily accepted or rejected by the parties. If rejected, it would be up to the Court to make a decision on enforcement. Thus, we conclude that the activity does not violate the separation of powers requirement, does not violate the independence requirement of Rule 18-103.1(c), and does not violate Rule 18-103.2.

We are troubled, however, by a reasonable person’s perception of the Requestor’s impartiality, *see* Rule 18-101 (c), particularly because part of the Monitor’s responsibility is to make recommendations. Moreover, the Monitor will file reports that are public and post information on its website that is public. It appears that those reports will contain detail. Thus, it is reasonably possible that public statements relating to police conduct may be attributed to or be perceived as attributable to the Requestor. *See* Rule 18-102.10 (b) (with respect to an “issue that is likely to come before the court,” a judge “shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties....”). Public expressions of positions on issues may reasonably be perceived as affecting impartiality in a specific case in that the judge

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may rule consistent with a position and not on the merits of that case. The subject matter of the proposed Consent Decree is high profile and presumably will be the subject of considerable media coverage. Although postings by the Monitor will be law based, the findings and recommendations may become intertwined with political positions.

The Requestor advises that the Requestor will not seek recall status for the courts in Baltimore City. The City and members of the BPD will likely be participants in many cases pending in those courts. Thus, we agree that the Requestor should not perform judicial duties in those courts. In addition, the Requestor should not perform duties as a Senior Judge with respect to any matter in which any of the parties to the Decree are involved. Because of the Committee's concerns about the perception of impartiality, however, the Committee concludes that Requestor should refrain from participation as a Senior Judge in all matters in which alleged misconduct of a police officer is an issue, regardless of the officer's department or where the action is pending.

The Requestor would receive compensation for the activity in question. Rule 18-103.12 provides that a judge may accept "reasonable compensation" for permitted extrajudicial activities "unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." If the compensation is reasonable and commensurate with the task, this Rule is not violated. Nevertheless, the receipt of compensation may implicate Article 33 of the Maryland Declaration of Rights. Article 33 provides, in part:

No Judge shall hold any other office, civil or military, or political trust, or employment of any kind, whatsoever, under the Constitution, or Laws of this State, or of the United States, or any of them, or receive fees, or perquisites of any kind, for the discharge of his official duties.

The interpretation and application of this provision is not within this Committee's purview. We express no opinion with respect to its application.

Subject to the above disqualifications from judicial service, we conclude that the activity in question does not violate the Code. The Requestor should make known to the other members of the Monitor the limitations on participation as discussed herein.

**Application:** The Maryland 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.

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Additionally, this opinion should not be considered to be binding indefinitely. The passage of time may result in amendments 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.