Maryland Judicial Ethics Committee

Opinion Request Number: 1981-14

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■ Published Opinion ☐ Unpublished Opinion ☐ Unpublished Letter of Advice

No Impropriety in Judge Leasing Building to State Agency
and Sitting in Cases Involving Agency

A judge has advised us that, in response to a public solicitation for bids, he offered to lease a suite of offices in a commercial building that he owns to the State Department of General Services, for the use of the Division of Parole and Probation. He has requested an opinion as to whether there is an ethical problem in entering into such a lease.

As was pointed out in In re Foster, 271 Md. 449 (1974), and in Judicial Ethics Committee [Opinion Request Nos. 1975-06, 1976-11, 1977-06, and 1979-03], there is nothing inherently inappropriate in a judge owning commercial real estate or entering into a lease of it, provided that the lease does not "tend to reflect adversely on his impartiality, interfere with the proper performance of his duties, exploit his judicial position or involve him in frequent transactions with lawyers or persons likely to come before his court." So long as the judge's involvement in the management of the property is minimal and his relationship with the tenant is purely one of landlord-tenant, we saw no inherent impropriety. That is no less the case where the tenant is a State agency than where the tenant is an attorney practicing before the court ([Opinion Request Nos. 1976-11 and 1979-03]).

Although not specifically included in the judge's request, we think it advisable to address the related question of whether the judge would be obliged to recuse himself in any case in which his tenant appears before him in some capacity. That aspect of the problem was raised, but not addressed, in [Opinion Request Nos. 1976-11 and 1979-03]. In light of the subsequent enactment of the Public Ethics Law (Md. Code, Art. 40A[*]) and to provide a more complete response to the underlying ethical issue, it must now be considered.[1]

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[*] As of the editing date [July 10, 2006], recodified generally as Maryland Code, State Government Article, Title 15.

[1] Art. 40A, § 2-104(a) authorizes the "appropriate advisory body" to issue an advisory opinion "concerning the application of this article upon the written request of a person subject to its provisions." A judge is subject to the provisions of the Act. See art. 40A, §§ 1-201(w) and (dd), 3-101. By virtue of designation by the Court of Appeals, this Committee is the "appropriate advisory body" to render an advisory opinion to a judge. See art. 40A, § 1-201(b); Rule 16, Rules of Judicial Ethics. [As of the editing date [July 10, 2006], former art. 40A, §§ 2-104(a), 1-201(w) and (dd), 3-101, and 1-201(b) are reworded and recodified as Maryland Code, State Government Art. §§ 15-301, 15-102(bb) and (ll), 15-501, and 15-102(b), respectively, and former Rule 16 is Rule 16-813, Canon 7].

The issue involves both the canons of judicial ethics and § 3-101 of art. 40A[*].

[Opinion Request Nos. 1976-11 and 1979-03] discussed the underlying propriety of a lease in the context of American Bar Association Canon 5C(2) and Maryland canons XXIV and XXV, generally precluding a judge from entering into and maintaining business relationships which might bring his personal interest into conflict with the impartial performance of his official duties or which might arouse suspicion as to his impartiality.[2] Of more precise applicability here are Canon IV, requiring that a judge's conduct be free from impropriety or the "appearance of impropriety," and Canon XXVIII requiring that a judge abstain from "taking part in any judicial act in which his personal interests are involved." See also Rule 2, Rules of Judicial Ethics.

The relevant provision of art. 40A is § 3-101(a)(4)[***], which precludes a judge from participating in any matter in which one of the parties is a "business entity which is a party to an existing contract with the [judge] ... if the contract could reasonably be expected to result in a conflict between the private interest of the [judge] and his official State duties." (Emphasis supplied.)

The statutory provision – the prohibition and the caveat – well states the ethical considerations implicit in Canons IV and XXVIII. A judge ought not to participate in a case in which he has some relationship with a party that might reasonably be expected to influence his required impartiality in the matter. Whether such a relationship necessarily arises from a leasing arrangement is something that has to be judged on a case-by-case basis.

In judging the matter of recusal, we must, of course, assume that the underlying leasing arrangement falls within the permissible ambit of our earlier opinions – that there are no inordinate entanglements between the judge and the tenant. It is always possible that complications or disputes may arise out of any leasing arrangement such as to produce a very real potential for conflict of interests; and, if that occurs, even if the leasing arrangement itself is permissible, the judge would clearly have to recuse himself in order to avoid the appearance of partiality.

Where the tenant is a private individual or entity, there are other factors that also have to be considered, among which are: (1) the extent of any personal and direct relationship between the judge and the tenant emanating from the lease, (2) whether the tenant's interest in the case may affect his ability or desire to perform under the lease, his desire to continue or renew the lease, or his attitude toward the judge as a judge or as a landlord, (3) the relative substantiality of the benefits accruing to the judge from the lease, and (4) whether the private relationship by virtue of the lease might reasonably cause others to question the judge's impartiality in the matter.

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[*] As of the editing date [July 10, 2006], Maryland Code, State Government Article, § 15-501.

[2] We find nothing in the Public Ethics Law inconsistent with these Canons; however, we do call the judge's attention to the applicable financial disclosure requirements.

[***] As of the editing date [July 10, 2006], reworded and recodified as Maryland Code, State Government Article, § 15-501(a)(2)(iv)1.

To some extent, these considerations may also apply where the tenant is a public agency, but perhaps in different ways. A public body is not quite so monolithic as most private entities. It is not to be supposed, for example, that a judge would be improperly influenced in a criminal case prosecuted by a locally elected State's Attorney because the Department of General Services has leased space from him for some State agency; nor is it likely that the Department of General Services will act one way or another with respect to the property because of the judge's decision in a case involving some other State agency.

We think that, in general, where a public lease is relatively simple and straightforward, where there exist no extensive personal relationships or entanglements with the contracting or using agency, where the outcome of a case is not likely to influence in any way the performance or continuation of the lease, and where neither the judge nor the parties reasonably expect the existence of the landlord-tenant relationship to affect the judge's handling of the case, recusal is not required under either the canons or the statute merely because the public body, or some agency of it, is a party to the case or has some interest in it.

With respect to the particular matter before us, from the information provided to us in the judge's request, we see no impropriety in the judge entering into the lease or sitting in cases thereafter in which the Division of Parole and Probation may have some interest.