Maryland Judicial Ethics Committee

Opinion Request Number: 2014-30[1]

Date of Issue: September 25, 2014

■ Published Opinion ☐ Unpublished Opinion ☐ Unpublished Letter of Advice

The "Ice Bucket Challenge"

Issue: May a judge participate in the "ice bucket challenge"?

Answer: Yes. The judge may do so, but only under circumstances where it is clear that he or she is acting in a personal capacity.

Facts: The requesting judge (the "Requestor") relates:

> I [recently] became aware that I was the recipient of an "Ice Bucket Challenge," a phenomenon that is currently sweeping the country for the benefit of ALS research.[2] A prominent local businessman who is a friend of mine, appeared in a cell-phone videotaped Youtube message, sitting outside a building. Just before someone dumped a bucket of ice water over him, he stated that he challenged "the Honorable [Requestor], . . [a Maryland] Judge," and two others to participate. While he never specifically stated what it was he was challenging me to do, the well-known nature of the challenge is that once the gauntlet is thrown, the ball is in the court of the person challenged to either get doused with a bucket of ice water, or write a check to an ALS charity. Those who answer the challenge usually do both, and often the response is also recorded in some way and publicized, many times with additional people being challenged as a way to increase the fund-raising.
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> To what extent, if at all, may I participate in the Ice Bucket Challenge consistent with my ethical obligations pursuant to the Judicial Code of Conduct?

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[1] Judge Duden did not participate in this opinion.

[2] "ALS" refers to amyotrophic lateral sclerosis, a progressive neurodegenerative disease that affects nerve cells in the brain and the spinal cord, also known as "Lou Gehrig's Disease."

Discussion: Before considering how the Maryland Code of Judicial Conduct (the "Code"), Maryland Rule 16-813, applies to the Requestor's inquiry, it may be useful to provide additional information about the "ice bucket challenge," which is an activity undertaken to raise public awareness of ALS and monetary contributions to the ALS Association, which provides funding for ALS research, treatment and related activities. The ALS website explains:

> The challenge involves people getting doused with buckets of ice water on video, posting that video to social media, then nominating others to do the same, all in an effort to raise ALS awareness. People can either accept the challenge or make a donation to an ALS Charity of their choice, or do both.

http://www.alsa.org/news/archive/ice-bucket-challenge.html (last visited September 6, 2014).

The first "ice bucket challenge"—in the context of ALS—appears to have been posted on a social media website on July 31, 2014. Since then, the practice has, literally, "gone viral." The ALS Association reported that, as of August 29, 2014, it had received over $100 million in contributions (By comparison, the ALS reports that its contributions for the previous August were approximately $3 million). *Id.* The ice bucket challenge has generated overwhelming public interest. For example, and focusing on just *one* social media website, more than 2.4 million ice bucket-related videos have been posted on Facebook, and 28 million people have uploaded or commented upon these posts. *See* http://www.bbc.com/news/magazine-29013707 (last visited September 6, 2014). With this context in mind, we turn to the Requestor's inquiry.

As we interpret the available information, the "ice bucket challenge," involves four separate steps: (1) dousing oneself (or being doused) by icy water; (2) challenging other, specifically identified individuals to do the same or to make a contribution to the ALS Association (or both); (3) recording the dousing and the challenge; and (4) posting the video on a social media website.

Two provisions of the Code are particularly relevant in this matter. Rule 1.3, in pertinent part, prohibits judges from "lend[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow[ing] others to do so." Rule 1.2, in turn, requires, *inter alia*, that judges "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Comment [2] to Rule 1.2 states: "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other persons, and must accept the restrictions imposed by this Code."

In discussing charitable fund-raising events, in the judicial ethics context, it has been rightly observed that:

> Ethical standards for judges limit participation in fund-raising for charitable organizations to ensure that the *prestige of office is conserved for its essential purpose* – maintaining public confidence in the independence, impartiality, and integrity of judicial decisions. The restrictions also address the concern that *people may feel pressured to make donations when a judge is asking or may expect future favors from a judge* in return for a donation. *But the rules impose limits, not absolute prohibitions*, in recognition of judges' desire to contribute to their communities off-the-bench as well as on.[3]

(Emphasis added).

In the Committee's view, the ice bucket challenge is inextricably linked with the ALS Association's extremely successful and highly-publicized fund-raising efforts, which have been "[l]argely driven by social media." [4] In the friend's challenge of the Requestor, the Requestor was *specifically identified* as a judge and the court on which he or she sits was identified. Consequently, for the Requestor to record his or her response to the challenge and to post the recording on a social media website would unavoidably and impermissibly lend the prestige of judicial office to the ALS Association's fund-raising campaign.[5]

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[3]Cynthia Gray, *Judicial Conduct Reporter*, Vol. 36, No. 1, Spring 2014, p.1.

[4]Bryan P. Sears, *Ethics Rules Might Chill Challenge: Public Officials Can't Use 'Prestige of Office,'* The Daily Record, August 25, 2014, at 1A.

[5]Our research has uncovered no judicial ethics opinions from other jurisdictions, to date, addressing participation in the ice bucket challenge. This is not surprising given that it is a relatively recent phenomenon. In Georgia, however, a judge who publicly announced her intent to take the challenge decided not to do so after being contacted by the Georgia Judicial Qualifications Commission, the body authorized to conduct investigations and hearings with respect to complaints of ethical misconduct by Georgia judges and to issue advisory opinions regarding appropriate judicial conduct.

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This Committee has previously opined on the subject of judges' use of social networking sites. In [Opinion Request No. 2012-07], issued on June 12, 2012, we observed that information posted by a judge on social media can be quickly and widely disseminated, and possibly beyond its intended audience. We thus cautioned that, for a host of reasons, social media networking sites are "fraught with peril for judges." A global survey of 19 countries, addressing online privacy issues, found that nearly half of the sample (47%), and a majority of millennials, "worry that friends or family will share inappropriate personal information about them online. Around one-third overall already regret posting personal information about themselves."[6]

Of course, not all charitable endeavors in which a judge may wish to engage need entail making reference to, or otherwise implicating, the judge's judicial office. Indeed, the ice bucket challenge may arise or be addressed in different ways. For example, the Code does not prohibit a judge, having been challenged, from responding by making a donation and informing his or her challenger of that fact, without recourse to social media, and without publicly challenging others. Likewise, a judge might be challenged by a family member or friend in such a way that the judge's office is not disclosed.

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http://www.dailyreportonline.com/id=1202669115537/JQC-Puts-Freeze-on-Judges-Ice-Bucket-Challenge (last visited September 8, 2014). We also note that the Secretary of State has prohibited diplomats from participating in the challenge for reasons much as the same as those expressed in this opinion:

> There are firmly established rules preventing the use of public office, such as our ambassadors, for private gain, no matter how worthy a cause . . . . Thus, high-ranking State Department officials are unfortunately unable to participate in the ice bucket challenge.

See http://time.com/#3154685/u-s-diplomats-banned-from-ice-bucket-challenge (last visited August 23, 2014).

[6] Naomi Troni, *Social Media Privacy: A Contradiction in Terms?* Forbes, April 24, 2012, http://www.forbes.com/sites/onmarketing/2012/04/24/social-media-privacy-a-contradiction-in-terms/ (last visited September 17, 2014).

While responding to a challenge, under such circumstances, is not prohibited by the Code, a judge must exercise care not to disclose his or her judicial status and not to permit others to do so, and must also refrain from "mak[ing] inappropriate use of court premises, staff, stationery, equipment, or other resources[,]" pursuant to Rule 3.1(e). In addition, he or she must comply with the requirements of Rule 3.7(a). Comment [4] to Rule 3.1 states: "While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions ... for an organization, even as permitted by Rule 3.7(a), might create the risk that the person solicited would feel obligated to respond favorably or would do so to curry favor with the judge."

Although Rule 3.7(a) permits a judge to solicit contributions from "judges over whom the judge does not exercise supervisory or appellate authority," the Committee does not interpret this rule as addressing solicitation in the form of a *public challenge*, particularly one communicated through social media. A solicitation issued by means of social media is accessible not only to the judge's online contacts, but potentially, to thousands of people within the social network. As such, those viewing the posting may contribute "to curry favor with the judge." *See, e.g.,* [Massachusetts Advisory Opinion No. 2008-11] (recommending that a judge with a webpage on a charity's website take it down, or otherwise make it publicly inaccessible, because of the risk that individuals other than those from whom the judge might properly solicit contributions would see it and contribute on the judge's behalf.).

We have long recognized the "dilemma that judges may face when asked to participate in extra-judicial activities. There is often a fundamental tension between judicial independence and the benefits of community involvement." [Opinion Request No. 2007-11], issued on October 14, 2008. Yet the benefits of such involvement are recognized by the Code. Comment [2] to Rule 3.1 states: "Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system." Broadly speaking, with respect to fund-raising activities, as with the use of social media, the ethics questions that arise typically do not involve *whether* a judge can participate, but rather, the *manner* in which he or she does so.[7] Accordingly, every situation must

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[7]*See, e.g.*, [Illinois Judicial Ethics Committee Opinion No. 96-10] (Determining that a judge could not participate in a local bar association fund-raiser for a charitable organization where, as part of the festivities, the bar association proposed a "Run for the Robes," featuring judges running a 100-yard
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be analyzed based on the particular facts presented and great care must be taken to avoid actions that may be perceived as coercive or an invitation to court favor with the judge.

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.

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dash dressed in their robes, and a dunk-tank featuring judges as the targets.); [South Carolina Advisory Opinion 3-2009] (concluding that a judge could participate as a dancer in a fund-raising event similar to "Dancing with the Stars," and could ask for donations from other judges over whom the judge had no authority as long as the judge abided by other provisions of the Canons).