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Judges Can Take Pay for Some Artistic Activities, Panel Says

In an opinion issued on Friday, the Advisory Committee on Judicial Ethics modified an earlier opinion by the committee, which had barred judges "in all circumstances" from offering artwork for sale directly to the general public. The queries that spurred the committee's opinion were part of an influx of inquiries regarding "extra-judicial" work the committee has recently received from judges.

Mark Fass

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A state judicial ethics panel has loosened the ethical guidelines for judges who wish to work on the side as artists.

In an opinion issued on Friday, the Advisory Committee on Judicial Ethics modified an earlier opinion by the committee, which had barred judges "in all circumstances" from offering artwork for sale directly to the general public.

Here, the committee found that artist-judges may engage third parties, such as agents or publishers, to market their work.

The queries that spurred the committee's opinion, [Joint Opinion 09-192/09-231](#), were part of an influx of inquiries regarding "extra-judicial" work the committee has recently received from judges, according to the committee's chairman, George D. Marlow.

The ethics advisory opinion appears on page 6 of the print edition of today's Law Journal.

"The judges are under tremendous financial pressure," said former Justice Marlow, who stepped down from the Appellate Division, First Department, bench in 2007 and retired from Dutchess County Supreme Court last July. "This is year 12 they haven't had a raise and they're looking for more ways to earn some extra income that will not interfere with their main job of being a judge and will not cross any ethics lines."

The advisory committee, established by the Office of Court Administration in 1987, answers such questions to provide guidelines for judges facing ethical quandaries.

The committee's opinion does not bind New York's judges. However, under the state's Judiciary Law, conduct that comports with the committee's opinion will be "presumed proper" in any subsequent investigation by the Commission on Judicial Conduct.

The joint opinion is the result of two separate inquiries by two anonymous judges.

The judge in inquiry 09-231 is an artist who wanted to know whether a judge may exhibit art in a gallery, on a gallery's Web site, in an art show or in public places such as libraries.

The judge in inquiry 09-192 is a musician "who has been playing an instrument solo for decades" and now hopes to pursue part-time employment as a solo performer, according to the opinion.

The panel found that both judges can pursue their creative endeavors and seek compensation, subject to certain limitations.

Such outside work, for example, must remain "occasional," the panel cautioned, and judges who work as solo musicians must accept payments only from persons "unlikely to appear in the judge's court."

Under New York's rules of judicial conduct, judges may participate in "extra-judicial" activities so long as their participation does not cast reasonable doubt on their impartiality, detract from the dignity of their office or interfere with the performance of their work.

Over the years, artistically minded judges have repeatedly asked for further guidance. The present joint opinion cites 20 years of the committee's opinions regarding whether judges may teach dance lessons (sometimes), act in commercial motion pictures (no) or participate in a television series based on the "judge's judicial experience and life" (definitely not).

Here, the committee relaxed its stance regarding the marketing of art, if only subtly, by extending to aspiring artists a guideline it had previously set forth for aspiring novelists.

Like a judge trying to sell a manuscript, a judge hoping to sell artwork may engage a third party in order to market his or her work to the general public, the committee stated.

The opinion, decided by a majority of the 23-member committee, is unsigned.

Maryrita Dobiak serves as the committee's chief counsel.

The impact of the decision remains to be seen, as New York's judiciary is not particularly well known for breeding or attracting artists. A court spokesman could not name any painters or photographers on the state bench.

To the contrary, several judges yesterday bemoaned the fact that the opinion would not apply to their work, as their artistic endeavors had been strictly non-profit.

Manhattan Civil Court Judge Gerald Lebovits ([See Profile](#)) has played the drums for several rock bands, including one called "Judge Me Not."

Judge Lebovits said yesterday that although his bands have never played Madison Square Garden, they have performed several successful gigs at state and county bar functions.

"That's the sad story of my life: I've never been paid for a gig," Judge Lebovits said. "The most money I've ever earned when I played the drums is that I didn't have to pay the admission charge."

Acting Brooklyn Supreme Court Justice Matthew D'Emic ([See Profile](#)), who put himself through Brooklyn Law School in the mid-1970s in part by playing bass, said that he too was sadly distant from pushing any ethical boundaries, his recent appearance as a finalist in an AARP-sponsored "Bay Ridge Idol" contest notwithstanding.

"What I do, I'm not breaking any rules," Justice D'Emic said. "Usually, they don't pay me. I'm not that good."

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Joint Opinion 09-192/09-231

06-08-2010

The Committee on Judicial Ethics responds to written inquiries from New York state's approximately 3,400 judges, who serve both full- and part-time. The committee's opinions interpret the Rules Governing Judicial Conduct (22NYCRR, Part 100) and the Code of Judicial Conduct. The committee, comprised of 26 current and retired judges and headed by former Justice George D. Marlow, also answers inquiries about proper campaign conduct from candidates for elective judicial office. The New York Law Journal publishes selected recent opinions of the committee.

Digest: A full-time judge may pursue his/her artistic or other creative endeavors as a hobby and may seek compensation for such endeavors on an occasional basis, subject to certain limitations.

Rules: 22 NYCRR 100.2; 100.2(A); 100.2(C); 100.3; 100.3(A); 100.4; 100.4(A)(1)-(3); 100.4(B); 100.4(C)(3)(b)(i); 100.4(D)(1)(a)-(c); 100.4(D)(3); 100.4(D)(3)(b); 100.4(H); 100.4(H)(1); 100.4(H)(1)(a); 100.4(H)(1)(c); 100.4(H)(2); 100.6(B)(1); 100.6(B)(4); Opinions 09-08; 06-141; 06-138; 06-105; 03-02; 00-24 (Vol. XIX); 00-01 (Vol. XVIII); 99-145 (Vol. XVIII); 99-86 (Vol. XVIII); 98-62 (Vol. XVII); 96-134 (Vol. XV); 95-74 (Vol. XIII); 94-57 (Vol. XII); 94-19 (Vol. XII); 94-116 (Vol. XIII); 93-37 (Vol. XI); 90-24 (Vol. V); 88-133 (Vol. III); Joint Opinion 96-143/97-43/97-58/ 97-66/97-96 (Vol. XV).

Opinion:

Two full-time judges ask whether they may seek compensation for certain extrajudicial activities. The judge in inquiry 09-192 is a musician who has been playing an instrument solo for decades and would now like to "pursu[e] part time employment as a [solo musician]." The judge in inquiry 09-231 is an artist who asks whether he/she may exhibit his/her artworks in an art gallery, on the art gallery's Web site, in an art show, and/or in public places such as libraries. According to the judge, participants in juried art shows (i.e., art shows in which designated individuals select which of the submitted artworks will be displayed and/or awarded a prize) must pay a fee to participate. The artist judge also asks whether he/she may permit an art gallery to sell his/her artwork and retain a commission.

The Rules Governing Judicial Conduct (Rules) do not prohibit judges from engaging in extra-judicial activities (see 22 NYCRR 100.4). Rather, a judge who engages in extra-judicial activities must do so in compliance with certain general principles set forth in the Rules that apply to all such activities, as well as certain limitations that apply to specific extra-judicial activities (see *id.*)

Thus, a judge must conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) detract from the dignity of judicial office; or (3) interfere with the proper performance of judicial duties and are not incompatible with judicial office (see NYCRR 100.4[A][1]-[3]). In addition, a judge who serves as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of a non-profit educational, religious, charitable, cultural, fraternal or civic organization is prohibited from personally participating in the solicitation of funds or other fundraising activities on behalf of such an organization or governmental agency (see 22 NYCRR 100.4[C][3][b][i]).

The rules further provide that a judge may engage in avocational¹ activities, i.e., speaking, writing, lecturing, teaching, and in extra-judicial activities subject to the requirements of the rules in general (see 22 NYCRR 100.4[B]).

Such requirements include the following general principles:

A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities (see 22 NYCRR 100.2);

A judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (see 22 NYCRR 100.2[A]);

A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others (see 22 NYCRR 100.2[C];

The judicial duties of a judge take precedence over all the judge's other activities (see 22 NYCRR 100.3[A]).

The rules also provide that a full-time judge may receive compensation for permissible extra-judicial activities if the source of the compensation does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety (see 22 NYCRR 100.4[H][1]). However, a judge's compensation for extra-judicial activities must not exceed a reasonable amount or what a person who is not a judge would receive for the same activity (see 22 NYCRR 100.4[H][1][a]). Nor may a full-time judge solicit or receive compensation for extra-judicial activities performed for or on behalf of:

(1) New York State, its political subdivisions or any office or agency thereof (see 22 NYCRR 100.4[H][1][c][1]);

(2) a school, college or university that is financially supported primarily by New York State or any of its political subdivisions, or any officially recognized body of students thereof, except that a judge may receive the ordinary compensation for a lecture or for teaching a regular course of study at any college or university if the teaching does not conflict with the proper performance of judicial duties (see 22 NYCRR 100.4[H][1][c][2]); or

(3) any private legal aid bureau or society designated to represent indigents in accordance with article 18-B of the County Law (see 22 NYCRR 100.4[H][1][c][3]).

Part-time judges are specifically exempted from these same limitations concerning compensation and reimbursement (see 22 NYCRR 100.4[H][1]; 100.4[H][1][c]; 100.6[B][1]), and are permitted to accept private employment or public employment in a federal, state or municipal department or agency, provided that such employment is not incompatible with judicial office and does not conflict or interfere with the proper performance of the judge's duties (see 22 NYCRR 100.6[B][4]).

The Rules also address a judge's extra-judicial financial activities. A judge is prohibited from engaging in financial and business dealings that (a) may reasonably be perceived as exploiting the judge's judicial position; (b) involve the judge with any business, organization or activity that ordinarily will come before the judge; or (c) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves (see 22 NYCRR 100.4[D][1][a]-[c]).

A judge also is prohibited from serving as an officer, director, manager, general partner, advisor, employee or other active participant of any business entity (see 22 NYCRR 100.4[D][3]), but may manage and participate in a business entity engaged solely in investment of the judge's financial resources or the financial resources of members of the judge's family (see 22 NYCRR 100.4[D][3][b]).

In previous opinions, the committee has advised that judges may engage in extra-judicial activities similar to those that are the subject of this inquiry, i.e., involving the expression of creative talents: A full-time judge may teach dance lessons for a not-for-profit corporation (see Opinion 94-57 [Vol. XII]); a part-time judge may participate in a musical performance at a non-political, fundraising event for a not-for-profit organization, so long as the judge's participation is not a prominent or substantial part of the event (see Opinion 98-62 [Vol. XVII]); a full-time judge may sell a patent for an invention the judge owns (see Opinion 00-01 [Vol. XVIII]); a full-time judge may act under his/her own name in a community theater production sponsored by a not-for-profit organization as long as no reference is made to the judge's judicial status (see Opinion 00-24 [Vol. XIX]); a full-time judge may be a member of a musician's union and participate in musical performances, as long as the band itself is not a business enterprise and the judge's involvement is not publicized (see Opinion 06-141); a full-time judge may accept occasional requests from friends, neighbors and colleagues to purchase the judge's photographs or to have the judge make portraits or sports/action photographs (see Opinion 09-08); and may prepare and publish a book of photographs (see *id.*). In addition, judges may write and publish books, articles, manuals, columns and commentaries about the law (see Opinions 88-133 [Vol. III]; 99-145 [Vol. XVIII]; 93-37 [Vol. XI]; 90-24 [Vol. V]; Joint Opinion 96-143/97-43/97-58/97-66/97-96 [Vol. XV]); and may write and publish fiction (see Opinions 06-105; 99-145 [Vol. XVIII]).

However, a full-time judge may not teach dancing classes at a private performing arts studio (see Opinion 94-19 [Vol. XII]); act in a commercial television program (see Opinion 99-86 [Vol. XVIII]) or a commercial motion picture (see Opinion 96-134 [Vol. XV]); and may not participate in a television series based upon the judge's judicial experiences and life (see Opinion 94-116 [Vol. XIII]) as the judge would be an active participant in a for-profit business entity which is expressly prohibited by the Rules (see 22 NYCRR 100.4[D][3]).

The committee also has advised that a judge who may engage in permissible extra-judicial activities involving a not-for-profit entity may be compensated for doing so as long as the source of such compensation does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety (see 22 NYCRR 100.4[H]; Joint Opinion 96-143/97-43/97-58/97-66/97-96 [Vol. XV] [the extra-judicial activity of judges, for which compensation is received, should be related to the improvement of the law, the legal system, and/or the administration of justice; or it should be limited to non-commercial ventures, or to personal and family matters, as specifically provided in the Rules]). Therefore, a full-time judge who teaches dance classes for a not-for-profit organization may receive compensation for doing so (see Opinion 94-57 [Vol. XII]) and may act in a community theater production and receive compensation for doing so if the theater group is a not-for-profit organization (see Opinion 00-24 [Vol. XIX]). Also, a full-time judge who is a member of a musician's union may accept compensation for occasional performances at the pay scale set by the union as long as the band the judge plays for is not a business enterprise (see Opinion 06-141; 22 NYCRR 100.4[D][3]). And, the one-time sale of a patent that the judge owns is permissible because "[i]ts sale would not appear to run afoul of the limitations on financial activities on full-time judges set forth in section 100.4(D) of the Rules Governing Judicial Conduct" (Opinion 00-01 [Vol. XVII]; see also Opinion 95-74 [Vol. XIII] [full-time judge may liquidate his/her collection of carpets, but may not engage in the continuing activity of buying and selling carpets]; Opinion 03-02 [full-time judge may dispose of his/her collection of sports memorabilia by way of direct sale to dealers, or consignment, or auction, or a one-time liquidation, without violating 22 NYCRR 100.4(D)(3)]).

Similarly, a full-time judge may accept occasional requests from friends, neighbors and colleagues to purchase the judge's photographs or to have the judge make portraits or sports/action photographs, and may publish a book of photographs so long as he/she does not exploit his/her judicial position in the process (see Opinion 09-08).

Thus, the judge who wishes to pursue part-time employment as a solo musician may do so only occasionally, for a fee, for family, friends, neighbors and others who are unlikely to appear in the judge's court. Were the judge to advertise his/her availability for employment by the general public as a musician, or for a business entity such as a caterer or country club, the judge would appear to be engaged in the business of providing musical performances, which is not ethically permissible (see 22 NYCRR 100.3 [A]; 100.4[A][3]; 100.4[D][3]; see e.g. Opinions 94-19 [Vol. XII]; 99-86 [Vol. XVIII]; 96-134 [Vol. XV]; 94-116 [Vol. XIII]).

And, the judge who is an artist may, for example, allow a gallery or other public or private entity to exhibit his/her artwork, and he/she may participate in juried and non-juried art shows on an occasional basis, assuming he/she must be present at such exhibits and shows. The judge also may exhibit his/her art work on the internet or at a gallery or public place without limitation if his/her presence is not required while the art work is displayed. In addition, the judge may place his/her art work for sale on commission with an art gallery.

With respect to selling art work on commission, we note that the committee previously has advised that a judge may engage a publisher and/or a marketing firm to act as an intermediary to sell his/her works of fiction (see Opinions 06-105; 99-145 [Vol. XVIII]). We view the proposed activity as analogous.

However, neither judge may allow his/her creative activities to interfere with the proper performance of his/her judicial duties (see 22 NYCRR 100.3; 100.3[A]; 100.4[A][3]; 100.4[B]) and may not use the prestige of their offices to promote their creative works (see 22 NYCRR 100.2[C]). Further, in the event that either judge receives compensation in excess of \$150, he/she must comply with the reporting requirements set forth in section 100.4(H)(2) of the Rules Governing Judicial Conduct.

This opinion modifies Opinion 09-08 to the extent that it prohibits a judge from offering photographs for sale to the general public in all circumstances. Just as the judge who wishes to place his/her art work for sale on commission with an art gallery, or a judge who engages a publisher and/or a marketing firm to sell his/her works of fiction (see Opinions 06-105; 99-145 [Vol. XVIII]), the judge in Opinion 09-08 also may engage a third party to market and sell his/her photographs to the general public.

Endnotes:

1. The term "Avocational" is not defined in the Rules. However, according to the Merriam-Webster Online Dictionary, "avocation" is defined as "a subordinate occupation pursued in addition to one's vocation especially for enjoyment" (Merriam-Webster Online Dictionary, 2010, available at <http://www.merriam-webster.com/dictionary/avocation> [accessed May 10, 2010]); see also "hobby," which is defined as "a pursuit outside one's regular occupation engaged in especially for relaxation" (Merriam-Webster Online Dictionary, 2010, available at <http://www.merriam-webster.com/dictionary/hobby> [accessed May 10, 2010]).

In contrast, one's "vocation" is defined as "the work in which a person is employed" (Merriam-Webster Online Dictionary, 2010, available at <http://www.merriam-webster.com/dictionary/vocation> [accessed May 10, 2010]).

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