



New York State Bar Association  
Committee on Professional Ethics

Opinion 953 (1/11/13)

**Topic:** Bar Association soliciting members for contributions and members making such contributions to pay for portraits of retiring but still serving judges, which will hang in the courthouse to honor such judges.

**Digest:** It is permissible for a Bar Association to solicit contributions and for its members to make contributions for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift is made to the court, not to an individual judge.

**Rules of Professional Conduct:** 3.5(a) and 8.4

**Code of Judicial Conduct:** § 100.4(D)(5)

## QUESTION

1. The inquiring attorney is a member of a local bar association. The bar association wishes to honor a retiring Supreme Court Justice by commissioning a portrait of the Justice which would hang in the courthouse. Despite retirement, the retiring Justice would be likely to continue to serve through certification. The Bar Association would like to solicit its members for contributions to defray the costs of the portrait. May the members properly make such contributions?

## FACTS

2. As described above, the bar association would like to ask its members to contribute to the costs of commissioning and hanging portraits of retiring but still serving Supreme Court Justices as a way of honoring the Justices for their service. The portraits would be a gift to the court, not to any individual judge. Each member would determine whether and how much to contribute, with anticipated donations being in the range of \$50 to \$150. Contributing members would be recognized by announcement in an Association newsletter and/or at a Bar Association function.

## OPINION

3. Rule 3.5(a)(1) of the New York Rules of Professional Conduct (the “Rules”) states:

A lawyer shall not: (1) seek to or cause another person to influence a judge, official

or employee of a tribunal by means prohibited by law or give or lend anything of value to such judge, official, or employee of a tribunal *when the recipient is prohibited from accepting the gift or loan* . . . [Emphasis added.]

4. Rule 8.4(d) & (f) state:

A lawyer or law firm shall not:

(d) engage in conduct that is prejudicial to the administration of justice;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of *applicable rules of judicial conduct* or other law . . . [Emphasis added.]

5. The starting point of our analysis, therefore, is to ask what restrictions on accepting gifts are placed on judges by the Code of Judicial Conduct. Section 100.4 (D)(5) of the Rules of the Chief Administrative Judge (often referred to as the “Code of Judicial Conduct”) provides:

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift *incident to a public testimonial*, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under section 100.3(E);

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 100.4(H).

6. First, we note that under the facts described in the inquiry, no tangible gift at all is being made to any judge. An Association member who contributes to the Association to defray expenses for a portrait is making a gift to the Association, not to any individual judge. The Association, in turn, donates the portrait to the courthouse, thus making a tangible gift to the court. That gift is in honor of a retiring judge, but is not made to the judge. All the retiring judge receives is the honor of having the portrait painted and hung in the courthouse. We doubt that such an honor is a “thing of value” within the meaning of Rule 3.5(a)(1). If the portrait is not a “thing of value” to the judge, then contributing funds to help pay for the portrait does not violate Rule 3.5(a)(1).

7. An examination of a series of Advisory Opinions issued by the New York Advisory Committee on Judicial Ethics leads to the conclusion that a retiring Judge would not violate the Code of Judicial Conduct by accepting such an honor. NY Jud. Adv. Op. 06-67 points out that a judge may not solicit gifts, but here there is no solicitation by or on behalf of the retiring Justice.

8. NY Jud. Adv. Op. 91-50 opines that the Code of Judicial Conduct does not prohibit a judge from accepting a gift of “nominal” value, made as a token of appreciation from a high school student for the judge’s efforts in explaining the law to the student during the course of an extended school sponsored visit to the court.

9. NY Jud. Adv. Op. 06-171 concludes that a judge may properly accept a free membership from a bar association, citing the exception in §100.4 D)(5)(a) for “a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice.” Here, the hanging of the judge’s portrait in the courthouse, if it is a gift to the judge, is “nominal” within the meaning of NY Jud. Adv. Op. 91-50, and it is “incident to a public testimonial” within the meaning of §100.4 D)(5)(a).

10. NY Jud. Adv. Op. 93-42 approves of a town justice accepting a recording system from the district attorney for use in the courtroom. Here, as in that situation, the gift is to the court and not to the judge personally.

11. The Preamble to Part 100 of the Rules of the Chief Administrative Judge states that “[t]he rules governing judicial conduct are rules of reason.” That statement, combined with (and illustrated by) the reasoning of the cited opinions from the Commission on Judicial Conduct,

leads us to conclude that hanging a retiring judge's portrait in the courthouse would not implicate any improper conduct by the judge being honored with the portrait. Therefore, a lawyer could properly make a contribution to the Bar Association for purposes of defraying the expenses of the portrait without violating Rule 3.5(a)(1).

12. Furthermore, we believe that a gift made to the court rather than to the individual judge, "in connection with a public testimonial," could not reasonably be expected to influence a judge or interfere with the administration of justice. Accordingly, we conclude there is no impropriety in the Association soliciting the described contributions from its members and no ethical violation by a lawyer who makes such a contribution.

## **CONCLUSION**

13. Lawyers who belong to a Bar Association may contribute to the Association for the purpose of defraying the costs of commissioning portraits of retiring judges who will still serve on the bench, where the portraits are a means of honoring the judges and the actual gift (the portrait) is made to the court, not to an individual judge.

(53-12)