

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2022-08

**Date of Issue:** March 07, 2022

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

### **A Judge may permit a law clerk to publish an article in a law journal.**

**Issue:** Whether a Judge may permit a law clerk to publish an article in a law journal.

**Answer:** Yes, subject to certain conditions.

**Facts:** Requestor is a circuit court judge, currently "running in the 2022 election" to keep his/her seat. Requestor's law clerk has "written a paper about the lack of protection for employees who are using or have used medical marijuana." According to Requestor, "[a] law journal ... has contacted [the clerk] asking to publish [the] article." Requestor explains that the "article is recommending a change in the law to increase the protection for the employees." Requestor wonders whether there is "a problem with [the clerk] having the article published while . . . clerking for [Requestor] if there is a disclaimer that the opinions are [the clerk's] alone[.]"

**Analysis:** The Maryland Code of Judicial Conduct (the "Code"), Title 18, Chapter 100 of the Maryland Rules, establishes the standards for the applicable conduct of judges (and, by extension, their staff). Several rules of the Code potentially are pertinent to this request.

Rule 18-101.2 requires that a judge "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and "avoid conduct that would create in reasonable minds a perception of impropriety."

Rule 18-101.3 provides that "[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Rule 18-102.2(a) provides that "[a] judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly." Comment [1] makes clear that "a judge must be objective and open-minded." Comment [2] recognizes that "each judge comes to the bench with a unique background and personal philosophy. . . ." Nonetheless, a "judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." *Id.*

Rule 18-102.4 mandates that "[a] judge shall not be swayed by public clamor or fear of criticism." In addition, "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Importantly, pursuant to this Rule, "[a] judge shall not convey or permit others to convey the impression that any person is in a position to influence the judge." Comment [1] confirms that "[a]n independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family.

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Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences."

Rule 18-102.10 states, in pertinent part, that:

(a) A judge shall abstain from public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding and shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Rule does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court.

(b) With respect to a case, controversy, or 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 of the office.

Rule 18-102.12(a) makes clear that "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code."

Rule 18-103.1 provides that:

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.

Rule 18-104.4 provides, in pertinent part, that a candidate for election "shall act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary and maintain the dignity appropriate to judicial office." Moreover, the Rule makes clear that a candidate "shall take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities that the candidate is prohibited from doing by this Rule. . . ." *Id.* In addition, "with respect to a case, controversy, or issue that is likely to come before the court, [a candidate for election] shall not make a commitment, pledge,

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or promise that is inconsistent with the impartial performance of the adjudicative duties of the office . . . ." *Id.* Finally, a candidate for election "shall not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . . ." *Id.*

Requestor did not provide a copy of the article at issue. That acknowledged, according to Requestor, his/her law clerk takes the position that the law does not provide adequate "protection for employees who are using or have used medical marijuana." The law clerk, through the article, advocates for a change in the current law. The concern, of course, is that the opinions expressed by the law clerk will be viewed as those of Requestor and run afoul of the above delineated rules.

The relationship between a judge and his/her law clerk is special, and, to some extent and in some matters, a law clerk can be seen as an extension of the judge for whom the clerk works. As the Court of Appeals stated in *Attorney Grievance Commission v. Sheridan*, 357 Md. 1, 16 (1999) (internal quotation marks omitted) (quoting *Gill v. Ripley*, 352 Md. 754, 773 (1999)), "[j]udicial clerks are integral to the judicial process. Their work is entirely judicial in nature and is supervised, approved, and adopted by the judges who initially authorized it." It is for this reason that we opined in Opinion No. 2019-14 that "[a] law clerk's actions reflect sufficiently upon the court that ethical requirements must be applied to law clerks similar to those governing judicial conduct." Professor John Paul Jones has gone so far as to say that, "[w]hether real or imagined, the influence said by some to be exercised by law clerks over their judges makes the appearance of impropriety by a law clerk as serious as the appearance of impropriety by [the] judge." John Paul Jones, *Some Ethical Considerations for Judicial Clerks*, 4 GEO. J. LEGAL ETHICS 771, 780 (1991).

On the other hand, under Maryland Code, State Personnel and Pensions Article § 2-304(a)(2)(i) (2015 Repl. Vol.), subject to certain restrictions not applicable here, as a State employee, a law clerk "may freely participate in any political activity and express any political opinion. . . ." Again, we have not read the article. We surmise, however, that the law clerk's opinions regarding marijuana may be viewed as political in nature.

Only if Requestor can be assured that the opinion of the law clerk cannot reasonably be understood to be the opinion of Requestor or reflect his/her political views or the opinions or political views of other members of Requestor's court or of the Maryland Judiciary, may he/she permit its publication. In other words, the article may be published without violation of the Code of Judicial Conduct only if it is silent as to the law clerk's relationship with Requestor and the Maryland Judiciary. Therefore, Requestor, before permission is granted to publish the article, should review the article and ensure that the clerk's relationship to Requestor, Requestor's court, and the Maryland Judiciary is not in any way identified.

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**Application:** The Maryland Judicial Ethics Committee cautions that this Opinion is applicable only prospectively and only to the conduct of the Requestor described herein, 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 the request for advice involves a continuing course of conduct, the Requestor 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.