

Maryland Judicial Ethics Committee

Opinion Request Number: 1980-01

Date of Issue: January 4, 1980

■ Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge May Recommend Candidates for Judicial Appointments Whether Requested to Do So or Not

In your recent letter to this Committee, you state that you are retiring as of [date], and that several persons have sought your views on the relative merits of those who are interested in an appointment to the judicial office which you are vacating. You ask “whether, under the circumstances here, it would be improper for me to give my views to those who may be in a position to recommend appointments to the Governor.”

In [Opinion Request No. 1975-02 (unpublished)], this Committee dealt with the propriety of a judge writing a letter of recommendation to a Judicial Selection Commission on behalf of a candidate for appointment to a judgeship. The opinion first points out that “the writing of such a letter is not proscribed by either the Maryland Canons or Rules of Judicial Ethics.” The Committee, however, then “analogized” the making of such a recommendation to the active support of a candidate for election to judicial office, which had been deemed prohibited under Canon XXVII titled “Partisan Politics.” [Opinion Request No. 1975-02 (unpublished)] went on to quote Article 8 of the Maryland Declaration of Rights, relating to the separation of powers, and the opinion observed that the appointment of judges is an executive function. The Committee concluded in [Opinion Request No. 1975-02 (unpublished)] that a judge’s making a recommendation to a Judicial Selection Commission would be regarded as “inappropriate” unless the judge was first asked by a member of the Commission to express an opinion.

In our view, [Opinion Request No. 1975-02 (unpublished)] requires some clarification. Some of the language in the opinion might be construed as holding that a judge’s taking the initiative in recommending a candidate for judicial office is proscribed by Canon XXVII relating to partisan politics or by the separation of powers provision in the Declaration of Rights. To the extent that the language in [Opinion Request No. 1975-02 (unpublished)] may be subject to such construction, that language is hereby disapproved.

Certainly the appointment of a judge in Maryland today should not be regarded as a partisan political activity covered by Canon XXVII. In recent times, with the establishment and continued use of nonpartisan judicial selection commissions, there has been an effort in this State to make judicial appointments as “nonpolitical” as practicable. The movement has been toward what is often called a “merit” judicial selection system. The appointment of a judge simply cannot properly be “analogized” to the active political activity prohibited by Canon XXVII.

A judge’s making a recommendation concerning a candidate for appointment to a judgeship is also not prohibited by Article 8 of the Declaration of Rights. Article 8 provides that one who exercises the functions of one branch of government shall not “assume or discharge the duties of any other.” When an official in one branch of government makes a mere recommendation to an official or officials in another branch of government, he clearly is not assuming or discharging “the duties”

Maryland Judicial Ethics Committee

Opinion Request Number: 1980-01

Date of Issue: January 4, 1980

Published Opinion Unpublished Opinion Unpublished Letter of Advice
Page 2 of 2

of the latter branch. The assumption or discharge of duties ordinarily involves something more than making a recommendation. Otherwise, it would violate the separation of powers for judges to make recommendations to the Legislature concerning bills affecting the administration of justice. Moreover, if making a recommendation were deemed to violate the separation of powers provision, logically there would seem to be no basis for distinguishing solicited recommendations from unsolicited ones.

In sum, we conclude that a judge's making a recommendation regarding a candidate for appointment to a judgeship, whether the judge's views were asked for or not, does not violate either the Maryland Canons and Rules of Judicial Ethics or the Maryland Declaration of Rights.

Of course, there can be judicial conduct which does not violate either the Canons and Rules of Judicial Ethics or other provisions of law, but which a prudent judge would deem it inadvisable to engage in. For an active judge regularly to give unsolicited advice to those operating the other branches of government would seem to fall into this category. While not actually in violation of Article 8 of the Declaration of Rights, such conduct would not entirely comport with the spirit of the separation of powers principle. We believe that this is probably what the Committee contemplated when it said in [Opinion Request No. 1975-02 (unpublished)] that a judge's rendering unsolicited recommendations concerning judicial appointments would be regarded as "inappropriate."

Answering the specific question which you asked in your letter, the Committee does not believe that it would violate the Canons and Rules of Judicial Ethics or Article 8 of the Declaration of Rights, or that it would otherwise be improper, for you to give your views concerning applicants for a judgeship to those who may be in a position to recommend appointments to the Governor.