

Maryland Judicial Ethics Committee

Opinion Request Number: 2023-32

Date of Issue: October 24, 2023

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge’s Ability to Serve on MSBA Committee on Ethics Monthly Hotline

Issue: May a Judge Serve on the MSBA Committee on Ethics Monthly Hotline?

Answer: No.

Facts: The Requestor is an appointed member of the Maryland State Bar Association (“MSBA”) Committee on Ethics. According to the Guidelines of the Committee:

1. The Committee issues opinions solely on the proper interpretation of the Maryland Lawyers’ Rules of Professional Conduct (the “Rules”)
 - a. The Committee does not issue opinions on questions of law, issues likely to be decided by a Court or tribunal in existing or threatened litigation, or the propriety of past conduct which may be the subject of disciplinary proceedings or litigation (except in connection with prospectively rectifying such conduct).

* * *

8. Individual members of the Committee also provide oral advice on the interpretation and application of the Rules through the operation of a telephone hotline service, which advice constitutes the interpretation of the individual member alone and not the opinion of the Committee.

The Requestor asks whether it is appropriate for the Committee’s judicial members to sit on the monthly hotline where members field calls from Maryland attorneys on ethical issues. Specifically, he/she asks whether providing commentary on the rules constitutes “giving legal advice” or practicing law.

Discussion: The Maryland Code of Judicial Conduct (the "Code"), Title 18, Chapter 100 of the Maryland Rules, establishes standards for the ethical conduct of judges. Rule 18-100.2. The provisions of the Code that are the most directly applicable to the Requestor’s inquiry are Rules 18-101.1 and 18-103.10. Rule 18-101.1 requires judges to “comply with the law, including [the] Code of Judicial Conduct.” Rule 18-103.10 prohibits a judge from practicing law with limited exceptions:

- (b) **Exceptions.** (1) A judge may act self-represented in a matter involving the judge or the judge’s interest and, if without compensation, may give legal advice to and draft or review documents for a member of the judge’s family.

Maryland Judicial Ethics Committee

Opinion Request Number: 2023-32

Date of Issue: October 24, 2023

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 5

(2) To the extent expressly allowed by law and subject to other applicable provisions of this Code, a part-time judge of an orphans' court who is an attorney may practice law

“Practice law” is defined in Md. Code Ann. Bus. Occ. & Prof. §10-101(h):

(1) “Practice law” means to engage in any of the following activities:

- (i) giving legal advice;
- (ii) representing another person before a unit of the State government or of a political subdivision; or
- (iii) performing any other service that the Court of Appeals defines as practicing law.

(2) “Practice law” includes:

- (i) advising in the administration of probate of estates of decedents in an orphans' court of the State;
- (ii) preparing an instrument that affects title to real estate;
- (iii) preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court; and
- (iv) giving advice about a case that is or may be filed in a court.

The U.S. Bankruptcy Court in *In re Lucas*, 312 B.R. 559, 575 (Bankr. D. Md. 2004), discussed what constitutes the practice of law in Maryland:

Under Maryland law, the focus of the inquiry on whether an individual has engaged in the practice of law should be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent. The preparation of legal documents, their interpretation, the giving of legal advice, and the application of legal principles to problems of any complexity constitutes the practice of law.

“Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct.” *In re Cty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007). “Whether a person gives advice as to [local] law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice.” *Matter of New York County Lawyers Ass’n. (Roel)*, 3 N.Y.2d 224, 229 (1957).

We note that there is a distinction between a judge serving on the Maryland Judicial Ethics Committee giving what could be considered as legal advice and one serving on the MSBA Committee on Ethics. The Judicial Ethics Committee is authorized by Rule 18-306 to provide advice to judges and judicial appointees with respect to the application or interpretation of the Maryland Code of Judicial Conduct and the Maryland Code of Conduct for Judicial Appointees. Further, the Committee’s opinions and letters of advice are issued on behalf of the Committee, not an individual judge. In contrast, the MSBA Ethics Committee Guidelines permit a member to

Maryland Judicial Ethics Committee

Opinion Request Number: 2023-32

Date of Issue: October 24, 2023

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 5

write a dissent or special concurrence. *See* Guideline No. 7. But even in the context of an individual judge providing informal advice on the Code of Judicial Conduct when asked by another judge, there is a distinction between a judge giving “legal advice” to another judge on the interpretation of the Rules that apply to both of them and providing such advice to a lawyer, with a specific inquiry, regarding the Rules of Professional Conduct.

This Committee has not previously addressed this issue. Therefore, we have considered opinions decided by other judicial ethics committees on similar topics for guidance. In NY Jud.Adv.Op. 23-64 (June 15, 2023), the New York Advisory Committee on Judicial Ethics ruled that a judge may not participate in a local bar association’s phone bank event where members of the public call in with legal questions. The Committee stated that “it will be difficult, if not impossible, for the inquiring full-time judge to avoid giving legal advice to some callers.”

In C.J.E.A.B. Advisory Opinion 2006-02 (February 7, 2006), the Colorado Judicial Ethics Advisory Board reached a similar result for a call-a-lawyer night, even if the judge did not disclose that she was a judge:

Full-time judges are prohibited by Canon 5F from engaging in the practice of law Participation in the judge’s local legal service program’s call-a-lawyer night, in which volunteer attorneys apply legal principles and techniques in providing advice to callers, constitutes the practice of law. Accordingly, the judge may not participate in this program by fielding calls and dispensing advice, even if she provides such advice anonymously.

While the two opinions referenced above determined that a judge could not provide legal advice to the *public*, the same prohibition would apply to legal advice given to attorneys. In AZ.Jud.Adv.Op. 95-9 (1995), the Arizona Supreme Court Judicial Ethics Advisory Committee ruled that a judge may not participate in the State Bar’s “Silent Partner” program that allowed lawyers to pose questions to more experienced members of the bar dealing with substantive and procedural legal issues, as well as law office management matters. The Committee found that such participation constituted the practice of law. The Committee expressed concern that the lawyer could place an “unusual degree of reliance on the advice received because of the advisor’s status as judge.” There could also be embarrassment to the judiciary if in defending an action that the lawyer took, the lawyer revealed that he/she was advised to do so by the mentoring judge.

Similarly, in Formal Advisory Opinion: 2011-03 (July 8, 2011), the North Carolina Judicial Standards Committee determined that judges should not participate as mentors in the North Carolina Bar Association’s mentorship program either as traditional or situational mentors. The Committee examined the Canons of the North Carolina Code of Judicial Conduct that could be violated by the judge’s participation:

[T]here are many Canons of the North Carolina Code of Judicial Conduct which are problematic with service as a mentor to new attorneys. Canon 5G of the Code

Maryland Judicial Ethics Committee

Opinion Request Number: 2023-32

Date of Issue: October 24, 2023

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 4 of 5

provides that a judge may not practice law, which would include providing legal advice to an attorney. The attorney could then use the judge's advice in the representation of a client, thereby creating a situation whereby a judge had indirectly provided legal advice to a litigant. It is reasonable to anticipate that the attorney would inform his client that the attorney had consulted with the judge in an effort to boost the attorney's credibility or allay his client's apprehension. The mentoring conduct would then violate Canon 2B of the Code which provides that a judge may not lend the prestige of his/her judicial office to promote the private interests of others nor convey or permit others to convey the impression that they are in a special position to influence a judge. Participation in the mentor program will also raise disqualification issues under Canon 3C(1) of the Code for the judge in matters in which the mentee attorney appears as counsel of record. Canon 2A of the Code requires conduct which promotes public confidence in the integrity and impartiality of the judiciary, while Canon 4 contains the proviso that a judge should not participate in quasi-judicial activities which cast substantial doubt on the judge's impartiality.

The North Carolina Judicial Standards Committee distinguished between legal advice given by judges to lawyers, and legal advice given to other judges:

While judges should not participate as mentors in the NCBA mentorship program or otherwise serve as a mentor for an attorney, judges are strongly encouraged to mentor new judges and otherwise provide disinterested expert advice on the law upon the request of another judge.

We agree with the conclusions and analysis set forth in the Opinions of the Arizona Supreme Judicial Ethics Advisory Committee and the North Carolina Judicial Standards Committee. We find them particularly instructive because here the MSBA Guidelines provide that "Committee members serving on the hotline rotate each month and their names may be obtained from the *Maryland Bar Journal*, the Bar Association's website, www.msba.org or by contacting the Bar Association." Even if the Requestor's title is not included beside his/her name, any attorney practicing in the Requestor's jurisdiction would probably know that the person giving advice on the hotline is a judge and those outside of the jurisdiction could easily find out the status. This would likely lead the attorney to rely more on the Requestor's interpretation and share what he/she was told by the judge with others.

Some judicial ethics opinions have specifically dealt with whether a judge could be on an ethics committee – albeit a hospital ethics committee. In Fl.Jud.Eth.Adv.Comm. Opinion Number 2003-07 (June 5, 2003), the Florida Judicial Ethics Advisory Committee ruled that a newly appointed judge could not continue to serve on a hospital's ethics committee where the judge would be participating in issuing opinions that promulgate policy and resolve medical/legal issues. The Committee determined that several Canons would be violated, including the one prohibiting a judge from practicing law.

Maryland Judicial Ethics Committee

Opinion Request Number: 2023-32

Date of Issue: October 24, 2023

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 5 of 5

The Massachusetts Supreme Judicial Court Committee on Judicial Ethics took a slightly different position in CJE Opinion No. 2008-12 (December 15, 2008), where the hospital ethics committee recognized that the judge could not practice law and could not provide legal advice. The hospital ethics committee promised it would not ask the judge legal advice and indicated that it would consider the judge to be a community representative. Under that scenario, the Committee on Judicial Ethics did not prohibit the judge from serving on the hospital's ethics committee. The judge was advised, however, to examine the hospital's activities to determine if the hospital ordinarily appeared before the judge's court or if the hospital frequently appeared before the courts in Massachusetts, which could lead to the judge's assessment that participation on the ethics committee was prohibited by other Canons. The judge was further advised that if the judge concluded that he/she could participate, the hospital ethics committee could not identify him/her as a judge.

Based on the Maryland Code of Judicial Conduct, the Annotated Code of Maryland, and the authorities discussed above, the Committee concludes that a judge may not serve on the MSBA Committee on Ethics monthly hotline. The interpretation of the Maryland Lawyers' Rules of Professional Conduct, in response to a specific question on permissible conduct, constitutes giving legal advice, which is the practice of law.

Application: The Maryland 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 amendments 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.