

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-10

Date of Issue: June 3, 2013

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge, a Former Assistant/Deputy State's Attorney, May Not Participate in Vote to Appoint a New State's Attorney When Member of Judge's Family Would Serve as an Assistant State's Attorney Under Such Appointee

Issue: May a former Assistant/Deputy State's Attorney, now a judge, participate in the vote to appoint a new State's Attorney when a member of the judge's family continues to serve as an Assistant State's Attorney who would serve under such appointee?

Answer: No.

Discussion: Pursuant to § 15-109 of the Criminal Procedure Article of the Maryland Code, the Circuit Court has the power to appoint an interim State's Attorney whenever necessary. This includes situations that involve absences, sickness, resignation or death of the State's Attorney. Article V, § 11 of the Maryland Constitution requires the Circuit Court judges of the jurisdiction in which the vacancy occurs to appoint a person to fill the vacancy for the remainder of the term.

An inquiry has been made as to whether a judge ("the Judge"), who formerly served as an Assistant and Deputy State's Attorney and a member of whose household continues to serve as an Assistant State's Attorney ("the Relative"¹), may participate in the vote required to appoint an interim State's Attorney's following the resignation of the former State's Attorney ("the Vote").

Rule 1.1 of the Maryland Code of Judicial Conduct ("the Code")² states that "[a] judge shall comply with the law, including this Code of Judicial Conduct." As noted above, among the duties required of a Circuit Court judge is to appoint a person to fill a vacancy in the office of the State's Attorney.

Rule 1.2, in turn, provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary ... [and] shall avoid conduct that would create in reasonable minds a perception of impropriety."

¹ For purposes of brevity, the term "Relative" is used herein. The individual involved is in fact both a "member of judge's ... family" and a "member of judge's ... household" as defined in B-108 and B-109 of the Maryland Code of Judicial Conduct.

²Maryland Rule 16-813.

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This Committee has previously concluded in an unpublished opinion that the Canons then applicable did not prohibit a former State's Attorney, who became a Circuit Court judge, from voting in the selection of an interim State's Attorney. Applying the present Code does not alter this conclusion. The Committee does not believe that having formerly served as a State's Attorney, or Assistant or Deputy State's Attorney and thereafter participating in such a vote would, by itself, undermine "the independence, integrity, and impartiality of the judiciary ... [or] create in reasonable minds a perception of impropriety."

In this particular case, however, there is the added dimension that the Relative continues to serve as an Assistant State's Attorney in the office where the vacancy has occurred and would thus be subject to the authority of whoever is ultimately appointed to serve as interim State's Attorney. In other words, were the Judge to participate in the Vote, the Judge would be participating in the selection of the person who would ultimately control the Relative's continued employment and, hence, whether income was earned therefrom and available to the Judge's household.

Rule 2.4(b) of the Code provides that "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Meanwhile, Rule 2.11(a)(3) provides that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including ... circumstances [where t]he judge knows that ... [a member of the judge's family] has a significant financial interest in the subject matter in controversy"

Although the Committee recognizes that the Vote is not a "proceeding" and that the definition of "significant financial interest" refers to income resulting from an *ownership* interest as opposed to *employment* income, the Committee considers the ethical considerations to be analogous and is therefore concerned that reasonable minds might perceive impropriety in the Judge's participation in the Vote since its outcome could reasonably be perceived as potentially having significant financial ramifications with regard to the Judge's household income. Accordingly, it is the Committee's opinion that the Judge should abstain from participation in the Vote.

Application: The 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.

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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 changes of facts that could affect the conclusion of the Committee. If you are engaging in a continuing course of conduct, you 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.