

Maryland Judicial Ethics Committee

Opinion Request Number: 2020-02

Date of Issue: May 20, 2020

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judges may preside over swearing-in ceremonies for new Assistant State's Attorneys that take place in courtrooms during court hours

Issue: May swearing-in ceremonies for new Assistant State's Attorneys be conducted with judicial participation in a courtroom during court hours?

Answer: Yes, with restrictions.

Facts: Requestor is a District Court Administrative Judge. The Circuit Court in Requestor's jurisdiction routinely holds courtroom swearing-in ceremonies for new Assistant State's Attorneys (ASA's) and has invited three District Court associate judges to participate jointly in one such ceremony. Requestor describes these ceremonies as follows:

- Proceedings are conducted in a Circuit Court courtroom in the jurisdiction;
- At least one judge participates, sometimes more;
- Participating judges are usually Circuit Court judges, but sometimes District Court judges are asked;
- Ceremonies are conducted "after scheduled court proceedings (usually at 4 p.m.)";
- Printed invitations which include the name(s) of the participating judge(s) are sent to invitees;
- Invitees include family/friends of the new ASA's and some local officials;
- Any participating judge is robed during the ceremony;
- The Clerk of the Court administers the oath of office;
- Participating judges make remarks as part of the ceremonies; and
- Participating judges are usually former Assistant State's Attorneys.

Requestor and other judges on Requestor's court are concerned that the ceremonies unduly confer the prestige of office on newly sworn-in ASA's such that observers, particularly other attorneys, could reasonably question the independence, integrity, and impartiality of the judges participating in them. Requestor has therefore asked this Committee for an opinion as to whether the Code of Judicial Conduct permits judges to participate in swearing-in ceremonies as described.

Discussion: Pursuant to the Maryland Judicial Code of Conduct (the "Code"), Maryland Rule 18-100.1 *et seq.*, "[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." Rule 18-101.2 (a) and (b). Further, "[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 18-101.3. These principles are of primary importance in considering whether, or to

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what extent, judicial participation in the sworn empaneling of an Assistant State’s Attorney is permissible under the Code.

In Maryland, the position of State’s Attorney is an office established in each county and Baltimore City by Article V, Section 7 of the Maryland Constitution. It is separate and distinct from the Executive (Article II), the Legislative (Article III), and the Judicial (Article IV) Departments. As noted in State v. Hunter, 10 Md.App. 300 at 305, rev’d on other grounds, 263 Md. 17 (1971):

“ . . . [T]he office of State's Attorney is not a branch of the judiciary, nor is it directly subject to its supervision. (Cite omitted.) Under the Constitution and laws of Maryland, the State's Attorney is a constitutional office elected by the people and entrusted by them with the prosecution of persons accused of crime. The office is one of great dignity and commands great respect.”

Cited in State v. Lykins, 43 Md.App. 472, 473–74 (1979), aff’d and modified, 288 Md. 71 (1980).

In all jurisdictions but Baltimore City, Assistant State’s Attorneys are appointed by the elected State’s Attorneys pursuant to authority vested by Md. Code Ann., Crim. Proc. Section 15, Subtitle 4. The number of assistants is set by each county’s municipal government. In Baltimore City, the authority to appoint assistants is conferred by Art. V, Sec. 9 of the Maryland Constitution, with the number determined by “the Supreme Bench of Baltimore City.”

Because each ASA is invested with the same discretion as the State’s Attorney in deciding whether to exercise the sovereign power of the State in pursuing prosecution in any given case, the position is an “office of trust” and new assistants take office with an oath, administered by the Clerk of the Court. *See*: Md. Const. Art. I Sec. 9; *see also*: Md. Gen. Prov. Art. Sec. 2-206. It has become customary in some Maryland jurisdictions to conduct “swearing-in” ceremonies for ASA’s which take place in courtrooms, presided over by judges.¹

The ceremonies described by Requestor “usually” take place at 4 p.m. “after scheduled court proceedings.” This would nevertheless be during business hours. Maryland state courts do not close to the public earlier than 4:30 p.m., and even then, trials or hearings in any given courtroom can run much later. This opinion is based on the premise that the ceremonies at issue are held at least in part during the normal court day, either in the morning or afternoon, at a time when a judge normally sits.

¹ Such ceremonies are not conducted for assistant attorneys in the Office of the Public Defender. While the Public Defender’s office is statutorily created, assistants do not exercise sovereign authority in representing the indigent and therefore do not assume their office with an oath.

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As a threshold matter, we consider whether any Code provision disallows courtroom use during court hours for such proceedings. Rule 18-103.1(e) of the Code provides that a judge shall not “make inappropriate use of court premises, staff, stationery, equipment, or other resources.” (Emphasis supplied.) Courthouses are public buildings erected with public funds, often prominent and centrally sited in their cities or towns. A certain level of use for official but non-case-related purposes may be expected. Given the solemn nature of the occasion here – the execution of a law-related, constitutionally-required oath - and the fact that ASA’s will practice primarily in a courtroom setting, the Committee does not find this usage “inappropriate.” The dictates of Rule 18-103.1(e), however, must be followed: the business of the court must remain paramount.

Does the Code allow a judge to “preside” over such a ceremony? If the ceremony takes place in a courtroom during the court’s hours of operation, it is held as a judicial courtesy, and would expectedly occur with a judge robed and on the bench. The judge would therefore, as a matter of propriety, control the proceedings. The judge would recognize the Clerk of the Court for the swearing-in, may choose to make a few appropriate remarks, and may also elect to allow others to speak.

The Committee is not persuaded that such courtroom use would impermissibly lend the prestige of judicial office pursuant to Rule 18-101.3, above. The rule precludes conduct that “advances the personal or economic interests of the judge or others.” A swearing-in ceremony, properly performed, lends “prestige” only in the sense that it recognizes the important role an ASA plays in the administration of justice. The ceremony does not, however, confer any financial, professional or personal advantage to the individual ASA.

Similarly, we do not believe such proceedings undermine confidence in the judiciary by creating a perception of improper bias toward the State under Rule 18-101.2 (a) and (b), above. Under this provision, any perception of impropriety would have to be “reasonable,” and Comment 4 to the rule states that “[j]udges should participate in activities that promote ethical conduct among judges and attorneys, support professionalism within the judiciary and the legal profession, and promote justice for all.” The Committee is not prepared to say that limited use of a courtroom to administer a legally mandated oath to an assistant in a constitutionally created office accompanied by measured remarks would create an appearance of impropriety in reasonable minds.

Patently, the proper conduct of these proceedings will require the firm exercise of discretion and control by the judge(s) presiding, especially in offering remarks. While appropriate to the occasion, judicial comment must not be overly effusive, or in the nature of an overt personal endorsement, or testimonial, for the ASA being sworn, or for the jurisdiction’s State’s Attorney’s Office (“SAO”). While some degree of complimentary speech is to be expected, especially when based on a judge’s personal knowledge of the

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ASA (as where, for example, the ASA was the judge’s former law clerk), the appearance of partiality to the State’s cause is to be avoided.²

Inevitably, an ASA’s swearing-in will require coordination between the court and the SAO if the event is to take place in a courtroom during business hours before a judge. In making arrangements, the court must be sure to safeguard the imperatives of judicial independence, integrity and impartiality.

So long as ASA swearing-in ceremonies are conducted within the parameters discussed, the Committee is persuaded they would not be in violation of the Code. Some particulars of the ceremonies described by Requestor, however, bear further comment.

According to Requestor, the State’s Attorney arranges for and sends out invitations which identify the presiding judge(s) for the swearing-in. The Committee has particular concerns about the use of judges’ names to promote these events because doing so may reasonably create an appearance that the State’s Attorney and the ASAs being sworn-in have a special connection with the presiding judge(s) that could confer a trial advantage. Additionally, such usage could be misread to imply political support for the State’s Attorney. At all times, care must be taken so that such perceptions are avoided. Therefore, we advise participating judges to ensure that invitations, if issued, do not include their names.

Requestor also advised that certain judges from the District Court were invited to participate in these proceedings at the Circuit Court. Maryland law allows District Court judges to sit in the Circuit Courts and Circuit Court judges to sit in the District Courts. *See* Section 18 (b) of Article IV of the Constitution of Maryland and Maryland Rule 16-108. Each year the Chief Judge issues a series of “Cross Designation Orders” enabling this procedure. If any or all of the District Court judges wish to accept the invitation to participate, so long as the Administrative Judges of the Circuit and District Courts, as well as any presiding Circuit Court judge, authorize the appearance, this practice is neither procedurally nor ethically proscribed.

Requestor did not indicate the typical amount of time taken up by the programs at issue. This opinion will not impose a time limit for such proceedings, except to state that the court time provided should be appropriate for the occasion and that presiding judges must be sensitive to ethical prerogatives in guiding the program.

If well-supervised, these ceremonies can “promote ethical conduct” and “support professionalism.” Such occasions may serve to emphasize, not only the nature and importance of the ASA’s role, but also the opportunity the position offers to “promote

² Requestor indicates that judges who are asked to preside by the State’s Attorney or the ASA are usually former ASA’s themselves. Whether or not they are SAO alumni, presiding judges must not give the impression that they hold any bias toward that office.

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justice” through the application of fairness and common sense. *See* Comment 4 to Rule 18-101.2 (a) and (b), above.

In closing, we emphasize that this opinion should not be read to require judges to agree to participate in ASA swearing-in ceremonies at SAO request, nor as requiring administrative judges to allow associate judges to participate.³ Neither should it be read to require the consent of either administrative or associate judges to the use of court time, courtrooms, and judicial resources for these proceedings.

Application: The 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.

³ While the question of participation will generally be within the discretion of each judge, the Committee recognizes that administrative judges, in the exercise of their responsibilities as stewards of court resources, may have occasion to disallow participation of an associate under their supervision. *See* Rule 18-102.5, involving judicial administrative duties and directives.