

Maryland Judicial Ethics Committee

Opinion Request Number: 1987-05

Date of Issue: November 12, 1987

■ Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge May Not Serve as Member of Hospital or Nursing Home Committee Which Gives Advice Concerning Treatment or Nontreatment of Patients

A judge has requested the opinion of the Committee regarding the propriety of serving as chair of the Ethics Committee of the Hebrew Home of _____.

The Ethics Committee is composed of at least one lawyer, one non-staff physician, and one Rabbi in addition to representatives from the administration, medical, nursing and social work departments. The role of the Committee is “to develop guidelines and policies for the staff and the institution on ethical issues; to consult with staff, families or residents on cases which present a conflict on ethical issues; to provide a forum for discussion of ethical issues from various perspectives: legal, religious, medical, social, ethical; to develop an awareness of ethical issues.”

Cases presented to the Committee have included the issues of feeding the terminal patient by artificial means and differences of opinion between the physician and the family as to whether to continue heroic measures. The Committee has been involved in writing guidelines for treatment orders at the end of life and clarifying policies concerning informed consent and the use of psychotropic medication. The future plans of the Committee include “continuing to discuss cases retrospectively as an educational process; writing policy guidelines on ethical issues; looking at social and administrative issues in the Home which pose ethical problems; developing educational programs for residents, families and staff; and encouraging procedures to strengthen the patient[']s role in medical decision making (such as the durable power of attorney and living wills).”

(The functions of this Ethics Committee are very similar to the duties and responsibilities of the patient care advisory committees which all “hospitals” in the state are required to have established by July 1, 1987. See Md. Health–Gen. Code Ann., § 19-370 *et seq.* (1987 Supp.). § 19-373(b) provides that the advisory committee may (1) educate various persons “concerning medical decision-making” and (2) “review and recommend institutional policies and guidelines concerning the withholding of medical treatment.” § 19-374(a) requires the advisory committee, upon request, to “give advice concerning the options for medical care and treatment of an individual with a life-threatening condition.” Apparently, the Hebrew Home is a “domiciliary care” institution rather than a “hospital,” as those terms are defined in § 19-301.*)

Canon IVC of the Code of Judicial Conduct provides:

“A judge may participate and serve as a member, officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, law-related or civic organization not conducted for the economic or political advantage of its members, subject to the following provisions:

* Chapter 147, Acts of 1996, repealed the definition of “domiciliary care home” in § 19-301 as part of a reorganization of licensing for “assisted living programs”.

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- (1) A judge should not participate and serve if it is likely that the organization:
- (a) will be engaged in proceedings that would ordinarily come before the judge;
 - (b) will be regularly engaged in [adversary] proceedings in any court;
 - (c) deals with people who are referred to the organization by the court on which the judge serves or who otherwise might come before the court.”
(Emphasis added.)

The primary question presented in this inquiry is whether the judge’s service on the Ethics Committee would constitute the “practice of law” prohibited by both Maryland Code Ann. Cts. and Jud. Proc. Art., Section 1-203(a) and Canon IVI of the Code of Judicial Conduct.

In [Opinion Request No. 1987-04 (unpublished), 30 June 1987] the Committee concluded that the evaluation and recommendation by a judge for the judge’s church of litigation in which the church is involved constitutes the prohibited “practice of law.” In its discussion of the term “practice of law”, the Committee noted that neither the Code nor the Canon defines what is meant by the term for the purpose of the prohibition but that it has been generally recognized that “the giving of advice or the rendition of any service requiring the use of any degree of legal knowledge or skill” may constitute the practice of law. See Lozoff v. Shore Heights, Ltd., 342 N.E.2d 475 (Ill. App. 1976); also Estate of Vafiades v. Sheppard Bus Service, 469 A.2d 971 (N.J. Super L. 1983); State v. Wells, 5 S.E.2d 181 (S.C. 1939); and cases cited In Re Application of Mark W., supra, 303 Md. 1, including Lukas v. Bar Association of Montgomery County, 35 Md. App. 442 (1977).

Particularly in a medical framework, “ethical” and “legal” decisions are often inextricably intertwined. In [Opinion Request No. 1977-12], this Committee determined that a judge may not serve as a member of a hospital research committee stating:

“While it is true that you are not to be asked specifically to give legal advice, you will be expected to evaluate problems from a legal perspective and this would require you to familiarize yourself with many research activities and usages of proposed new drugs that may well result in malpractice suits against the hospital, its staff, or, conceivably, its research committee. Moreover, one of your duties will be evaluations from a legal perspective of the steps necessary for the protection of the hospital and its medical staff. The hospital and its staff obviously will place some reliance on the recommendations of the Committee, which will include your legal evaluation.”

The judge is requested to serve as the legal member of the Ethics Committee of the Home and will obviously be called upon to evaluate cases and issues from a legal perspective, to render advice, and to participate in the development of guidelines and policies which may also require legal determinations. Therefore, while we commend the judge’s desire to serve on the Committee, we conclude the acceptance of the position is prohibited by the Canon.