

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2013-15

**Date of Issue:** September 18, 2013

■ Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Judge May Serve on Commission on Child Custody Decision Making

**Issue:** May a judge serve as a member of the Commission on Child Custody Decision Making?

**Answer:** Yes, subject to the qualifications set forth below.

**Facts:** Chapter 633, 2013 Laws of Maryland (House Bill 687) established a Commission on Child Custody Decision Making (the “Commission”) effective July 1, 2013. The Commission is comprised of various stakeholders from the Legislature and the Executive Branch, the Maryland State Bar Association, the University of Maryland School of Social Work, and members of the Maryland bench, among others.<sup>1</sup>

The Commission is charged with the responsibility of studying the practice, principles, and process for child custody decision making in Maryland. Chapter 633, Section 1(f)(1). The Commission is to make recommendations to the Governor regarding: (1) how to make the establishment and modification of child custody orders more uniform, fair, and equitable; (2) how to reduce litigation in child custody proceedings; (3) the adverse effects of child custody litigation and ways the court system can minimize those effects; (4) how to promote and ensure that children have ongoing relationships with each parent; (5) how to maximize the involvement of both parents in each child’s life; (6) the advantages and disadvantages of joint physical custody and the impact of joint physical custody on the health and well-being of children; (7) whether or not there is any gender discrimination in custody decisions in Maryland; (8) an assessment of the statutes from other states used for child custody determinations; (9) whether a change to the Annotated Code of Maryland is necessary with respect to child custody decisions; (10) case management for family law cases in Maryland and other states and how to improve timely access to the court for custody matters; (11) the accountability of Maryland courts regarding protective orders and domestic violence proceedings; (12) the most effective manner to facilitate cooperative decision making by parents involved in

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<sup>1</sup> Chapter 633, Section 1(b) provides that the Commission consists of the following members: two members of the Senate of Maryland from the Judicial Proceedings Committee, two members of the House Judiciary Committee, two Circuit Court judges, one District Court judge, one family law master, two representatives of the Maryland State Bar Association, one representative of a domestic violence advocacy group, one representative of a fathers’ rights group, one representative of the Women’s Law Center, one educator on family law, three licensed mental health workers, one representative of the Children’s Rights Fund of Maryland, and one sociologist from the University of Maryland School of Social Work.

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2013-15

**Date of Issue:** September 18, 2013

■ Published Opinion    □ Unpublished Opinion    □ Unpublished Letter of Advice

Page 2 of 5

child custody proceedings; (13) an assessment of current training programs available in Maryland to judges regarding child custody decision making and ways to improve the training; (14) standardization of the language used by courts in making child custody determinations; (15) data regarding contested custody cases by jurisdiction over a two year period; and (16) data on pro bono legal resources available in domestic violence protective order proceedings in Maryland. *Id.*, Section 1(f)(3)-(20). The Commission members receive no compensation, but may be reimbursed for expenses. *Id.*, Section 1(e).

**Discussion:** Chapter 633 evidences the Legislature's intent that members of the bench from the Circuit and District Courts serve on the Commission. Judges, nevertheless, may face a dilemma when asked to participate in such extra-judicial activities given the necessity of maintaining judicial independence and impartiality. As the Committee previously opined in [Opinion Request No. 2007-11], issued on October 14, 2008:

Sometimes a statute that establishes a governmental commission will specify that a judge should be one of the members. Legislation, however, does not override the specific rules and general principles in the code of judicial conduct to render legitimate service that is otherwise impermissible under those standards. ... Automatic deference to the legislature is not consistent with the principles of judicial independence that underlie the code. Although a legislature would not intentionally attempt to compromise judicial independence by requiring judicial participation in a government commission, the legislature may have mandated judicial participation without due consideration or understanding of the possible ramifications for judicial impartiality and independence.<sup>2</sup>

Rule 3.4 of the Maryland Code of Judicial Conduct (Md. Rule 16-813) states that “[a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.” Comment [1] to Rule 3.4 provides that the Rule “implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system or the administration of justice.” Comment [1] warns, however, that “a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment ... and giv[e] due regard to the requirements of the independence and impartiality of the judiciary.” Comment [2] to Rule 3.4, in turn, provides that “[a] judge may not accept a governmental appointment that could interfere with the effectiveness and independence of the judiciary, assume or

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<sup>2</sup> Quoting Cynthia Gray, *Ethics and Judges' Evolving Roles off the Bench: Serving on Governmental Commissions*, 17-18 (2002).

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2013-15

**Date of Issue:** September 18, 2013

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Page 3 of 5

discharge an executive or legislative power, or hold another 'office' under the Constitution or laws of the United States or the State of Maryland.”<sup>3</sup>

This Committee has issued several opinions with respect to a judge’s service on governmental committees. These opinions all largely turn on the level and extent to which a committee otherwise concerned with the law is mandated to undertake an executive or legislative function. For example, in [Opinion Request No. 2007-11], the Committee opined that a judge should not accept an appointment as a member of a county’s Local Management Board as many of the Board’s functions were executive in nature. Among the duties carried out by the Local Management Board were the development, funding, and evaluation of services to achieve measurable improvement in child well-being.

In contrast, in [Opinion Request No. 2004-24], issued on December 3, 2004, after concluding no executive or legislative powers were implicated, nor were there any other constitutional impediments, the Committee opined that a judge could serve on a Local Drug and Alcohol Abuse Council as the functions of that Council were seen as advisory only, not involving control over funding or otherwise binding on any governmental entity.

In [Opinion Request No. 2009-02], issued on July 28, 2009, the Committee opined that a judge could accept an appointment to the Maryland Justice Act Committee (“CJAC”); however, there were limits to the participation. In that opinion, the Committee noted that the purposes and functions of the CJAC, which were to “review and evaluate, make policy recommendations and coordinate efforts with other agencies” were not clearly delineated, and concluded that appointment to the CJAC was permissible if it was understood that the judge’s participation was primarily limited to the functions that concerned the administration of justice and improvement of the law, and were not otherwise executive or legislative in nature. *See also* [Opinion Request No. 2011-24], issued on December 14, 2011 (the Committee found that a judge may be a member of the Public Defender Regional Advisory Board, but again with limitations).

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<sup>3</sup> Rule 1.2(a) of the Maryland Code of Judicial Conduct provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” (Md. Rule 16-813). Article 8 of the Maryland Declaration of Rights states: “That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.” Article 33 provides, in pertinent part: “[T]he independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People[.]”

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2013-15

**Date of Issue:** September 18, 2013

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Page 4 of 5

Finally, the recent opinion of this Committee in [Opinion Request No. 2013-11], issued on August 12, 2013, is closely analogous to the facts under consideration in this Opinion. In [Opinion Request No. 2013-11], the Committee opined that a judge could serve as a member of a Task Force on Juvenile Court Jurisdiction, but cautioned the judge to avoid participation on topics which implicate legislative or executive functions. Specifically, the Committee found that recommendations that potentially would result in legislative action or that may result in the development of protocols for the Executive Branch were to be avoided.

Broadly speaking, the charge given to the Commission on Child Custody Decision Making concerns the law, the legal system, and the administration of justice. While the Commission's responsibilities appear to be advisory, the nature of some of the recommendations to be made, however are of concern to the Committee. For example, the questions found in Chapter 633, Sections 1(f)(3), (9), (11) and (13)<sup>4</sup> may implicate legislative functions in which a judge should not be involved.

Similarly, the Commission's recommendations found in Chapter 633, Section 1(f)(4) regarding "[a] study [on] how to reduce litigation in child custody proceedings" may implicate executive functions involving, *inter alia*, the development of protocols for Executive Branch agencies. As the Committee said in [Opinion Request No. 2009-02] "judges should not create protocols for Executive Branch agencies. Nor should they create protocols that bind the courts; each case should be decided on its own facts and the law applicable to those facts." Accordingly, to the extent that the development of these recommendations involves executive or legislative functions, the requesting judge should not participate in them.

The Committee thus concludes that the requesting judge can accept appointment to the Commission if it is understood that the judge's participation is limited to those functions that concern the law, the legal system, and the administration of justice, that are not executive or legislative in nature, and do not compromise judicial independence. The

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<sup>4</sup> Section 1(f)(3) requires Commission members to study how to make the establishment and modification of child custody orders more uniform, fair, and equitable. Section 1(f)(9) requires Commission members to study whether or not there is any gender discrimination in custody decisions in Maryland, and, if so, how to address such discrimination. Section 1(f)(11) requires Commission members to study whether the Annotated Code of Maryland should contain a statute regarding child custody decision making that would include definitions and factors for consideration in such decisions. Section 1(f)(13) requires Commission members to study the accountability of Maryland courts when using interventions such as protective orders, whether the courts should adopt processes to allow for compliance hearings, and the impact of domestic violence proceedings on temporary and final custody determinations.

**Maryland Judicial Ethics Committee**

**Opinion Request Number:** 2013-12

**Date of Issue:** September 18, 2013

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

Page 5 of 5

requesting judge, therefore, should make clear to all Commission members, and those who appear before the Commission, the limits of the judge's participation. The Committee further cautions that the judge should constantly review the activities in which he or she is asked to participate.

**Application:** The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct described in this opinion, to the extent of your compliance with this opinion. Omission or misstatement of a material fact in the written request for opinion negates reliance on this opinion.

Additionally, the 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 fact that could affect the conclusion of the Committee. If you engage 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 the facts, submit an updated request to the Committee.