

Maryland Judicial Ethics Committee

Opinion Request Number: 2011-24

Date of Issue: December 14, 2011

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Serve on Public Defender Regional Advisory Board

Issue: May a judge serve as a member of a Public Defender Regional Advisory Board (“Regional Advisory Board”)?

Answer: Yes, but the judge may not participate in all functions of the Regional Advisory Board.

Facts: The Governor’s Office has asked a trial judge to serve as member of a Public Defender Regional Advisory Board. The judge has requested an opinion as to the propriety of serving on the Board.

Pursuant to § 16-302 of the Criminal Procedure Article of the Maryland Code, the Board of Trustees of the Office of the Public Defender is responsible for studying and observing the operations of the Office, coordinating the activities of the regional advisory boards, and advising the Public Defender on panels of attorneys, fees, and other matters about the operation of the public defender system. There are four Regional Advisory Boards. These Boards, in turn, are responsible for studying and observing the operation of the district public defender offices, and advising the Public Defender and district public defenders on panels of attorneys, fees, and other matters about the operation of district public defender offices and the public defender system.¹ The members of the Regional Advisory Boards are appointed by the Governor and serve a term of three years.²

Section 16-303(d) of the Criminal Procedure Article requires that each member of a Regional Advisory Board be: (1) a resident of a district represented by that Regional Advisory Board; and (2)(i) a judge of a circuit court, (ii) a judge of the District Court, or (iii) an active attorney admitted to practice before the Court of Appeals of Maryland.

Discussion: Section 16-303(d) evidences the Legislature’s intent that trial judges serve on Regional Advisory Boards. Judges, nevertheless, may face a dilemma when asked to participate in such extra-judicial activities given the necessity of maintaining judicial independence and impartiality.³

¹ *Id.* at § 16-304.

² *Id.* at § 16-303.

³ 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.” (Rule 16-813). Article 8 of the Maryland Declaration of Rights states: “That the Legislative, Executive and

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Rule 3.4 of the Maryland Code of Judicial Conduct (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 states 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.”

In [Opinion Request No. 2007-11], issued on October 14, 2008, this Committee opined that a judge should not accept an appointment as a member of a county’s Local Management Board. The opinion stated, *inter alia*:

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.^[4]

Thus, while some of the purposes and functions of Local Management Boards are related to the administration of justice, many functions are executive in nature, thereby, rendering a judge’s membership on such Boards inappropriate.⁵

In [Opinion Request No. 2009-02], issued on July 28, 2009, by contrast, this Committee opined that a judge could accept an appointment to the Maryland Children’s

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[.]”

⁴ Quoting Cynthia Gray, *Ethics and Judges’ Evolving Roles off the Bench: Serving on Governmental Commissions*, 17-18 (2002).

⁵ In [Opinion Request No. 2004-24], issued December 3, 2004, the Committee permitted a judge to serve on a Local Drug and Alcohol Abuse Council; however, the functions of that Council were seen as advisory only, not involving control over funding or otherwise binding on any governmental entity.

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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 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.

The Office of the Public Defender (“OPD”) provides legal representation to indigent individuals in criminal and juvenile proceedings in the courts.⁶ The OPD, however, is not a part of the Judicial Branch. It is in the Executive Branch of state government.⁷ The Public Defender is appointed by the Board of Trustees,⁸ and is responsible for the operation of the Office.⁹ The Public Defender has various duties, which include the preparation of schedules of fees and expenses for panel attorneys, consultation and cooperation with professional groups about the causes of criminal conduct and the development of effective means to: reduce and discourage the commission of crime; rehabilitate and correct individuals charged and convicted of a crime; and administer and conduct the Office.¹⁰ The Public Defender is also required to ensure that each district public defender maintains a confidential list of private attorneys available to be appointed as panel attorneys in cases involving, for example, a conflict of interest.¹¹

There are many aspects of the OPD that have a direct relationship to the law, the legal system and administration of justice. The appointment of attorneys to represent

⁶ Section 16-204(b) of the Criminal Procedure Article provides, in part, that public defender representation shall be provided in:

- (i) a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;
- (ii) a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to a presentment being made before a commissioner or a judge;
- (iii) a postconviction proceeding for which the defendant has a right to an attorney under Title 7 of this article;
- (iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;
- (v) a proceeding involving children in need of assistance under § 3-813 of the Courts Article; or
- (vi) a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article[.]

⁷ *Id.*, at § 16-202.

⁸ *Id.* at § 16-203(a).

⁹ *Id.* at § 16-207(b).

¹⁰ *Id.*

¹¹ *Id.* at § 16-208.

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indigent litigants has a direct relationship to the administration of justice, as does maintaining a list of attorneys for appointment in conflict of interest cases. Conversely, there are other functions of the OPD that are not related to the administration of justice, but rather, are executive in nature. Such matters include employee and office management issues, as well as funding and budgetary issues. These are not matters that a judge should be involved in, as they might undermine a judge's independence and impartiality.

As discussed above, the Regional Advisory Boards are responsible for studying and observing the operation of the district public defender offices and advising the Public Defender and district public defenders on panels of attorneys, fees and other matters concerning the operation of the district public defender offices and the public defender system. It is the Committee's understanding that the recommendations of the Regional Advisory Boards are not binding on any governmental agency or entity.

Trial judges are in frequent contact with public defenders and panel attorneys and, thus, are in a unique position to study, make observations and provide advice to the OPD on issues that pertain to the law, the legal system and the administration of justice. Indeed, having a judge fulfill such a role, as a member of an advisory body, would not undermine judicial independence or impartiality.

The Committee, however, is concerned about that portion of § 16-304(3) of the Criminal Procedure Article that states that Regional Advisory Boards advise the Public Defender and district public defenders on "other matters about the operation of the district public defender offices and the public defender system." While it is unclear exactly what these "other matters" are, to the extent that they involve Executive Branch functions, a judge should not participate in them. As we said in [Opinion Request No. 2007-11], "[w]hile there indeed may be some 'elasticity' in the separation of powers among the branches of government, some functions are clearly *non-judicial* and may not be performed by judges."

For the reasons discussed, the Committee concludes that the requesting judge can accept appointment to a Regional Advisory Board, provided that 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, and that are not executive in nature. The requesting judge should make his or her limitations clear to the Board members. The Committee further cautions that the judge constantly should 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 of the requestor described in this opinion, to the

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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 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 facts, submit an updated request to the Committee.