

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2014-06

**Date of Issue:** May 6, 2014

- Published Opinion       Unpublished Opinion       Unpublished Letter of Advice

Orphans' Court Judge May Accept Employment with a State or Local Jurisdiction Under  
Certain Circumstances

**Issue:** May a judge of the Orphans' Court accept employment with a State or local jurisdiction?

**Answer:** Yes, provided that the employment involves only the performance of ministerial duties.

**Facts:** The requesting judge (the "Requestor") is a judge of the Orphans' Court, serving part-time. The Requestor inquires as to whether he/she may work for an agency of the State or of the jurisdiction in which his/her court is located.

**Discussion:** The Orphans' Court is established pursuant to Article IV, § 1 of the Maryland Constitution. It is a court of record. Its judges are elected by the voters of the jurisdiction (county or Baltimore City) in which it is located and are paid by the local jurisdiction. *Id.* § 40.

The Requestor is a lawyer and may practice law, provided that the judge may not use his/her judicial office to further his/her success in the practice of law, nor may the judge appear before the Orphans' Court on which the judge serves. Maryland Code of Judicial Conduct ("Code"), Maryland Rule 16-813, Section 3, Rule 3.10(b)(2)(B).

Articles 33 and 35 of the Maryland Declaration of Rights apply to this issue. They provide, in pertinent part:

Article 33: "[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.... No Judge shall hold any other office, civil or military, or political trust, or employment of any kind, whatsoever, under the Constitution or Laws of this State, or of the United States[.]"

Article 35: That no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State.... Non-elected membership in the militia of this State, a law enforcement agency, a fire department or agency, or a rescue squad shall not be considered an office of profit within the meaning of this Article....

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The term “office”<sup>1</sup> as it applies in Article 35 has been interpreted by the Court of Appeals in a line of cases. In *Moser v. Howard County Board*, 235 Md. 279, 281 (1964), the Court succinctly identified five standards that had been used as a guide in determining whether a position is an office: 1. The position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional; 2. The incumbent performs an important public duty; 3. The position calls for the exercise of some portion of the sovereign power of the State; 4. The position has a definite term, for which a commission is issued, a bond required and an oath required; 5. The position is one of dignity and importance. Noting that no one test is determinative, the Court held in *Hetrich v. County Commissioners*, 222 Md. 304, 307 (1960), that the ultimate test is whether it is a “position that has been created by law and casts upon the incumbent duties which are continuing in nature and not occasional and call for the exercise of some portion of the sovereignty of the State.”

An example of the Court’s interpretation of the meaning of the term “office” is found in *Duncan v. Koustenis*, 260 Md. 98 (1970). The Court held that a public teacher did not occupy an office because he did not exercise the sovereign powers of government - those being vested in the Department of Education.

In 1980, the Maryland Attorney General gave an opinion on whether judges could teach part-time in a State institution in light of the restrictions of Articles 33 and 35 (65 Op. Atty Gen. 285, 1980 WL 118104 (Md. A.G.)). He examined the language of both Articles and concluded that they could do so. He found that courts in other states have interpreted the terms “office,” “political office,” and “public office” to be synonymous and further concluded that the term “office” has the same meaning in Articles 33 and 35.

The Attorney General reviewed the history of the language of Article 33 and found that the comma inserted after the word “trust” in the third sentence was inserted by error by a scrivener after the Constitution of 1867 where the Article first appeared was adopted. Upon removing the extraneous comma, one correctly interprets the term “political” to modify both terms: “trust” and “employment.” He concluded that the term “political employment” means employment involved with policymaking or with management of the affairs of state, or a position that involved policymaking or management responsibility “with a political view for the good government and benefit of the community.”

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<sup>1</sup>The court has used the terms “office of profit”, “public office” and “office” synonymously.

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Always there is the responsibility to “avoid conduct that would create in reasonable minds a perception of impropriety.” Rule 1.2. Since citizens who do business with a government agency might not be able to discern whether a person acting for the agency is an officer exercising the sovereign power of government or is simply performing a required task, a narrow view of what government positions are public offices is required. The contrast between the descriptors of “ministerial” and “discretionary” duties is helpful.

A ministerial duty is one that involves the execution of a specific task that is to be performed according to specific guidelines. *D’Aoust v. Diamond*, 424 Md. 549, 588-89 (2012). A discretionary duty is one that requires personal deliberation, decision and judgment. *Id.* at 589. Public officials (“officers”) exercise their judgment when they exercise the sovereign power of government. *James v. Prince George’s County*, 288 Md. 315, 327 (1980).

The Requestor is a lawyer and likely would seek employment such as a staff attorney for an agency or department. While one in such a role would not directly exercise the sovereign power of government, the advice given and the research performed would likely *influence* the exercise of the sovereign power of government. Lawyers function by exercising deliberation and judgment. Their duties, by their very nature, are discretionary. (Whether one is a public official or performing discretionary duties is not a matter of geography; the limitations apply in any jurisdiction.)

It is the opinion of the Committee that the Requestor may accept employment by a State or local agency, provided that such employment involves performing only ministerial duties. Such positions, in addition to teaching, might include administrative positions such as file clerk or counter clerk or service as a member of a fire or rescue squad. Such a position should not be in the office of a Register of Wills or an Orphans’ Court, where matters that might come before the Requestor repose.

In summary, Articles 33 and 35 do not prohibit judges from other employment by the State or local government as long as the employment is not as a public officer. Nor does the Code prohibit such employment, although the latter also provides some limits. Rule 3.1(a) prohibits “activities that will interfere with the proper performance of the judge’s judicial duties,” while Rule 3.1(b) prohibits “activities that will lead to frequent disqualification of the judge.”

The authority of this Committee is limited to rendering opinions as to the application of the Code of Judicial Conduct; it does not extend to interpretations of the Maryland Declaration of Rights. In this opinion, the Committee has cited interpretations by the Court of Appeals and the Attorney General and has been guided by them in analyzing the intent of the Court in adopting the current Code of Judicial Conduct, specifically, Rules 1.1. (Compliance with the Law) and 1.2 (Promoting Confidence in the Judiciary). The Requestor may wish to seek an opinion from the

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Attorney General before accepting employment in a specific position to satisfy his/her requirement to comply with the law. Rule 1.1.

**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.

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 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.