

Maryland Judicial Ethics Committee

Opinion Request Number: 2009-02

Date of Issue: July 28, 2009

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Accept Appointment as Member of Maryland Children's Justice Act Committee

Issue: May a judge accept an appointment as a member of the Maryland Children's Justice Act Committee ("CJAC")?

Answer: Yes, but the judge may not participate in all of the functions of the CJAC.

Facts: The requesting judge has been appointed to the Children's Justice Act Committee, a standing committee of the State Council on Child Abuse and Neglect ("SCCAN").¹ The CJAC fills the role of a State task force, the establishment of which is required in order for Maryland to receive federal grants to assist in the handling of cases of child abuse and neglect. 42 U.S.C. § 5106c ("Children's Justice Act" or the "Act"). The Act requires that the task force be comprised of judges, attorneys, representatives of the law enforcement community, child protective services, parents, representatives of parents' groups, child advocates, health and mental health professionals, and individuals experienced in working with children with disabilities.

The duties of the CJAC are described variously in the Act, and in the CJAC's draft by-laws.² Included among the duties enumerated in the Act are the following:

- [R]eview and evaluate State investigative, administrative and both civil and criminal judicial handling of cases of child abuse and neglect... as well as cases involving suspected child maltreatment related fatalities....
- [M]ake policy and training recommendations as to:
 - (a) investigative, administrative and judicial handling of cases of child abuse and neglect ... as well as cases involving suspected child maltreatment related fatalities ... in a manner which reduces the additional trauma to the child victim and the victim's family and which also ensures procedural fairness to the accused;
 - (b) experimental, model and demonstration programs for testing innovative approaches and techniques which may improve the prompt and successful resolution of civil and

¹ Md. Code Ann., Fam. Law Art., § 5-7A-05(d).

² The State of Maryland Children's Justice Act Committee Draft By-Laws, 10/31/05.

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criminal court proceedings or enhance the effectiveness of judicial and administrative action in child abuse and neglect cases, particularly child sexual abuse and exploitation cases, including the enhancement of performance of court-appointed attorneys and guardians ad litem for children, and which also ensure procedural fairness to the accused[.]

(c) [R]eform of State laws, ordinances, regulations, protocols and procedures to provide comprehensive protection for children from abuse, particularly child sexual abuse and exploitation, while insuring fairness to all affected persons.

42 U.S.C. § 5106d & e.

The CJAC's by-laws also direct that the committee is to "[c]oordinate efforts with other public and private agencies charged with addressing the issues of child abuse and neglect[.]"³

Discussion: Judges are often called upon to participate in activities off the bench. Those invitations come from, among other sources, governmental agencies, community and civic groups, and occasionally a legislative body. Regardless of the source of the invitation, a judge may not participate in any activity that is in violation of the canons of judicial ethics.⁴

In this instance, the CJAC is a committee of a State agency established pursuant to federal law. The Judiciary has a direct interest in the handling of cases involving children in the courts. Judges have knowledge and experience in conducting criminal and civil trials and hearing from social workers, mental health providers and child advocates.

³ 10/31/05 CJAC Draft By-Laws, Section A.

⁴ See, e.g., [Opinion Request No. 2007-11], issued on October 14, 2008, quoting Cynthia Gray, *Ethics and Judges' Evolving Roles off the Bench: Serving on Governmental Commissions*, 17-18 (2002): "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 participation in a government commission, the legislature may have mandated judicial participation without due consideration and understanding of the possible ramifications for judicial impartiality and independence."

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Canon 4 of the Maryland Code of Judicial Conduct governs extra-judicial activities. Canon 4A(1) establishes that, in conducting extra-judicial activities, a judge shall not “cause a substantial question as to the judge’s capacity to act impartially as a judge[.]” Canon 4C(1) cautions that a judge shall not “consult with” an executive or legislative body or official” except “when acting as to a matter that concerns the administration of justice, the legal system, or the improvement of the law.” Canon 4C(2) permits appointment to a governmental “advisory commission, committee or position.”

Whether a judge may participate as a member of a committee thus depends on the functions it performs and the responsibilities that the judge is to undertake. The functions of the CJAC are not clearly delineated; rather, they are stated in general terms. The CJAC is to “review and evaluate,” “make policy recommendations” and “coordinate efforts with other agencies.”

Many of the responsibilities of the CJAC are related to the administration of justice and the improvement of the law. For example, its attention to judicial handling of cases “in a manner which reduces the additional trauma” to victims and which “ensures procedural fairness to the accused” are matters of direct interest to judges. Judges are keenly interested and capable of recommending programs “which may improve the prompt and successful resolution of civil and criminal court proceedings” and the “enhancement of performance of court-appointed attorneys and guardians ad litem[.]” It is, therefore, appropriate for a judge to be involved in those functions.

Not all of the activities of the CJAC concern the administration of justice or the improvement of the law, however.⁵ Other judicial ethics panels have explored the boundaries of “the administration of justice.” The Massachusetts Committee on Judicial Ethics, noting that “facets of almost every social problem facing today’s society will play themselves out in the courts,” has declared that there must be a “direct nexus between what a governmental commission does and how the court system meets its statutory and constitutional responsibilities....” Massachusetts Advisory Opinion 98-13.⁶

⁵ The history accompanying Canon 4C(2) explains that “Canon 4C(2) is derived from the provisions of the Maryland Code (1987), Canon 4B(2) as to serving on a governmental advisory body and the similar, first sentence of ABA Code (2000), Canon 4B(2), but is restated to allow acceptance of an appointment to a governmental advisory commission, committee or position in addition to those devoted to the administration of justice, the legal system, or improvement of the law.” Md. Rule 16-813, p. 516. The Committee believes, however, that while a judge may serve on commissions or committees in addition to those devoted to the administration of justice or the improvement of the law, such considerations nevertheless are important, if not dispositive, factors in determining whether, and to what extent, serving is appropriate.

⁶ Issued on 8/27/98.

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Accordingly, the mere fact that an issue may come before the courts does not mean that it is related to the administration of justice or the improvement of the law.

Some of the CJAC's duties appear to be in the nature of functions of the Legislative or Executive Branch of government. For example, the requirement to recommend *reform* of State law suggests the performance of a legislative function. The Act specifies that disbursements of federal grants are conditioned upon adoption by the state of recommendations of the task force, which, in Maryland, is the CJAC. 42 U.S.C. § 5106c(e)(1). That requirement thus elevates mere legislative *recommendations* to legislative *requirements* in order to receive federal funds. To the extent that the CJAC issues recommendations, in compliance with the Act, a judge should not participate.

Similarly, the duty to make recommendations as to "investigative, administrative and judicial handling of cases" suggests creation of protocols for law enforcement and social welfare agencies, as well as the courts. Such functions are executive in nature, as is the general duty to "coordinate efforts with other ... agencies." 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. While merely exchanging information with other agencies is not objectionable, the extent of such "coordination," in this circumstance, is not spelled out.⁷

The by-laws list among CJAC's responsibilities, "[r]eview and comment on all grant applications for federal Children's Justice Act funds...." In the "review and comment" process a judge can perform the advisory function of recommending the effective use of grant funds to enhance the administration of the law. The Committee cautions, however, that if, in the review process the CJAC is, in reality, approving or rejecting grants, the judge should not participate. Approving funding is a function of the Executive Branch of government.

Particularly troublesome, among the duties of the CJAC, is the element of fatality review. Judges should not examine and critique the policies and practices of social and law enforcement agencies. Furthermore, conclusions resulting from fatality reviews may find their way into court in civil suits claiming the negligence of an agency in a particular case or in many cases involving that agency. As such, a judge should not participate.

For the reasons discussed above, the Committee concludes that the requesting judge can accept appointment to the CJAC if it is understood that the judge's participation is primarily limited to those functions that concern the administration of justice and the improvement of the law, and that are not executive or legislative in nature.

⁷ For a more detailed discussion of separation of powers issues, *see* [Opinion Request No. 2007-11].

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The requesting judge should make clear to all CJAC members, and those who appear before CJAC, 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 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.