

Maryland Judicial Ethics Committee

Opinion Request Number: 2016-19

Date of Issue: June 11, 2016

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

An Orphans' Court Judge As Guardian or Mediator

Issues: May an Orphan's Court judge (1) serve as a court-appointed guardian or (2) act as a mediator?

Answer: An Orphans' Court judge may not serve as a mediator except as part of his/her judicial duties. An Orphans' Court judge may serve as a guardian but only in limited circumstances.

Facts: The requesting judge ("Requestor") is an Orphans' Court judge who is also an attorney. The Requestor asks if the Code of Judicial Conduct (the "Code") permits him/her to: (1) serve as a court-appointed guardian in guardianship proceedings; and (2) act as a mediator. With regard to the second inquiry, the Requestor relates that he/she is a certified mediator and provided mediation services on a volunteer, pro bono basis through court-sponsored alternative dispute resolution programs. The Requestor seeks the Committee's advice as to whether he/she may continue this public service and, additionally, whether he/she may serve as a mediator in a private capacity.

Discussion: Initially, we note that Estates and Trusts Article § 2-109 prohibits orphans' court judges in most counties from appearing as counsel in court proceedings.¹ Section 2-109(b) set out exceptions: judges of the Orphans' Courts of

¹ ET § 2-109 states:

§ 2-109. Restriction on judge's practice of law.

(a) *In general.* — Except as provided in subsection (b) of this section, a judge of the court may not act as an attorney at law in a civil or criminal matter during a term of office.

(b) *Application of section.* — This section does not apply:

(1) In Harford County;

(2) In Montgomery County;

(3) In Baltimore City, to a judge of the Court while practicing law before any court of the State except an orphans' court; or

(footnote continued)

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Baltimore City, and Baltimore, Howard and Calvert Counties may appear as counsel, subject to limitations that vary from jurisdiction to jurisdiction.² Section 2-109 does not address whether an orphans' court judge may serve as a court-appointed guardian or as a mediator. To answer these questions, we turn to the provisions of the Code.

Rule 3.10 states in pertinent part:

RULE 3.10. PRACTICE OF LAW

(a) **In General.** Except as expressly allowed by this Rule, a judge shall not practice law.

(b) **Exceptions.** * * *

(2) To the extent expressly allowed by law and *subject to other applicable provisions of this Code*, a part-time judge of an orphans' court who is a lawyer may practice law, provided that:

(A) the judge shall not use the judge's judicial office to further the judge's success in the practice of law; and

(B) the judge shall not practice or appear as an individual in a matter involving the judge or the judge's interest in the court on which the judge serves, even if another judge is presiding.

(Emphasis added.)

(footnote continued)

(4) In Prince George's County, Baltimore County, Calvert County, and Howard County, to a judge of the Court while practicing law in connection with a case that is:

(i) Outside the jurisdiction of orphans' court; and

(ii) Unrelated to the administration of an estate or guardianship.

² Section 2-109(a) does not apply to Montgomery and Harford Counties but for a different reason. Judges of those counties' circuit courts serve as orphans' court judges. *See* Md. Constitution Article IV § 20.

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The other provisions of the Code relevant to the Requestor's inquiry are Rules 3.8 and 3.9.

Rule 3.8 imposes several restrictions upon the ability of judges to serve to fiduciary positions, including as guardians. The most relevant of these restrictions the Requestors' inquiry is Rule 3.8(a), which provides that judges may serve as fiduciaries only in matters involving members of the judge's "immediate family."³

Rule 3.9(a) states that:

3 Rule 3.8 states:

RULE 3.8. APPOINTMENTS TO FIDUCIARY POSITIONS

(a) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(b) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(c) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(d) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

(e) Paragraph (a) of this Rule does not apply to retired judges approved for recall under Maryland Constitution, Article IV, § 3A.

The Code defines "member of a [judge's] [candidate's] family" as "a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge or candidate maintains a close familial relationship." Code General Provisions B-108.

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A judge may not act as an arbitrator or mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

In his/her letter to the Committee, the Requestor suggests that the prohibitions on Rules 3.8 and 3.9 are intended to apply only to judges of the District, Circuit and appellate courts of this State. We do not believe that the language of either rule supports this interpretation. In fact, the General Provisions of the Code A-109 states in pertinent part:

This Code applies to:

(1) Incumbent judges of the Court of Appeals, the Court of Special Appeals, the Circuit Courts, and the District Court;

(2) *Except as otherwise expressly provided in specific Rules*, incumbent judges of the Orphans' Courts[.]

Because there are no express provisos in either Rule 3.8 or 3.9 that apply to Orphans' Court judges,⁴ we conclude that the Code prohibits the Requestor from serving as a mediator. The Requestor may serve as a guardian only as permitted by Rule 3.8.

Application: The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor's compliance herewith. Omission or misstatement of a material fact in the written request for an 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 the request for advice involves a continuing course of conduct, the Requestor should keep abreast of developments in

⁴ Rules 3.8 and 3.9 contain express exceptions for retired judges who are subject to recall for temporary service pursuant to Article IV § 3A of the Maryland Constitution. *See* Rule 3.8(e) and Rule 3.9(b).

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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.