

## Maryland Judicial Ethics Committee

**Opinion Request Number:** 2022-44

**Date of Issue:** November 23, 2022

Published Opinion     Unpublished Opinion     Unpublished Letter of Advice

### ***Pro bono* activities of a law clerk**

**Issue:** Whether a law clerk may undertake *pro bono* legal services or representations of individuals.

**Answer:** A law clerk may not undertake any legal services or representations that involve the practice of law. A law clerk may, however, engage in *pro bono* activities that would not be considered the practice of law such as training, writing, or speaking about the law, as long as those activities are conducted in accordance with the Maryland Code of Judicial Conduct.

**Facts:** The Judiciary has received an inquiry from a *pro bono* legal services organization that would like to expand its *pro bono* outreach to include judicial law clerks. The Requestors seek advice “concerning the extent, if any, to which law clerks can undertake *pro bono* legal services or representations with appropriate conditions and limitations.” The organization has proposed that law clerks participate in two types of activities involving the practice of law: 1) a series of clinics – property ownership, expungement and consumer protection – at which volunteer lawyers assist walk-in clients with legal problems relating to the clinic’s theme; and 2) direct representation of clients in a variety of common areas of need. It is anticipated that representation would be limited to situations that do not involve adverse parties, “including uncontested divorces and adoptions, name changes and birth certificate corrections, deed changes, expungements and shielding, estate planning and administration, and uncontested guardianships.” The Requestors ask that the Committee:

issue a published opinion concerning the extent, if any, to which law clerks can undertake *pro bono* representations in a manner consistent with the Rules of Judicial and Professional Conduct so long as (a) they are admitted to practice before undertaking any such work, (b) they work solely on uncontested matters, (c) they work only on matters that are not or would not be pending in the jurisdiction of their clerkship, (d) they ensure a complete separation between their duties as clerks and their judicial office and their *pro bono* work, including a complete separation between their duties as clerks and their judicial office and their *pro bono* work, including the time they spend working on any matters and the resources used in connection with their representation, and (e) they are supervised by a lawyer who is neither their judge nor a member of the Judiciary.

**Discussion:** Rule 18-102.12 of the Maryland Code of Judicial Conduct provides that “[a] judge shall require court staff, court officials, and others subject to the judge’s direction

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and control to act in a manner consistent with the judge’s obligations under this Code.” In Opinion Request Number 2019-14, we applied Rule 18-102.12 and concluded that a judge could not permit an incoming law clerk to accept a salary advance from a law firm because the advance would be an interest free loan, which a judge would be prohibited from accepting. Rule 18-103.10 prohibits a judge from practicing law with limited exceptions:

(b) **Exceptions.** (1) A judge may act self-represented in a matter involving the judge or the judge’s interest and, if without compensation, may give legal advice to and draft or review documents for a member of the judge’s family.

(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 an attorney may practice law . . .

“Practice law” is defined in Md. Code Ann. Bus. Occ. & Prof. §10-101(h):

(1) “Practice law” means to engage in any of the following activities:

(i) giving legal advice;

(ii) representing another person before a unit of the State government or of a political subdivision; or

(iii) performing any other service that the Court of Appeals defines as practicing law.

(2) “Practice law” includes:

(i) advising in the administration of probate of estates of decedents in an orphans’ court of the State;

(ii) preparing an instrument that affects title to real estate;

(iii) preparing or helping in the preparation of any form or document that is filed in a court or affects a case that is or may be filed in a court; and

(iv) giving advice about a case that is or may be filed in a court.

A law clerk is prohibited from practicing law to the same extent as a judge and, therefore, may not represent individuals in *pro bono* matters even if the law clerk follows the conditions and limitations set forth in the Request. The fact that law clerks would separate any *pro bono* legal work fully from any association with their judges, their courts, or their judicial branch roles is not dispositive and would not transform their practicing law, which is not permitted, into an activity that is permitted. In addition to our reliance on the plain language of the Maryland Code of Judicial Conduct and the Annotated Code of Maryland, we have looked to opinions issued by other judicial ethics committees that have addressed the issue of law clerks performing *pro bono* work.

In Advisory Opinion JE 17-001 (2017), the State of Nevada Standing Committee on Judicial Ethics found that a proposed amendment to the Nevada Rules of Professional

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Conduct that would permit judicial law clerks in counties with a population in excess of one hundred thousand to perform *pro bono* work would potentially violate the Nevada Code of Judicial Conduct. The Committee conducted extensive research on this issue, analyzed rules similar to the Maryland Code of Judicial Conduct, and concluded that “a judicial law clerk . . . may not volunteer to conduct *pro bono* public service while serving as the law clerk to a judge because such judges are prohibited from the practice of law themselves and are required to ensure that their staff likewise comply with this requirement.”

Other judicial ethics committees have prohibited law clerks and those similarly situated from representing *pro bono* clients using a similar analysis. In Opinion No. 283 (2001), the Texas Judicial Ethics Committee found that an attorney employed at a state intermediate appellate court could not perform *pro bono* work on a federal appeal when the issue appealed involved only a federal issue and no state, Texas or otherwise, had concurrent jurisdiction. The attorney was also not permitted to perform *pro bono* work on an appeal in another state. The Committee reasoned that:

Canon 3B (6), (8), (10) and 3C (2) require that [appellate] court staff attorneys are subject to the same ethical standards as the judge for whom they work. Cannon 4G prohibits a judge from practicing law except as permitted by statute or this Code. *Pro bono* appellate work in a federal or sister-state requires the practice of law. No Code sections provide an exception to the prohibition against practicing law under the circumstances presented here.

In AZ Jud. Adv. Op. 91-3 (1991), the Arizona Supreme Judicial Ethics Advisory Committee ruled that Canon 5 of the Code of Judicial Conduct, which prohibits a judge from practicing law, prohibits a judge’s law clerk from practicing law also. The Committee cited federal cases that have addressed the position a law clerk occupies. *See e.g., Hall v. Small Business Administration*, 695 F.2d 175, 179 (5<sup>th</sup> Cir. 1983) (clerk is forbidden to do all that is prohibited by the judge), and *Kennedy v. The Great Atlantic & Pacific Tea Co.*, 551 F.2d 593, 596, reh. denied 554 F.2d 475 (5<sup>th</sup> Cir. 1977) (rules of conduct applicable to a judge are equally applicable to the judge’s law clerk).<sup>1</sup>

While the federal Code of Conduct for Judiciary Employees permits judicial employees to engage in *pro bono* legal services, such representation is very limited and employees are prohibited from entering an appearance in any federal, state, or local court or administrative agency.

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<sup>1</sup> The Arizona Committee recognized the importance of *pro bono* work and opined that law clerks could engage in *pro bono* legal activities such as law-related educational activities and assisting needy persons in finding an attorney when Legal Aid has a conflict.

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Maryland does not have a code of conduct that applies specifically to law clerks as the federal judiciary and some other states do. *See e.g.*, Arizona Code of Conduct for Judicial Employees; New Hampshire Court Rule 46, Law Clerk Code of Conduct; Palm Beach County Code of Conduct for Trial Court Law Clerks (Florida Fifteenth Judicial Circuit Administrative Rule 11.604-9/08). In Palm Beach County, the Code of Conduct prohibits law clerks from practicing law “in any federal, state, or local court, or undertake to perform legal services for any client while employed as a law clerk.” The law clerk may only perform “routine legal work necessary to the management of the personal affairs of the law clerk or a member of the law clerk’s family” with certain conditions spelled out in the Code.

In Maryland law clerks are provided an information sheet that details their benefits, conditions, and salaries. The information sheet specifically prohibits outside employment with limited exceptions:

**No outside** employment, public or private, during the appointment term, except that, with the permission of the judge, the law clerk may engage in such outside activities, with compensation, that are allowed for judges under the Maryland Code of Judicial Conduct (see Maryland Rule 18-103.12).

(Emphasis in original.)

We are mindful that Maryland Rule 19-306.1(a) provides that “[a]n attorney has a professional responsibility to render pro bono public legal service.” Subsection (b) sets forth the goals of *pro bono* work unless the attorney is prohibited by law from rendering the legal services described. The Court of Appeals’ Standing Committee on *Pro Bono* Legal Services has interpreted the provisions of Rule 19-306.1 in its “Frequently Asked Questions.” One question posed is “[d]oes 19-306.1(b) apply to ALJs, judges, [magistrates], law clerks and law professors?” The Standing Committee’s response is:

The Committee believes that the goal in Rule 19-306.1(b) does not apply to Administrative Law Judges (ALJ’s), judges, [magistrates], judicial law clerks and law professors unless, in addition to their activities in their capacities, they also engage in representing clients. The “practice of law” is defined in the Maryland Code . . . .

(<https://www.mdcourts.gov/probono/faqs>)

In summary, although the Committee recognizes the importance of *pro bono* work, pursuant to the ethics rules, a law clerk may not provide legal services to or otherwise represent a *pro bono* client in matters that involve the practice of law whether the services involve giving advice to individuals who walk into a clinic or direct representation of

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clients in a variety of common areas of need that are largely uncontested. A law clerk, may, however, engage in *pro bono* activities that would not be considered the practice of law such as training, writing, or speaking about the law, as long as those activities are conducted in accordance with the Maryland Code of Conduct.

**Application:** The Maryland 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 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 the Requestor engages in a continuing course of conduct, he or she 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.