

Maryland Judicial Ethics Committee

Opinion Request Number: 2024-24

Date of Issue: October 17, 2024

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judges' Signing of Federal U Visa Certifications – Supplemental Opinion

Issue: If a judge chooses to respond to a request to complete a certification in connection with the federal U Visa program, may the response be considered an administrative function rather than a judicial function and therefore not require notification of all parties to the proceeding to which it relates?

Answer: The ultimate determination whether the response is an administrative function or a judicial function is not a question to be answered by this Committee. That said, even if the act itself could be considered to be administrative, it is so closely related to a prior judicial proceeding that the judge may not entertain the request or respond to it on an *ex parte* basis.

Facts: The Requestors are members of the Domestic Law Committee of the Maryland Judicial Council. Under the umbrella of the Domestic Law Committee is a Special Status Workgroup that is preparing a proposed statewide policy to address the circumstances in which Maryland judges may sign certifications as part of the federal U Visa process. An earlier inquiry from the Requestors resulted in this Committee's Opinion No. 2023-20 (August 21, 2023).

The Requestors now have submitted a supplemental request focused on confidentiality issues. As with the initial request, the Requestors have provided a very detailed and helpful explanation of the U Visa program and the supplemental issues involved. The Requestors pose the following question:

In light of federal and state confidentiality protections for noncitizen victims, can the signing of a U visa certification be considered an “administrative function” under the following circumstances?

- **Open cases and closed cases subject to modification** – A judge other than the presiding judge completes a U visa certification based on a review of case records.
- **Closed cases** – The presiding judge or another judge completes a U visa certification based on criminal activity detected in a case after the case is closed and any period for appeal has passed.

Request at 2 (emphasis in original).

Because of the complexity of the federal program and the issues involved, the Committee will repeat much of the background included in Opinion No. 2023-20. The U Visa program, described more fully below, is administered by the United States Citizenship and

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Immigration Services (USCIS) within the federal Department of Homeland Security (DHS). It offers temporary lawful immigration status to noncitizen victims of certain crimes who cooperate in the prosecution of those crimes. The program is intended to protect persons whose lack of lawful immigration status may make them more vulnerable to victimization and to encourage unlawful immigrant victims to report criminal activity and to assist in the prosecution of that alleged criminal activity.

The federal authorities administering the U Visa program depend in part on other government officials, including state prosecutors and judges, certifying the cooperation of applicants for U Visas in the criminal justice system. The federal USCIS process to determine whether to issue a U Visa is confidential. This opinion is limited to whether a Maryland judge’s consideration of a request to sign a certification that will be used by the applicant in the federal administrative process ethically can be confidential.

Analysis:

A. Potential Code Provision Implicated

The Maryland Code of Judicial Conduct (the “Code”), Title 18, Chapter 100 of the Maryland Rules, establishes the standards for the ethical conduct of judges.

Rule 18-102.9 provides in part:

(a) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge out of the presence of the parties or their attorneys, concerning a pending or impending matter

(b) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(c) A judge shall not investigate adjudicative facts in a matter independently, and shall consider only the evidence in the record and any facts that may properly be judicially noticed.

* * *

B. The Federal U Visa Program

The U Visa program was established by the Battered Immigrant Women Protection Act of 2000 within the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), codified in part at 8 U.S.C. § 1101(a)(15)(U)(i). The program is administered by the USCIS within the federal DHS.

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It offers temporary lawful immigration status to noncitizen victims of certain crimes who have suffered substantial physical or mental abuse and who cooperate in the detection, investigation, prosecution, or sentencing of that criminal activity. Goals of the program include protecting persons whose lack of lawful immigration status may make them more vulnerable to victimization and encouraging unlawful immigrant victims to report criminal activity and to assist in holding offenders accountable for criminal activity.

A person may apply for U Visa status by filing a petition with the USCIS. The USCIS makes all determinations in connection with such a petition. To grant a petition, the USCIS must find that the person:

- was a victim of a qualifying criminal act;
- has specific, credible, and reliable information about the qualifying crime;
- was, is being, or is likely to be helpful to the certifying agency in the detection, investigation, prosecution, conviction, or sentencing of the qualifying crime;
- suffered substantial physical or mental abuse as a result of the qualifying crime; and
- is admissible to the United States.

Opinion No. 2023-20 dealt and this opinion deals entirely with the third of these requirements. A person petitioning the USCIS for U Visa status must submit a DHS Form I-918, Supplement B (U Nonimmigrant Status Certification) (“DHS Form I-918B”). The DHS Form I-918B must be completed by a qualifying agency or official. Under federal law, certifying agencies include “[a] Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity.” 8 C.F.R. 214.14(a)(2). A certifying official includes “[a] Federal, State, or local judge.” 8 C.F.R. 214.14(a)(3)(ii).

The agency or official signing the DHS Form I-918B subscribes in part as follows:

Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in **Part 1**, is or was a victim of one or more of the crimes listed in **Part 3**. I certify that the above information is complete, true, and correct to the best of my knowledge I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

DHS Form I-918B (available at <https://www.uscis.gov/sites/default/files/document/forms/i-918supb.pdf> (last viewed August 29, 2024) (emphasis in original). Part 1 of the

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form includes basic identifying information for the victim. Part 3 includes check boxes for thirty-one different “Federal, state, or local criminal offenses (or any similar activity),” including abusive sexual contact, domestic violence, false imprisonment, felonious assault, kidnapping, prostitution, rape, sexual assault, sexual exploitation, stalking, trafficking, and unlawful criminal restraint. Part 3 also requests significant factual information concerning the qualifying criminal activity, including when and where it occurred; a brief description of “the criminal activity being investigated and/or prosecuted and the involvement of the petitioner”; and “a description of any known or documented injury to the victim.”

Part 4 of DHS Form I-918B contains the “helpfulness” information. The person completing the form must answer three yes/no questions:

1. Does the victim possess information concerning the criminal activity listed in **Part 3**?
2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above?
3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above?

Id. (emphasis in original). Part 4 also requests an explanation of a “yes” answer to any of these questions and provides space for “any additional information you would like to provide.” Although Part 4 is not mentioned specifically in the certification section, the information provided in Part 4 is covered by the general affirmation “that the above information is complete, true, and correct to the best of my knowledge”

Maryland judges do not participate directly in conducting criminal investigations and prosecutions. It is critical that judges remain independent of the prosecutorial role. *See, e.g., Sharp v. State*, 446 Md. 669, 700 (2016) (“To avoid a minefield of issues, we advise trial courts to comport with both *Barnes [v. State]*, 70 Md. App. 694 (1987) and current ABA Standard 14–3.3 and refrain from directly making plea offers to defendants in criminal cases.”); *Barnes v. State*, 70 Md. App. 694, 707 (1987) (“The trial judge, in our view, improperly interjected himself into the plea bargaining process as an active negotiator, infringing upon the function reserved to counsel in the adversary process.”). Maintaining the independent judicial role promotes compliance with the bedrock impartiality principles of Rules 18-101.2(a), 18-102.2(a), 18-102.10(b), and 18-102.11(a).

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Federal law recognizes this limitation on a judge as a certifying official completing a DHS Form I-918B. The federal statutory definition requires that a U Visa applicant has been helpful to federal, state, or local authorities “investigating or prosecuting criminal activity” that falls within the statute. 8 U.S.C. § 1101(a)(15)(U)(i)(III). The implementing federal regulations expand the scope of “investigation or prosecution”: “*Investigation or prosecution* refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, *conviction*, or *sentencing* of the perpetrator of the qualifying crime or criminal activity.” 8 C.F.R. 214.14(a)(5) (second emphasis added). The agency explained this particular expansion of the terms “investigation or prosecution” was necessary because “[j]udges neither investigate crimes nor prosecute perpetrators.” 72 Fed. Reg. 53,020 (Sept. 17, 2007).

A Maryland judge asked to complete a DHS Form I-918B thus must make three basic determinations: (1) that there was qualifying criminal activity; (2) that the party requesting the certification was the victim of the criminal conduct; and (3) that the victim has been or will be helpful in the prosecution of the criminal conduct.

C. Opinion No. 2023-20

In 2023, the Requestors asked this Committee (1) whether a Maryland judge has an obligation to respond to a request for a U Visa certification and (2) if so, in what circumstances a judge who provides a certification would have to recuse in a subsequent proceeding.

The Committee began with the basic observation that “completing a DHS Form I-918B is a judicial act because it is an action taken by a judge in the judge’s official capacity and in connection with some proceeding within the court’s jurisdiction.” Opinion No. 2023-20 at 6. Because completing a DHS Form I-918B is not essential to resolution of any criminal or civil matter before a judge, however, the Committee concluded that completing the certification would be optional for any Maryland judge. A Maryland judge may simply decline to entertain a request to complete the certification.

The Committee then concluded that completing a DHS Form I-918B is not prohibited (1) as an impermissible character reference pursuant to Maryland Rule 18-103.3, (2) as lending the prestige of office to a person in violation of Maryland Rule 18-101.3, (3) as making an inappropriate public statement about a proceeding in violation of Maryland Rule 18-102.11(a)(4), or (4) as an impermissible extra-judicial activity under Maryland Rule 18-103.1.

After reaching these conclusions, the Committee also reached the conclusion that the Requestors now find problematical:

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The Committee concludes that if a DHS Form I-918B certification otherwise is appropriate, the Court should ensure that it is not done *ex parte*. The request for the certification and the Court's action on it are not a necessary part of the proceeding before the judge, but they nevertheless are connected to and based on that adversarial proceeding. The judge should follow Maryland Rule 18-102.9 and should ensure that all parties to the proceeding are notified of the request and the judge's action on it. The judge should also allow a reasonable opportunity for any party to the proceeding to respond to the request.

Opinion No. 2023-20 at 7.

The Committee continued with discussion of issues that might arise when a certification is sought based on either criminal or civil proceedings, including the important factors of whether those proceedings were open or closed when the request was made. This discussion included consideration of several opinions issued by federal and state judges on specific certification requests. The Committee also reviewed two more general opinions on the subject issued by the judicial ethics advisory authorities in North Carolina and Minnesota.

The Committee finally summarized its conclusions:

1. A Maryland judge is not prohibited in all circumstances from completing a DHS Form I-918B, nor is a judge required to entertain a request from an alleged victim to complete DHS Form I-918B. In many instances, it may be preferable for a judge to refer the request to the prosecuting authority or to another law enforcement agency.
2. If a Maryland judge entertains a request to complete a DHS Form I-918B, **the judge should avoid *ex parte* communications and should ensure that all parties in the underlying proceeding are aware of the request.**
3. A Maryland judge should complete a DHS Form I-918B **only when the necessary conclusions can be made based on completed proceedings.** If the victim is likely to appear before the court either in further proceedings in the same matter or in other related proceedings, completing the DHS Form I-918B is not advisable because the judge's impartiality may be questioned in further proceedings involving the victim.

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4. The Committee does not decide whether it is ever permissible under federal law for a Maryland judge to complete a DHS Form I-918B certification based only on civil proceedings, but the potential for additional proceedings, particularly criminal proceedings, is increased in those circumstances, thereby increasing the risk of proceedings in which the judge’s impartiality might be questioned.
5. If a Maryland judge completes a DHS Form I-918B, the judge should limit responses to matters supported by the court record and should avoid certifying or promising future action by the judge.
6. If a Maryland judge completes a DHS Form I-918B, the judge should then recuse in any subsequent proceeding involving the same or similar issues and the same victim or the person accused by the victim.

Opinion No. 2023-20 at 15-16 (emphasis added).

D. The Supplemental Request

The Requestors now focus on the issue of confidentiality. They point out that the federal administrative proceedings on an application for a U Visa are confidential. 8 U.S.C. § 1367(a)(2). This confidentiality allows noncitizen victims of domestic violence and abuse to seek protection under the U Visa and other programs without notice to their alleged abusers. The Requestors state that “U visa certifiers are also expected to maintain records about completed certifications in a way that complies with federal privacy and confidentiality requirements set forth in the VAWA Confidentiality statute [8 U.S.C. § 1367] and 8 C.F.R. § 214.14(e)(2).” They cite the Department of Homeland Security U Visa Resource Guide and the USCIS Policy Manual, which appear at least to encourage U Visa certifiers to maintain confidentiality; the cited federal regulation does not appear to bind a certifier to confidentiality.

The federal regulation provides first, in general, that information developed in the federal administrative proceedings may not be disclosed: “The use or disclosure . . . of any information relating to the beneficiary of a pending or approved petition for U nonimmigrant status is prohibited,” with exceptions not applicable here. 8 C.F.R. § 214.14(e)(1). It then provides: “Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.” But a DHS Form I-918B completed by a Maryland judge is information provided to the applicant to be used in the federal

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administrative proceedings. It is not information disclosed from those administrative proceedings or information received by the certifying judge. The regulation therefore does not require that the certification process outside the federal administrative proceedings be confidential.

The Requestors suggest that confidentiality of the certification process would be desirable and that it could be achieved if certification by judges were limited to closed rather than open cases. Thus, the Requestors seek “guidance as to whether a judicial certification completed in a closed case could ethically be considered as an administrative function that does not require giving the alleged perpetrator notice of the request and an opportunity to be heard.”

The distinction between an administrative function and a judicial function is not a difference determined by the Maryland Code of Judicial Conduct. The Maryland Rules governing public access to judicial records, for example, distinguish between an “administrative record” and a “case record.” Md. Rule 16-903(b) and (d). The Committee only opines on issues that arise under the Code of Judicial Conduct. The Committee does not rely on a distinction between administrative and judicial functions.

The Committee’s concern is that any judicial U visa certification necessarily is related to the judge’s presiding over an adversarial judicial proceeding. In Opinion 2023-20, the Committee considered the important difference between making a certification based on open versus closed proceedings. As quoted above, the Committee opined that “[a] Maryland judge should complete a DHS Form I-918B only when the necessary conclusions can be made based on completed proceedings.” Opinion 2023-20 at 15. This is because of the likely need for recusal in any subsequent proceedings involving the same parties. In the Committee’s view, the need to avoid *ex parte* communications related to the request to complete a DHS Form I-918B arises from the fact that the parties necessarily were involved in a prior adversarial proceeding before that judge and from the potential for future proceedings either on reopening of the prior proceedings or initiation of different, but related proceedings. The Committee does not believe the issue can be avoided simply by classifying completion of a DHS Form I-918B as an administrative function, even if the Maryland Rules other than the Maryland Code of Judicial Conduct could be construed to support such a classification.

Application: The Maryland 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 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.

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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 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.