

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

A Judge May Provide an Introduction to a Book on a Law-Related Subject Published by a Non-Profit Organization

Issue: May a judge provide an introduction to a book written on a law-related topic published by the Maryland State Bar Association as part of its continuing legal education program?

Answer: Yes, the judge may do so.

Facts: A judge (the “Requestor”) has been asked to write an introduction for the second edition of a book (the “Book”) written by a Maryland lawyer (the “Author”) regarding aspects of Maryland’s law of civil and criminal procedure. The Book is a practice manual focused upon a very specific area of Maryland law. The Requestor has provided the Committee with a copy of the proposed introduction. From it and other information supplied by the Requestor, the following picture emerges.

A number of years ago, the Requestor and the Author participated in a continuing professional education program sponsored by the Litigation Section of the Maryland State Bar Association. The Author prepared written materials as part of this effort. At the conclusion of the program, the Requestor encouraged the Author to expand upon the written materials so that it could be published as a book. The Author did so, and the Book was published several years later by the Maryland Institute for Continuing Professional Education of Lawyers, Inc. (“MICPEL”). The Author is in the process of writing a second edition and has asked the Requestor to write a short introduction to it.

In addition to providing the information that we have previously related, the Requestor’s proposed introduction, which is two paragraphs long, commends the Author’s scholarship and alludes to the fact that the topics addressed in the Book are sometimes overlooked by lawyers, omissions that can result in delay, expense and serious prejudice to clients. MICPEL is no longer in business and the second edition of the Book will be published by the Maryland State Bar Association (the “MSBA”) as part of its continuing legal education efforts.

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 6

The Requestor further states:

I will receive no compensation or royalties for this effort. Because the topic of the treatise is Maryland law driven, I anticipate its market will be largely Maryland lawyers and judges.

Discussion:

The Maryland Code of Judicial Conduct (the “Code),” Maryland Rule 16-813, provides in pertinent part;

General Provisions A-105.

The Rules in this Code are rules of reason that should be applied ... with due regard for all relevant circumstances.

* * * *

Rule 1.3. AVOIDING LENDING THE PRESTIGE OF JUDICIAL OFFICE

A judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

* * * *

Rule 3.1. EXTRAJUDICIAL ACTIVITIES IN GENERAL

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. When engaging in extrajudicial activities, a judge shall not:

* * * *

(c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality....

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 3 of 6

The Committee believes the Requestor may provide the proposed introduction to second edition of the Book. Our conclusion is based on the content of the proposed introduction, the subject matter of the Book and the circumstances surrounding its proposed publication.

As Comment [1] to Rule 3.1 notes, judges “are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects.” The proposed introduction provides background information and communicates the Requestor’s views as to the importance of the topics discussed by the Book to its intended audience of lawyers and judges. In our view, conveying this kind of information falls squarely within the ambit of the sort of activities encouraged by Comment [1]. Of course, a judge may not engage in conduct that, in the opinion of a reasonable person, would “undermine the judge’s ... impartiality....” Rule 3.1(c). However, we do not believe that a reasonable person would view the introduction, and specifically, the Requestor’s passing praise of the Author’s diligence and scholarship, as compromising the Requestor’s impartiality.

The Committee also concludes that the writing of the introduction will not constitute an impermissible “lend[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others” Rule 1.3. The information and comments contained in the Introduction are based upon the Requestor’s personal knowledge. Introductions of the sort proposed by the Requestor are not unusual for legal practice manuals.¹ Because the Requestor

¹*See, e.g.,* Andrew Jezic, *et al.*, MARYLAND LAW OF CONFESSIONS (2012) (Foreword by the Hon. Andrew L. Sonner); Maryland State Bar Association, Inc. Standing Committee on Pattern Jury Instructions, MARYLAND CIVIL PATTERN JURY INSTRUCTIONS (2009 Ed.) (Introduction by the Hon. Robert M. Bell); David E. Aaronson MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY (3rd Edition, 2009) (Foreword by the Hon. Joseph F. Murphy, Jr. (Forewords to prior editions by Hon. John F. McAuliffe and the Hon. J. Dudley Digges)); Paul Mark Sandler, *et al.*, APPELLATE PRACTICE FOR THE MARYLAND LAWYER (3rd Ed., 2007) (Introduction by the Hon. Robert M. Bell); Daniel Friedman, THE MARYLAND STATE CONSTITUTION (2006) (Foreword by the Hon. Robert L. Karwacki); Charles E. Moylan, Jr., CRIMINAL HOMICIDE LAW (2002) (Foreword by the Hon. Diane O. Leasure); Paul Mark Sandler *et al.*, PLEADING CAUSES OF ACTION IN MARYLAND (1st Ed., 1991) (Introduction by the Hon. Lawrence F. Rodowsky); Paul V. Niemeyer and Linda M. Schuett, MARYLAND RULES

(continued...)

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 4 of 6

will not receive any compensation for writing the introduction, the Requestor is not advancing his/her own economic interests. We do not believe that the introduction will advance the Author's personal or economic interests in a way proscribed by Rule 1.3. The introduction might—and presumably will—cause lawyers and judges to consider purchasing the Book but increased Book sales will not affect the Author's economic interests because the MSBA does not pay royalties to authors.² The only personal interest of the Author at issue is his/her professional reputation which, in the final analysis, will be burnished or sullied by the quality and usefulness of the Book itself, as opposed to the Requestor's introduction. Under these circumstances, the relationship between the introduction and the Author's reputation is too attenuated for us to conclude that Rule 1.3 can reasonably be interpreted to prohibit what Comment [1] to Rule 3.1 encourages. *See* General Provisions A-105 ("The Rules in this Code are rules of reason"). The Requestor should also take reasonable steps to ensure that the prestige of the Requestor's judicial office is not exploited in any marketing of the Book by the publisher. In the context of a book published by a non-profit entity such as the MSBA, "reasonable steps" could consist of a request to the publisher to consult with the Requestor before mentioning the Requestor's name or position in any marketing efforts.³

¹(...continued)

COMMENTARY (1st Ed., 1984) (Foreword by the Hon. John F. McAuliffe).

²The MSBA website indicates that the authors of the books that it publishes are "practitioners, judges and professionals who unselfishly contribute their time and expertise to help Maryland lawyers improve their practice and professionalism." <http://msba.inreachce.com/> (last visited November 15, 2012).

³Ethics advisory committees for other jurisdictions have responded to inquiries similar to the Requestor's. While specific advice varies from case to case, a prevailing theme is that, although judges are well-suited to comment on legal matters, judges must take care that the prestige of judicial office is not exploited in advertising or marketing efforts. For example, the United States Judicial Conference's Committee on Codes of Conduct has recently republished guidelines for federal judges with regard to the "extent of permissible advertising of the judge's publications" on extra-judicial matters. *USJC Committee on Codes of Conduct* Opinion No. 55 (2009) (found at 2B Guide to Judiciary Policy 55-1). It began its analysis by noting that Canon 4 of the Code of Conduct for United States Judges permits judges federal judges to write on both

(continued...)

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 5 of 6

We add two caveats. The second edition of the Book is a law-related work and will be published by the MSBA, a non-profit organization, as part of its continuing professional education efforts for lawyers and judges. Different considerations may apply to law-related works published by for-profit entities. *See* Comment [4] to Rule 1.3⁴ Finally, this opinion does not address the circumstances under which a judge may write an introduction to a non law-related work whether published by a non-profit or for-profit organization.

³(...continued)

legal and non-legal subjects. Moreover, it noted that the Commentary to Canon 4 states that “[a]s a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice” The committee cautioned, however, that:

The judge should, as far as possible, make certain that advertising for the judge's publications does not violate the language, spirit, or intent of the Code. A judge should be particularly careful to comply with Canon 2B,[] which, in part, counsels against lending the prestige of the judicial office to advance the private interests of the judge or others. To that end, in contracting for publication it would be advisable for a judge to retain a measure of control over the advertising (including the right to veto inappropriate advertising), so that the advertising does not exploit the judicial position or use the prestige of the judge’s office to advance the private interests of the judge or others.

⁴Comment [4] states:

Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge’s office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge’s writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

Maryland Judicial Ethics Committee

Opinion Request Number: 2013-26

Date of Issue: December 6, 2013

Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 6 of 6

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.