

Maryland Judicial Ethics Committee

Opinion Request Number: 1995-06

Date of Issue: August 31, 1995

■ Published Opinion Unpublished Opinion Unpublished Letter of Advice

Judge Should Not Serve on Arbitration Association Advisory Board

A judge has inquired whether it would be permissible for them to serve on an arbitration association's advisory board. The judge states that their name will not be used in any way to solicit business, nor will the judge be asked to participate in any funding activities of the association.

The letter which invites the judge's participation is attached to the judge's inquiry. The "invitation letter" explains that the association "is the premier non-profit public service organization providing prompt, effective and economical methods of business dispute resolution, as an alternative to litigation. . . ." The letter goes on to say that the "mission of the Advisory Board . . . is to function as the 'eyes and ears' of the [association], . . . to make a specific contribution by (a) assessing the need for [alternative dispute resolution (ADR)] within the business community, (b) advising the [association] on various aspects of appropriate dispute resolution, (c) . . . and (d) critiquing [association's] performance in mediation and arbitration... ."

There is agreement that the courts are overburdened and there exists a need for alternative methods of dispute resolution. It is noted that many retired judges serve as arbitrators. The question presented to the Ethics Committee is whether a sitting judge may serve as an advisor to such an association; whether a judge may advise the association on what is appropriate dispute resolution and whether the judge may critique the association's performance in mediation and arbitration.

Canon 4 of the Maryland Code of Judicial Conduct allows certain extra-judicial activities as long as "doing so does not interfere with the proper performance of judicial duties, does not reflect adversely upon the judge's impartiality, and does not detract from the dignity of the office." Specifically, pursuant to Canon 4C, "[a] judge may participate and serve as a member, officer, director, trustee, or *non-legal* advisor of an educational, religious, charitable, fraternal, *law-related* or civic organization not conducted for the economic or political advantage of its members" (Emphasis added.) However, participation is not allowed if the proposed organization: "(a) will be engaged in proceedings that would ordinarily come before the judge; (b) will be regularly engaged in adversary proceedings in any court; or (c) deals with people who are referred to the organization by the court on which the judge serves or who otherwise may likely come before that court." Canon 4C(1).

A judge serving on the advisory board of an arbitration association raises three concerns. 1) It may be perceived that a judge is promoting ADR business for individuals or organizations who specialize in ADR and charge fees for their services. 2) Giving legal advice may be an integral part of a position on the Advisory Board. 3) Unsuccessful arbitration cases may frequently appear in the judge's court. These concerns are discussed below.

1. Although the association is a non-profit organization, it encourages ADR, which, in essence, refers parties to individuals or organizations which charge a fee to help parties resolve their conflicts. The judge would be in a non-judicial position providing advice which would review/establish parameters within which potential litigants may seek ADR. This may create the

Maryland Judicial Ethics Committee

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Published Opinion Unpublished Opinion Unpublished Letter of Advice

Page 2 of 3

appearance of impropriety. Some individuals or organizations who assist or counsel parties in ADR will profit from the Advisory Board's recommendations, especially if certain individuals or organizations are specifically recommended.

2. Canon 4C permits a judge to be a *non-legal* advisor. As a member of the Advisory Board which provides various methods of ADR for businesses, it would be difficult for the judge to render advice without that advice being construed as legal advice. Likewise, critiquing the association's performance in mediation and arbitration would probably be viewed by others – both members and non-members of the Committee – as a critique by a participant with legal and judicial expertise.

3. The judge may be put in a position where businesses, having sought advice from the Advisory Board and having been unsuccessful at ADR, ultimately litigate their cases before the court. The judge may have had direct or indirect exposure to the parties or the merits of the case and, therefore, may have to recuse to prevent the appearance of impropriety. This practice, if occurring with some regularity, would be an undue burden on the court.

Alternative methods of resolving disputes are meant to be separate from formal judicial proceedings. Canon 4H prohibits a judge from acting as an arbitrator or mediator. A sitting judge acting on an advisory panel suggesting techniques and/or encouraging quasi-judicial methods of conflict resolution and critiquing these methods does not seem to comport with the guidelines for ethical extra-judicial activities.

Although there appears to be no previous opinion on point, the following opinions may provide some guidance.

[Opinion Request No. 1976-09] (9-20-76)

Judge may not act as an arbitrator in a pending court case whether compensated or not.

[Opinion Request No. 1977-12] (12-20-77)

Judge cannot serve as a legal evaluator of research projects for a hospital. A judge would be expected to evaluate research projects from a legal perspective. As written in several opinions, "there is 'no prohibition against a judge participating in the activities of educational, religious and charitable institutions,' subject, however, to several restrictions, one of which is any suggestion that 'the power or prestige of [the] office is being utilized to persuade others to support an institution with which [the judge] is connected.'" Canon XXIV.

In the issue under discussion, while the judge may not be asked specifically to give legal advice, the judge would be expected to evaluate problems from a legal perspective. One of the duties may or could include how the association or the individual arbitrator might protect itself from liability or suit.

Especially to a non-lawyer, there may be little distinction between legal evaluation and legal opinion. Therefore, the judge's participation may interfere with their judicial duties, or at least give

Maryland Judicial Ethics Committee

Opinion Request Number: 1995-06

Date of Issue: August 31, 1995

Published Opinion Unpublished Opinion Unpublished Letter of Advice
Page 3 of 3

the appearance of such interference.

For the above reasons, the Committee determines that the judge should not participate on the advisory board of an arbitration association.