

Maryland Judicial Ethics Committee

Opinion Request Number: 2007-11

Date of Issue: October 14, 2008

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Not Accept Appointment as Member of Local Management Board

Issue: May a judge accept an appointment as a member of a county Local Management Board?¹

Answer: No.

Facts: A circuit court judge has been appointed by the County Council in the jurisdiction in which the judge's court is located to serve as a member of the Local Management Board ("LMB"). The judge has requested an opinion as to the propriety of serving on the Board.

The LMB is charged with identifying the needs of children, youth and families in the community and determining funding allocations to various vendors of family services. The LMB is composed, *inter alia*, of public and private community representatives, a representative from the local health department, the local office of the Department of Juvenile Services, the Sheriff's Department, the Police Department, the Department of Parole and Probation, the local school system and the local department of social services.²

The circuit court on which the requesting judge serves interacts with almost all of the agencies involved in the LMB. Some of the initiatives of the LMB may result in the funding of services to which litigants are referred, particularly in domestic relations cases, Children in Need of Assistance (CINA) and juvenile delinquency cases.

Discussion: This request for an opinion amply demonstrates the dilemma that judges may face when asked to participate in extra-judicial activities. There is often a fundamental tension between judicial independence and the benefits of community involvement.

Reflecting a growing awareness that participation by judges in community, or extra-judicial activities is desirable, the Maryland Judicial Commission on Professionalism, in its Final Report, encouraged judges to participate in activities within their communities.³

¹ As used in this opinion, the word "county" means a county of the State or Baltimore City. Md. Code Ann., Human Services Art., § 1-101(b).

² See, e.g., Human Services Art., § 8-302.

³ The Commission's Revised Final Report and Recommendations were issued on May 30, 2007. The Subcommittee on the Judges' Role in the Bar and with Communities encouraged an amendment to Canon 4

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Along similar lines, the Comment to Canon 4A of the Maryland Code of Judicial Conduct (Rule 16-813) states that “[c]omplete separation of a judge from extra-judicial activities is neither possible nor desirable. A judge should not become isolated from the judge’s community.”

Canon 4C enumerates several instances in which judges, generally, may engage in charitable, civic and governmental activities. These instances, however, are often expressed in terms of the limitations on those activities.⁴

Canon 4B provides that judges may participate in extra-judicial activities such as lecturing, speaking, teaching and writing, and, as explained in the Comment, encourages participation in those activities that promote the administration of justice and the improvement of the law:

A judge is in a unique position to contribute to the administration of justice, the legal system, and improvement of the law, including the revision of substantive and procedural law and improvement of criminal and juvenile justice. As time may permit, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law.

The challenge for judges, then, is to determine the circumstances in which participation in extra-judicial activities is permissible, and those in which it is not. Such determinations require due consideration of the nature and purpose of the activity, and factors such as whether it involves the administration of justice, the legal system or the improvement of the law, and whether it casts doubt on the judge’s capacity to act impartially or raises separation of powers issues, as will be discussed *infra*.⁵ Canons 1 and 4A.

of the Maryland Code of Judicial Conduct (Rule 16-813), or its Comment, to state explicitly that “judges are encouraged to engage in greater interaction with the bench, bar and legal communities.”

⁴ Thus, judges may accept appointment to a governmental advisory commission, committee or position. Canon 4C(2). They may represent the country, a state or a locality on ceremonial occasions or in connection with cultural, educational, or historical activities. Canon 4C(3). With exceptions, they may be directors, members, non legal advisers, officers or trustees of a charitable, civic, educational, fraternal or sororal, law related or religious organization. Canon 4C(4)(a). They may assist an organization in planning fund-raising. Canon 4C(4)(d)(iv)(A). They may appear at public hearings and consult with executive or legislative bodies in matters concerning the administration of justice, the legal system or improvement of the law. Canon 4C(1).

⁵ The Center for Judicial Ethics of the American Judicature Society has observed:

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The Purposes and Functions of LMBs

To effectuate its stated policy to promote a positive, safe and healthy environment for children and families,⁶ the Maryland General Assembly has directed that each county shall establish and maintain a Local Management Board.⁷ The purposes of LMBs are generally defined in terms of ensuring that effective programs are in place, in each county, to serve the needs of children, youth and families.

Some of the purposes of LMBs are directly related to areas of the administration of justice. For example, the purpose of programs for at-risk youth is to protect or divert youth from entering the juvenile justice system.⁸ Other purposes may be indirectly related.

The specific functions in which LMBs engage to achieve their stated goals, however, raise significant concerns. Many of the duties of an LMB are in the nature of functions that are exercised by the Executive Branch of government.⁹ For example, it is the duty of an LMB to *implement* a “delivery system” and “terms, conditions, and performance measures[.]” as set forth in § 8-505(d) of the Human Services Article of the Maryland Code.¹⁰ In addition, the duties of LMBs relating to at-risk youth prevention and diversion

Sometimes a statute that establishes a governmental commission will specify that a judge should be one of the members. Legislation, however, does not override the specific rules and general principles in the code of judicial conduct to render legitimate service that is otherwise impermissible under those standards. . . . Automatic deference to the legislature is not consistent with the principles of judicial independence that underlie the code. Although a legislature would not intentionally attempt to compromise judicial independence by requiring judicial participation in a government commission, the legislature may have mandated judicial participation without due consideration or understanding of the possible ramifications for judicial impartiality and independence.

Cynthia Gray, *Ethics and Judges' Evolving Roles off the Bench: Serving on Governmental Commissions*, 17-18 (2002).

⁶ Human Services Art., § 8-102.

⁷ *Id.* at § 8-301(a).

⁸ *See, e.g.*, Human Services Art., § 8-601, which defines an “[a]t-risk youth prevention and diversion program[.]”

⁹ In its 2007 *Legislative Drafting Manual*, the Department of Legislative Services quoted a May 26, 1979 letter from the Attorney General to Governor Harry Hughes, in which he stated, “it is clear that the essential attribute of [executive] power is the power to *carry out, implement and administer laws*. It is this essential core power which the separation of powers doctrine protects from usurpation of another branch.” *Id.* at 27. (Emphasis added).

¹⁰ The July 2006 State of Maryland *Policies and Procedures Manual for Local Management Boards*, provides, in pertinent part:

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programs include the awarding of funds to local agencies and organizations, monitoring and evaluating program performance, providing technical assistance, and measuring program outcomes, among others. Md. Code Ann., Human Services Art., § 8-603(b). Even the more general description of duties set forth in § 8-303 of the Human Services Article suggests functions that may be executive in nature.¹¹

The *Local Management Board Profiles*, issued in January 2005, by the Governor’s Office for Children, Youth and Families explains how that Office views the duties of LMBs.¹² Among those duties is the development, funding and evaluation of services to achieve measurable improvement in child well-being. The report profiles county LMBs and their accomplishments. Thus, for example, in Baltimore County, the LMB expanded the funding base for local services to children and families and *competitively* secured \$9.5 million in new funding.¹³ It also had “administrative, fiscal monitoring and evaluation oversight” for a number of initiatives.¹⁴ The Carroll County LMB joined with another local agency to secure a contract for a management information system.¹⁵ It also entered into a contract with the University of Maryland to develop a needs assessment.¹⁶ In

LMBs are the core entity in each jurisdiction to stimulate action by State and local government, public and private providers, business and industry, and community residents to build an effective system of services, supports, and opportunities that improve outcomes for children, youth, and families. The LMB *plans, coordinates, implements, and manages a local interagency service delivery system for children, youth and families.*

Id. at 8. (Emphasis added).

¹¹ Section 8-303 of the Human Services Article provides:

- A local management board shall:
- (1) strengthen the decision-making capacity at the local level;
 - (2) design and implement strategies that achieve clearly defined results for children, youth, and families as articulated in a local 5-year strategic plan for children, youth, and families;
 - (3) maintain standards of accountability for locally agreed upon results for children, youth, and families;
 - (4) influence the allocation of resources across systems as necessary to accomplish the desired results;
 - (5) build local partnerships to coordinate children, youth, and family services within the county to eliminate fragmentation and duplication of services; and
 - (6) create an effective system of services, supports, and opportunities that improve outcomes for all children, youth, and families.

¹² *Local Management Board Profiles*, 3rd Ed., Fiscal Year 2004.

¹³ *Id.* at 15.

¹⁴ *Id.*

¹⁵ *Id.* at 20.

¹⁶ *Id.*

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Charles County, the LMB provided technical assistance to community providers and vendors.¹⁷

Separation of Powers

As a threshold matter, the suggestion that a judge is engaged in a position that exercises an executive function invokes consideration of the fundamental precept that governs the conduct of judges. This precept is articulated in Canon 1 of the Code of Judicial Conduct:

An independent and honorable judiciary is indispensable to justice in our society. A judge shall observe high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions to this Code are to be construed and applied to further that objective.

The powers of each of the three branches of government are independent of the other two, as expressed in Article 8 of the Maryland Declaration of Rights:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Article 33 of the Maryland Declaration of Rights, in turn, specifically addresses the issue of judicial authority. It provides, in pertinent part:

[T]he independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People[.]

Along these lines, the Court of Appeals has opined:

[T]he policy and intent of that law is that the courts and judges provided for in our system shall not only not be required, *but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function*; and that the exercise of any power or trust or the assumption of any public duty other than such

¹⁷ *Id.* at 25.

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as pertain to the exercise of the judicial function is not only without constitutional warrant, *but against the constitutional mandate in respect to the powers they are to exercise and the character of the duties they are to discharge.*

Board of Supervisors v. Todd, 97 Md. 263-64 (1903) (Emphasis added).

In *Board of Supervisors*, the Court considered the validity of a public local law that required the Circuit Court for Wicomico County, upon petition of eligible voters, to order an election on the question of granting liquor licenses. Declaring the law to be void, as in violation of Article 8, the Court held that counting names in a petition, ascertaining the eligibility of petitioners, and ordering an election was not a judicial function. *Id.* at 265.

The Court of Appeals has also held to be void statutes requiring judges to certify the validity of requests for payments for services by constables, coroners, sheriffs and surveyors, among others; *Robey v. Commissioners of Prince George's County*, 92 Md. 150 (1900); to appoint members of a board of visitors who would exercise control and supervision of the county jail; *Beasley v. Ridout*, 94 Md. 641 (1902); to issue certain horse racing licenses after certifying the validity of the signatures of applicants; *Close v. Southern Md. Agric. Ass'n*, 134 Md. 629 (1919).

In each of the cases cited *supra*, the Court described the offending functions in the negative. That is, they were not “judicial functions” or were “non-judicial duties.” Although the functions that were the subject of each case were not given labels such as “executive function” or “legislative function,” their assignment was held to be unconstitutional because they were functions of one of the other branches of government. Indeed, in *Board of Supervisors*, the Court noted:

[T]o test the constitutionality of the law here in question . . . we have only to inquire whether the duty so assigned to the court is a judicial duty. It is quite unnecessary to undertake to define here the essential qualities of a judicial act, or to prescribe the precise limits to be observed by the legislative branch of the government in assigning duties to the judiciary. Such attempt could, in its results, only be misleading and confusing. It would not be practicable to lay down a rule for all cases, and it would be inappropriate that the courts should undertake to do this. It is only necessary in this case to say that counting the names upon a petition, ascertaining whether the names appended thereto are those of voters at the last election for Governor, and ordering an election is not a judicial function is

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a proposition that would seem to be too plain to need argument to enforce it.

Id. at 264.

Recognizing the creation of State administrative agencies to meet the increased demands on government, the Court of Appeals acknowledged that there might be some overlap among the branches of government. The Court thus stated:

[T]he separation of powers concept may constitutionally encompass a sensible degree of elasticity and should not be applied with doctrinaire rigor. However, this constitutional ‘elasticity’ cannot be stretched to a point where, in effect, there no longer exists a separation of governmental power, as the Maryland Constitution does not permit a merger of the three branches of our State government, nor does it ‘make any one of the three departments subordinate to the other, when exercising the trust committed to it.’

Department of Natural Resources v. Linchester, 274 Md. 211, 220 (1975) (quoting *Painter v. Mattfeldt*, 119 Md. 466, 472 (1913)).

Judicial Ethics Committee Opinions

The Committee has previously considered requests as to the appropriateness *vel non* of service on various boards. In [Opinion Request No. 2004-24], issued on December 3, 2004, it approved membership on a local drug and alcohol abuse council, noting that the Council’s functions were advisory only and not executive in nature. The Committee thus stated:

An examination of the statute creating local drug and alcohol abuse councils demonstrates that the councils perform only advisory functions. The primary responsibility of a council is to develop a plan to meet the substance abuse service needs of the jurisdiction. This plan is essentially advisory, as it is not binding on any other governmental or private entity. The plan merely serves as a guide to other entities and funding sources as to those needs and the appropriate strategies to meet them.

In Opinion Request No. 2006-14 (unpublished), the Committee approved membership on the Disproportionate Minority Contracts Subcommittee of the Juvenile Council of the

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Governor's Office of Crime, Control and Prevention. That subcommittee's function, however, also was found to be advisory in nature and not executive.¹⁸

Conclusion

While there indeed may be some "elasticity" in the separation of powers among the branches of government, some functions are clearly *non-judicial* and may not be performed by judges. The duties of LMBs to direct funds and to implement and evaluate programs are functions that are executive in nature. Moreover, LMBs apply for and disburse money from the Children's Cabinet Interagency Fund, which are also executive functions.

Canon 1 of the Code of Judicial Conduct and Articles 8 and 33 of the Declaration of Rights clearly establish that the Judiciary must be independent and separate from the other branches of government. Judges should not participate in extra-judicial activities in which they are required to perform executive or legislative functions.

In addition, the fact that some of the initiatives of the LMB, in the requesting judge's jurisdiction, result in the funding of services to which litigants are referred, could place the judge's impartiality at issue, if he or she was to serve on the LMB. Canon 4A(1). Accordingly, for the foregoing reasons, it is the opinion of the Committee that the requesting judge should not accept the appointment to the LMB.

¹⁸ The Attorney General, in unpublished Opinion No. 79-054 (September 13, 1979), considered whether a Court of Special Appeals judge could accept an appointment to an Advisory Council on Mental Hygiene. The Attorney General opined, *inter alia*:

A position on the Council is *purely advisory and does not, we believe, amount to the exercise, assumption, or discharge of the functions or duties of a branch of government*. Providing advisory input from a cross section of the community into the State's mental hygiene program hardly appears to be the type of activity sought to be proscribed by Article 8.

(Emphasis added).

With respect to this issue, the Department of Legislative Services has stated, "the common practice of creating an advisory commission composed of Legislative, Judicial, and Executive Branch appointees *does not pose a constitutional problem if the commission is merely advisory and does not exercise an essential power of one branch of government.*" 2007 *Legislative Drafting Manual*, at 28. (Emphasis added).

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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.