

Maryland Judicial Ethics Committee

Opinion Request Number: 2008-43

Date of Issue: January 30, 2009

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

At Sentencing or Bail Hearing, Judge May Not Ask Criminal Defendant, Who is Represented by Counsel and Requesting Probation/Bail, to Divulge Defendant's Immigration Status

Issue: May a judge, consistent with the Canons of the Maryland Code of Judicial Conduct, ask a criminal defendant to divulge the defendant's immigration status at sentencing, when the defendant is represented by counsel and requests probation? May a judge make a similar inquiry at a bail hearing?

Answer: No.

Facts: The requesting judge has presented the above questions to the Committee. In responding, the judge has asked that this Committee consider the following: case law governing a judge's discretion at sentencing; 8 U.S.C. § 1325; and Canons 2A, 3A, 3B(1) and 3B(2) of the Code of Judicial Conduct (Md. Rule 16-813). The judge cited four Maryland appellate cases as representative of the law governing the scope of a judge's discretion at sentencing. The point of the cases cited is that a judge has very wide discretion in determining what factors to consider when determining an appropriate sentence. The federal statute, appearing at 8 U.S.C. § 1325, provides that aliens who enter the United States illegally are subject to criminal and civil penalties.

Discussion: As a threshold matter, it should be noted that asking about immigration status may or may not be in violation of substantive law. The Committee will not render an advisory opinion on that question. Our opinion is limited to the ethics questions.

An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). Pursuant to federal statutes, an alien who enters the United States without complying with certain procedures is in the country illegally, and an alien who enters illegally is subject to criminal, as well as civil, penalties. Aliens who did not enter the United States illegally, but whose status is currently illegal, *e.g.*, as a result of an expired visa, are subject to civil, but not necessarily criminal, penalties. The remedies available to the government, applicable to illegal aliens, include deportation. 8 U.S.C. § 1227.

As the requesting judge states, Maryland case law provides that a sentencing judge has "virtually boundless discretion" in determining what factors to consider in sentencing. *Jennings v. State*, 339 Md. 675, 683-84 (1995). The sentence must not be cruel and unusual, violative of constitutional principles, motivated by ill-will or prejudice, or exceed statutory limitations. *Id.* Consequently, we assume that, as a matter

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of substantive law, a court can consider a defendant's immigration status if properly presented to the court.

The question here, however, is whether a court may inquire of the defendant as to the defendant's immigration status. The constitutional privilege against self-incrimination applies in a sentencing proceeding. Ellison v. State, 310 Md. 244, 259 (1987). A sentencing court may not consider a defendant's exercise of his privilege against self-incrimination. Ridenour v. State, 142 Md. App. 1, 16 (2001). Because an illegal alien may be entitled to the privilege against self-incrimination, see United States v. Bin Laden, 132 F. Supp.2d 168 (S.D.N.Y. 2001), and, under certain circumstances, is subject to criminal penalties, the privilege against self-incrimination may be implicated.

Consistent with the existence of the privilege, the Maryland Rules contemplate that the State and the defendant may submit information to the court that each wants the court to consider. Md. Rule 4-342. A court may request that the Division of Parole and Probation prepare a presentence investigation report. Md. Rule 4-341. Except on court order, the report is confidential and not available for public inspection. Md. Code Ann., Corr. Servs. Art., § 6-112(a)(2). The general practice of Maryland trial judges is not to inquire of a defendant at sentencing except to clarify a matter presented and to invite the defendant to exercise the right of allocution.

Subsection (e), added to Md. Rule 4-242 in 1999, states that, before accepting a guilty plea, the court, the State's Attorney, or the defense attorney shall advise the defendant that, by entering the plea, the defendant, if not a United States citizen, "may face additional consequences of deportation, detention, or ineligibility for citizenship...." The Committee note to that section states that "the court should not question defendants about their citizenship or immigration status." The Rules Committee minutes, dated April 24, 1998, indicate that the Committee wanted to make it clear that subsection (e) was not intended to put any burden on the judiciary to ascertain a defendant's immigration status and that the advice of rights provision was added to aid the defendant in making a decision as to whether to plead guilty. The minutes also reflect the Committee's sensitivity to creating a public record reflecting a defendant's immigration status.

Canon 2A of the Code of Judicial Conduct provides that:

A judge shall avoid impropriety and the appearance of impropriety. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the impartiality and integrity of the judiciary.

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The Comment provides that the test for appearance of impropriety is whether the conduct would create such a perception in reasonable minds.

Canon 3A of the Maryland Code of Judicial Conduct provides that

A judge shall perform the duties of judicial office diligently, impartially, and without having or manifesting bias or prejudice, including bias or prejudice based on age, disability, national origin, race, religion, sex, sexual orientation, or socioeconomic status.

It is public knowledge that there are millions of illegal aliens in the United States and that the issues arising from that fact are controversial, high-profile, and are perceived by members of the public as involving national origin, race, and socioeconomic status.

Based on the above considerations, we conclude that reasonable minds could perceive an appearance of impropriety based on a judge's inquiry as to immigration status, at sentencing or at a bail hearing.

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 a judge engages in a continuing course of conduct, the judge 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.