

Maryland Judicial Ethics Committee

Opinion Request Number: 2009-15

Date of Issue: November 16, 2009

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Judge May Not Render an Opinion in a Case Pending Before a Foreign Court

Issue: May a retired judge render an opinion, in a pending case, to a foreign court in the form of an affidavit as to principles of Maryland law?

Answer: No.

Facts: A retired judge, subject to recall pursuant to Article IV, Section 3A of the Maryland Constitution, has been asked by an attorney to render an expert opinion on Maryland law to a foreign court. The attorney's client is a party to a proceeding in another country who has filed an appeal from the decision of an arbitration panel on the ground that the panel incorrectly interpreted Maryland law. In the foreign court, the law of other jurisdictions is a matter of fact, evidence of which is given by an expert in the form of an affidavit. The request of the judge, therefore, is for an affidavit that would describe certain principles of Maryland law by reference to decided cases, but not to the facts involved in the arbitration.

Discussion: The judge is being asked, in essence, to be an expert witness, although not by testifying, but by submitting an opinion in writing. A judge presumably is an expert in the law of the judge's jurisdiction. Judges routinely express their expertise in the opinions they issue in resolving cases before their courts. There can be little doubt that the requesting judge is an expert in Maryland law.

Normally, when issuing an opinion, a judge is deciding a case after considering evidence and arguments of two or more parties. Judges carefully weigh all sides of a controversy and decide cases impartially. Canon 2A of the Maryland Code of Judicial Conduct requires that judges act "in a manner that promotes public confidence in the impartiality" of the Judiciary.

Canon 2B directs that judges not "use the prestige of judicial office to advance the private interests of the judge or others." The Comment to Canon 2B provides that "a judge must avoid lending or using the prestige of office to the advancement of the private interests of others." Judges generally are prohibited from testifying as character witnesses for the same reason, namely, avoidance of lending the prestige of office in support of a party for whom the judge testifies.

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The Maryland Court of Appeals has noted that Canon 2 is fundamental to the analysis of judicial testimony. *Ginsberg v. McIntire*, 348 Md. 526, 549 (1998). In considering the propriety of allowing a judge who testified as a fact witness to be identified by his judicial position, the Court cited opinions from other jurisdictions.

The Supreme Court of Texas, in *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991), held that a judge who testifies as an expert lends the “prestige and credibility” of the judge’s office to the litigant’s position. *Id.* at 238. The judge also loses the appearance of impartiality. *Id.* Expert witnesses rarely appear impartial; they are seldom called to give testimony unfavorable to the party who calls them. *Id.* See also *Helmbrecht v. St. Paul Ins. Co.*, 343 N.W. 2d 132 (Wis. Ct. App.1983), *aff’d in part, rev’d in part, on other grounds*, 362 N.W.2d 118 (Wis. 1985).

The Idaho Supreme Court upheld the exclusion of two judges as fact witnesses in *Fuller v. Walters*, 807 P.2d 633 (Idaho 1991), *overruled on other grounds*, *City of McCall v. Buxton*, 201 P.3d 629 (Idaho 2009). That court cited the prohibition of lending the prestige of office to one party’s position. It also noted the likelihood that a jury might give greater weight to the testimony of a judge than the testimony of another witness. *Id.* at 639.

If the requesting judge were to render the expert opinion that has been requested, the judge would be lending the prestige of office to the party by whom the affidavit will be filed. The judge will not appear to be impartial. Rather than expressing an opinion after carefully weighing both sides of the controversy, the judge will be rendering an opinion that will be supportive of one party’s position. Even if the judge were requested to render an impartial opinion in the matter, the opinion would not be used unless it was more supportive of one party’s position than the other’s. As the Supreme Court of Texas noted, “a party does not ordinarily call an expert whose testimony is unfavorable.” *Joachim*, 815 S.W.2d at 238. Even assuming the judge could render an objectively impartial opinion, acceptable to the requesting party, it surely would be viewed by the appellate tribunal as submitted to support one party’s position.

While presumably the appellate tribunal will not be made up of jurors, but of seasoned legal professionals, an opinion submitted by a judge likely will carry more weight than that of another expert. After all, judges ideally are selected for their professional expertise.

Even if the tribunal can weigh equally the expert opinion of the judge and that of the opposing party’s legal expert, it may be confused by the fact that the opinion is given by a judge. Is the judge rendering an opinion, or is the judge rendering a ruling? If it appears to be the latter, it would be a misrepresentation of the judge’s role, which

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normally is to act for the court in deciding matters impartially, after due consideration of all parties.

Maryland favors alternative dispute resolution, and the Code of Judicial Conduct authorizes retired judges to conduct mediation and arbitration. Canon 4F(2). Canon 4F(2) authorizes the “conduct” of alternative dispute resolution proceedings. That activity is analogous to the role of a judge. A retired judge *conducts* arbitration or mediation when the judge is selected by both parties or found acceptable by them to assist in the resolution of their dispute. The judge conducts the proceedings by observing and hearing the parties’ positions and deciding upon due consideration of both sides. In doing so, the judge acts impartially, consistent with Canon 2A. Conversely, if the requesting judge rendered an opinion as to Maryland law on behalf of a party, he or she would be “participating” in the arbitration and appearing not to act impartially.

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.