

Maryland Judicial Ethics Committee

Opinion Request Number: 2010-11

Date of Issue: July 9, 2010

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

Auditor May Not Serve on Board of Maryland Transportation Authority

Issue: May a judicially appointed Interim Substitute Auditor serve concurrently as a member of the Board of the Maryland Transportation Authority?

Answer: No.

Facts: A recently appointed Interim Substitute Auditor (“ISA”) has requested an opinion regarding the propriety of continuing his/her work as a board member for an Executive Branch agency – the Maryland Transportation Authority (“MdTA”) – which, according to the agency’s website, is “responsible for managing, operating and improving the State’s toll facilities.” MdTA board members are appointed by the Governor, with the advice and consent of the Senate, for a three-year term and may be re-appointed following the expiration of that term. We have been informed by the ISA requesting this opinion that as an MdTA board member he/she has taken an oath of office; attends board meetings approximately twice monthly; and receives \$500 plus travel expenses per meeting as compensation for his/her service.

Discussion: Interim Substitute Auditors are appointed by a majority of the judges of the circuit court of the county in which they serve, and they serve at the pleasure of the appointing court. Md. Rule 2-543. While Auditors are typically required to take an oath of office, *see, e.g., Green v. Green*, 182 Md. 571, 574 (1943) (“The auditor is a ministerial officer of the court required to take an oath that he will well and faithfully execute the duties of his office without favor, affection, partiality or prejudice.” (citing Md. Ann. Code Art. 16, § 20 (1939))), we have been informed by the requestor that ISAs are not required to take an oath of office. Additionally, ISAs are not compensated by the court, but rather are paid by attorneys filing foreclosure actions.

Nevertheless, according to the information provided, ISAs are subject to the Maryland Code of Conduct for Judicial Appointees (“the Code”). Md. Rule 16-814. Canon 4 of the Code allows a judicial appointee to engage in extra-official activities, provided that those activities do not impugn the appointee’s ability to act impartially, demean the judicial position, or interfere with an appointee’s proper performance of his or her official duties. Canon 4A. Canon 4 further states that judicial appointees “may accept appointment to a governmental advisory commission, committee, or position.” Canon 4C(2). That allowance is qualified by the Comment to Canon 4C(2), which states that “[a] judicial appointee may not accept a governmental appointment that could interfere with the effectiveness and independence of the judicial system, assume or discharge an executive or legislative power (Maryland Declaration of Rights, Article 8), or hold an ‘office’ under the constitution or other laws of the United States or State of Maryland (Maryland Declaration of Rights, Articles 33 and 35).” While the requestor provided information helpful in analyzing whether the position of an ISA is “an office of profit,” as well as whether a judicial appointee may accept employment in a clerical position with an Executive Branch agency, the Committee does not perceive those issues to be dispositive of the question presented.

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As we stated in [Opinion Request No. 2009-14], issued on November 23, 2009, “Article 8 of the Maryland Declaration of Rights mandates a separation of powers in government and prohibits a person who exercises the functions of one branch, such as the Judiciary, from assuming the duties of another branch.” While an ISA does not take an oath of office and is not compensated by the court, he or she is appointed by the majority of the judges of the circuit court in which he or she serves. Furthermore, ISAs are required to adhere to the Code of Conduct for Judicial Appointees. The portion of the Comment to Canon 4C(2) with which the Committee is most concerned, for purposes of the instant inquiry, is that which states, “[a] *judicial appointee may not accept a governmental appointment that could . . . assume or discharge an executive or legislative power* (Maryland Declaration of Rights, Article 8).” (Emphasis added).

The Maryland Transportation Authority, being charged with “managing, operating and improving the State’s toll facilities,” is engaged in performing executive functions. The ISA requesting the opinion has more than a clerical position with the MdTA. He/she was appointed to the Board by the Governor in July of 2008, took an oath of office to serve in that position, and receives compensation for his/her service. Thus, as a member of the Board of the MdTA, he/she has accepted a governmental appointment to “assume or discharge an executive power.”

Because Article 8 of the Maryland Declaration of Rights requires a separation of powers between the coequal branches of government, it prohibits a person from concurrently exercising the functions of two branches of government. For that reason an ISA cannot simultaneously serve as a member of the Board of the Maryland Transportation Authority.

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.