

Maryland Judicial Ethics Committee

Opinion Request Number: 2017-01

Date of Original Issue: July 28, 2017

Date of Re-Issue: September 5, 2019

Published Opinion Unpublished Opinion Unpublished Letter of Advice

A Judge may, under certain circumstances, identify a suspected victim of human trafficking who appears in his/her court as a party or witness and request assistance for the suspected victim

Issue: May a judge, consistent with the requirements of Maryland Code of Judicial Conduct, Md. Rule 18-102.2, identify a suspected victim of human trafficking during a court proceeding and request assistance for that individual?

Answer: Yes, but under limited circumstances.

Facts: The inquiry in this case has its genesis in the Judiciary’s Joint Workgroup on Human Trafficking, which is charged with “developing and implementing plans to educate judges, magistrates, and appropriate judiciary staff . . . on issues related to human trafficking,” which may also include the identification of “other resources and best practices for helping victims of Human Trafficking who come into contact with the court system.” The Workgroup has drafted a proposed bench/information card identifying “signs and indicia that one may be a victim of human trafficking,” but “there exists concerns about the level of inquiry of a party or participant that a judge or magistrate can make [and remain] compliant with” Rule 18-102.2. The Requestor, who is a member of the Joint Workgroup, seeks an “opinion¹ regarding the scope and involvement that a judge may employ in the course of a court proceedings to identify (for the provision of services) potential victim of human trafficking.”

Discussion: Rule 18-102.2 (Impartiality and Fairness) provides that “[a] judge shall uphold the law and shall perform all duties of judicial office impartially and fairly.” Under Rule 18-100.3(d) “impartiality” and “impartially” are defined as the “absence of bias or prejudice in favor of or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”²

¹ At the time of Original Issue, the Requestor asked for an Unpublished Opinion. The Requestor has since asked that the Committee re-issue the Opinion as a Published Opinion and the Committee has agreed to this request.

² The words “impartiality” and “fairness” appear throughout the Code. In section 18-102 (Rules Governing the Performance of Judicial Duties) See Rules 18-102.10, 18-102.11, and 18-102.13.

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The Requestor focuses on “criminal cases and civil protective order cases” and juvenile delinquency cases not directly related to human trafficking “where the level of inquiry related to whether a party or other participant in the case may be a victim may seem to compromise the requirements of impartiality and fairness.” The Requestor provides a number of examples of how a judge or magistrate may see a victim of human trafficking:

- A petitioner in a civil domestic violence or peace order case seeks protection. The petitioner displays indicia of human trafficking but makes no such disclosure in the written petition or oral testimony of record.
- A respondent in a civil domestic violence case has a tattoo indicating she is a victim of HT. Petitioner is seeking custody of the child (possibly conceived from the respondent being raped by the petitioner).
- A petitioner in a civil domestic violence/peace order case, or a complaining witness in a criminal case wishes to “drop” charges or dismiss a civil order of protection. The court, magistrate, commissioners observes indicia of human trafficking and suspects that the request is being manipulated or guided by a human trafficker. None of the written documentation or oral proceedings disclose such manipulation.
- A criminal defendant is charged with a misdemeanor (prostitution, theft, trespass, credit card offense, possession of drugs, etc.). The judge notices on criminal defendant tattoos and other indicia of trafficking (which are unrelated to the criminal charge).
- A witness/victim has a criminal case. The judge observes conduct and other indicia of trafficking from the witness/victim (which conduct is not related to the witness’s/victim’s testimony).
- On delinquency dockets, in detention reviews, and court reviews (youth generally being supervised on probation or commitments to the Department of Juvenile Services), judges learn history of AWOL behaviors “when” the youth has been “whereabouts unknown” for significant periods of time and no known means of support). Explanations, if any, are offered by Respondent’s counsel or State and can vary, including the following:
 - The child had been staying with family, friends, etc., without elaboration or corroboration.
 - No explanation is offered at all.

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- Human trafficking is mentioned or implied.
- In a delinquency petition, the State and defense agree to STET on shoplifting. Judge sees Respondent looking over his/her shoulder at man in back row, who is clearly not a parent. During *voir dire*, the judge sees a tattoo (branding) on Respondent's arm. Judge becomes suspicious and declines to accept STET as a result. The State then stands and enters a *nol pros*.
- In Special Immigrant Juveniles Status/unaccompanied minors cases. When a child or youth is apprehended by immigration authorities and is not with a parent or guardian, the child is deemed an unaccompanied minor. The child is then sent to a Federal Office of Refugees Resettlement Center where he or she is then released to a sponsor (such as a family member or a person claiming to be a family member). Some children are eligible for Special Immigrant Juvenile Status, which allows undocumented minors who have suffered abandonment, neglect, or abuse by a parent to become lawful permanent residents. To qualify, the child must have an order from a juvenile court demonstrating that he or she is dependent on the state, cannot be safely reunited with parent(s), and that it is not in his or her best interest to return to the child's country of origin. The child's relationship to a "sponsor," or the facts of the sponsor him/herself, may alert the judge to the possibility (or probability) of trafficking.

The Requestor explains that identifying a human trafficking victim "at the earliest possible time is crucial" because:

Human trafficking victims are typically groomed into psychological dependence. They are also often made physically dependent through provision of controlled dangerous substances. Often the human trafficker is present in court with the human trafficking victim to ensure that undesired disclosures/admissions are not made. The strength of these improper bonds and the concomitant lack of free will is a major difficulty for victims seeking to extract themselves from human trafficking. A victim of HT suffers from PTSD and trauma bonding (Stockholm Syndrome). Therefore, the need to identify "is greater at a pretrial stage." But, without the benefit of programs or specialty courts involving pretrial screenings and "possible diversion" to a specialty court, a court's use of assessors usually come "post-conviction" and "pre-sentence."

The Requestor poses six specific questions, which, for the purposes of this opinion we have reordered and consolidated into four with a common predicate: The judge or magistrate

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observes visible indicia of human trafficking or for other reasons suspects human trafficking. The first three involve a trial or hearing situation, the fourth arises post-trial.

QUESTION (1): When the parties are each represented by counsel, may the judge bring the lawyers to the bench before or during trial and ask if anyone has explored the human trafficking issue with the victim/defendant?

ANSWER: Yes, if and when it can be done confidentially and safely, it would not violate Rule 18-102.2 to do so, but if the lawyers are not interested in pursuing the issue, the judge should take no further action, including referring the suspected victim for services and support, at that time. If, however, either lawyer would be interested and required time to do so, the judge may consider granting continuance to do so, subject to objection by the other side, as it would a continuance request for any other reasons. Attorney-Client privilege concerns prevent a judge from asking about anything that was discussed with a party by that party's counsel. Possibly the judge could pose the broader question as to whether, without violating client confidentiality, any attorney in the case had any concerns with regard to human trafficking issues as they relate to any party. *See* Md. Rule 2-508. *See also* Answer to Question 3 below.

QUESTION (2): If a party is not represented by counsel, can the judge request that an Assistant State's Attorney or Public Defender become involved as a friend of the court to facilitate exploring the human trafficking issue with the unrepresented litigant who may be a victim of human trafficking?

ANSWER: No. A friend of the court or amicus curiae is generally a person who is not a party to the case but who offers information bearing on the case to the court without being asked by the parties to assist the court. *See Black's Law Dictionary*, 103 (10th ed. 2014). In some jurisdictions, it's "an official who investigates and advises" the court in cases involving minors. *Id.* at 783. The purpose here is to appoint a lawyer to convey to an unrepresented party the judge's concerns that he/she may be a victim of human trafficking. Not only would the request be outside the scope of an assistant state's attorney's or a public defender's duties, such an appointment and involvement with the suspected victim under these circumstances could, in our view, be seen as creating a de facto attorney-client relationship between the perceived victim and the appointed attorney. And, in any event, such actions risk bringing the judge's impartiality into question.

QUESTION (3): In the litigation context, may a judge refer a person for services, programs, and support that is available for human trafficking victims and, if so, when may the judge do so and who can contact the service provider?

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ANSWER: Yes, but, without the agreement of counsel and their clients, such a referral should be made only after the legal proceeding is concluded. As we understand the question, such a referral would not represent an order and would not require the person to take advantage of any available services, programs, and support. We believe that it would be better if the person made direct contact with the service provider, but if that is impossible or impractical, the judge should not directly contact a service provider but instead should request a responsible person or entity, for example, the local Department of Social Services, to do so. That is because direct contact by a judge might raise issues of the use of the prestige of judicial office for the benefit of another, namely, the victim and/or the service provider.

QUESTION (4): Can the judge order trauma counseling as a condition of probation in a case where human trafficking is suspected but not necessarily verbalized?

ANSWER: Yes, subject to statutory limitations. Sections 6-220(b) (Probation before judgment) and 6-221 (Suspension of sentence or probation after judgment) of the Criminal Procedure Article permit placing a defendant on probation, subject to “reasonable conditions” based on a finding pursuant to section 6-220(b) that “the best interest of the defendant and the public welfare would be served” and, under section 6-221, with “the conditions that the court considers proper.” In the case of probation before judgment, the consent of the defendant is required. Although section 6-221 does not expressly include language regarding the best interests of the defendant and the welfare of the public found in section 6-220(b), it is our view that similar considerations would guide a determination of a “proper” condition in the case of suspected human trafficking, particularly in cases where the offense is a crime commonly associated with drug trafficking.

Application: The Judicial Ethics Committee cautions that this opinion is applicable only prospectively and only to the conduct of the Requestor described herein, to the extent of the Requestor’s compliance herewith. Omission or misstatement of a material fact in the written request for an 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 the request for advice involves a continuing course of conduct, the Requestor 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.