Maryland Judicial Ethics Committee

Opinion Request Number: 2025-21

Date of Issue: August 18, 2025

☒Published Opinion ☐ Unpublished Opinion ☐Unpublished Letter of Advice

Testimony by Judge Relating to Performance of Judicial Duties

Issues: 1. What restrictions, if any, should a judge observe if an attorney for a party in a past proceeding before the judge seeks to obtain testimony or non-public information from the judge relating to the past proceeding?

2. Should the judge in a post-conviction proceeding be recused if another judge in the same jurisdiction is likely to be a fact witness in the post-conviction proceeding based on the other judge's role in the criminal case from which the post-conviction proceeding arises? If a judge becomes a witness in a post-conviction proceeding based on the judge's role in the criminal case from which the post-conviction proceeding arises, is the testifying judge then required to recuse in future proceedings that may occur in the criminal case?

Answers: 1. With respect to a judge's factual testimony (other than character testimony), the Code of Judicial Conduct does not specify what restrictions apply when an attorney for a party seeks to obtain a judge's testimony or files related to the judge's performance of judicial duties in a past proceeding. However, based on the Code's numerous provisions designed to promote and preserve fairness and impartiality, it is advisable in most circumstances for the judge not to volunteer testimony or non-public information until the party seeking it has served the judge with a subpoena. When a subpoena has been served, the judge may meet with the attorney who served the subpoena as long as there is no pending matter before the judge involving the same parties. If the judge meets with the attorney for one party, the judge should consider whether fairness requires that the judge also be available to meet with the attorney for the opposing party.

2. With respect to recusal, recusal is not required in all instances in this situation, but it may be necessary depending on particular circumstances.

Facts: The Requestor is a circuit court judge. The Requestor asks four questions, which the Committee rephrases and reorders below. All of the questions arise from the situation of a current post-conviction proceeding that is related to the past criminal case in which the petitioner was convicted, although the first two questions are framed more broadly than only the post-conviction context. By rule, a different judge presides over the post-conviction proceeding than presided over the criminal guilty plea or trial resulting in conviction.

One party or the other in the post-conviction proceeding wants to present testimony of the presiding judge from the prior criminal case. The reasons for that testimony could be various, but the most likely scenario is a procedural event in the prior criminal case that is not clearly captured in the official record. The presiding judge from the prior criminal case

may have notes or other materials, not maintained in the criminal case records, that may bear on the issues.

The Requestor's four questions are:

1. May a judge who may be a witness in a proceeding based on the judge's performance of judicial duties in another proceeding meet with an attorney for one of the parties about the judge's potential testimony in the absence of a subpoena or even once a subpoena has been served?

2. May a judge who may be a witness in a proceeding based on the judge's performance of judicial duties in another proceeding share non-public information the judge maintains in chambers with an attorney for one of the parties in the absence of a subpoena?

3. Must a judge who is presiding in a post-conviction proceeding recuse in that post-conviction proceeding if another judge in the same jurisdiction (or a senior judge who regularly sits in that jurisdiction) is likely to be a witness in the post-conviction proceeding?

4. If a judge has become a witness in a post-conviction proceeding or has provided non-public information to an attorney representing a party in a post-conviction proceeding, must that judge recuse from any future actions involving the defendant who was the petitioner in the post-conviction proceeding?

Analysis: The Maryland Code of Judicial Conduct (the "Code"), Title 18, Chapter 100 of the Maryland Rules, establishes the standards for the ethical conduct of judges. The following rules may be implicated here.

Rule 101.2 provides:

> (a) **Promoting Public Confidence.** A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.
>
> (b) **Avoiding Perception of Impropriety.** A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

Comment 5 to the Rule states that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with competence, impartiality, and integrity is impaired." Md. Rule 18-101.2 Comment [5].

Rule 18-102.4(c) provides that "[a] judge shall not convey or permit others to convey the impression that any person is in a position to influence the judge." The Comment to this Rule states in part: "Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences." Md. Rule 18-102.4 Comment [1].

Rule 102.9 prohibits, with specific exceptions, *ex parte* communications in pending and impending matters and provides in part:

> (a) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge out of the presence of the parties or their attorneys, concerning a pending or impending matter, except as follows:
>
> * * *
>
> (2) When circumstances require, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (A) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (B) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond . . . .

Rule 18-102.10 addresses judicial statements on pending or impending matters and provides in part:

> (a) A judge shall abstain from public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding and shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Rule does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court.
>
> * * *
>
> (c) Notwithstanding the restrictions in sections (a) and (b) of this Rule, a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a non-judicial capacity.

Rule 18-102.11 applies to disqualification and provides in part:

> (a) A judge shall recuse in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:
>
> > (1) The judge has a personal bias or prejudice concerning a party or a party's attorney, or personal knowledge of facts that are in dispute in the proceeding . . . .

Rule 18-103.3 provides that, "[e]xcept when duly subpoenaed, a judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding."

Rule 18-103.5 provides in part that "[a] judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties."

A. Testimony by a Judge Relating to Performance of Judicial Duties

This opinion is limited to circumstances in which a judge's factual testimony is sought based on the judge's exercise of judicial duties. This situation is distinct from a situation in which a judge may be called to testify in a matter that is personal to the judge or in a matter in which the judge happens to be a witness to some event unrelated to the judge's judicial duties. When the source of the judge's factual knowledge is either personal or non-judicial, the judge's testimony may implicate the prohibition on lending the prestige of judicial office to advance the personal interests of another person under Rule 18-101.3. The Committee does not opine on those considerations here.

The Requestor's first two questions are posed more generally in terms of a judge's knowledge derived from "another proceeding," but we will begin with the more specific context of post-conviction proceedings. The context is a common one. A defendant is convicted in a criminal case, either by guilty plea or following trial. The defendant later petitions for post-conviction relief pursuant to Md. Code, Crim. Proc. § 7-101 *et seq.* By rule, the judge who presided over the proceeding resulting in the conviction does not preside over the post-conviction proceedings. Md. Rule 4-406(b). For convenience, we will refer to the judge who presided over the criminal proceedings resulting in conviction as the "trial judge" (even though conviction may have resulted from a guilty plea without trial) and to the judge presiding over the post-conviction proceedings as the "post-conviction judge."

The Committee cannot anticipate every circumstance in which the petitioner or the State in a post-conviction proceeding legitimately or illegitimately might seek testimony from the trial judge. The most common legitimate need is if there is an allegation that the record of the trial proceedings is either incomplete or inaccurate in a material way. Judges

generally strive to ensure that the record accurately reflects the full proceedings, but there may be instances in which some aspect of the proceedings occurred during a chambers conference or in communications that were not recorded and a sufficient summary of those events was not made on the record. There also may be instances in which the equipment or some other aspect of the recording process fails, resulting in an incomplete record. A judge may have personal notes or other non-public documents or information maintained in the judge's chambers that may assist in refreshing the recollection of the judge or that otherwise may be helpful in resolving factual questions about the past trial proceedings.

The Requestor's first question asks whether a judge whose testimony is sought may meet with the attorney for one party, whether or not a subpoena has been served on the judge. Before addressing that question, the Committee considers whether there is a requirement or a preference for the judge to insist that a subpoena be served before considering a meeting with the attorney.

It is not desirable for a judge to become a witness in post-conviction or any other proceedings. "An independent, fair, competent, and impartial judiciary . . . is indispensable to our system of justice." Md. Rule 18-100.4(a). Judges generally speak about cases before them only on the record in those proceedings or through opinions and other papers issued in the case. Thus, for example, a comment to the Rule governing judicial statements on pending and impending cases emphasizes that "restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary." Md. Rule 18-102.10 Comment [1]. The comment to another rule states that "[c]onfidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences." Md. Rule 18-102.4 Comment [1]. Even when the facts at issue are relatively straightforward, having a judge called to testify by one or the other side in adversarial proceedings risks a perception that the judge is testifying "for" one party and "against" the other party. Direct and cross-examination by advocates may be used to try to cast the judge in an unfavorable or partisan light. The testifying judge of course has no control over the positions the parties will take.

The only explicit requirement in the Code that a judge should avoid testifying as a fact witness unless the judge is subpoenaed is contained in Rule 18-103.3. That rule does not apply generally; it applies only when a judge is called as a character witness. Service as a character witness is more likely to arise in private situations, and Rule 18-103.3 implicates primarily the broader prohibition on a judge lending the prestige of judicial office to advance the personal interests of another person under Rule 18-101.3. A comment to the rule states that a judge should seek to avoid giving such testimony: "Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness." Md. Rule 18-103.3 Comment [1].

The Code thus does not state a general requirement that a judge testify only pursuant to a subpoena.

In addressing the questions presented by Requestor in this case, the Committee applies the Code of Judicial Conduct as a whole, understanding that the rules in the Code are "rules of reason." Md. Rule 18-100.1(b)(3). Although Md. Rule 18-103.3 applies only when a judge is called as a character witness, the Committee concludes that requiring a subpoena more broadly as a predicate to obtaining a judge's testimony comports with the intent of the Rules and serves several valuable purposes. First, it signals to the party desiring the judge's testimony that the judge is reluctant to testify, and it requires the party to be willing to undertake the formal step of issuing a subpoena. Second, it triggers a procedural opportunity for the judge to oppose testifying if the need for the testimony is not legitimate. A judge who is subpoenaed to testify based on the judge's performance of judicial duties is entitled to representation by the Attorney General, and the subpoena may be challenged, for example, if the party is seeking testimony about the mental processes of the judge or an inappropriate aspect of the proceedings like settlement or plea discussions. *See* Md. Rules 2-510, 4-266. Third, if the party is also seeking production of documents or other items, a subpoena requires specificity about what is sought and a similar opportunity to oppose production that is not appropriate. Fourth, although a subpoena may be obtained and served by a party without notice to the other parties in the case, a judge served with a subpoena may use that fact as a basis to inform the other parties of the judge's potential testimony if the judge believes those parties should be informed. Finally, a subpoena will better insulate a judge from any controversial or partisan statements made by any party, as well as from any allegation that the judge is testifying "for" one party and "against" another.

The judicial ethics committees in other states have addressed the issue of judges testifying in varying situations. Many of the opinions from other states involve judges testifying based on facts they learned in a private capacity and therefore are not directly applicable to this opinion. *See*, *e.g.*, Connecticut Comm. Jud. Eth. Op. No. 2016-07, 2016 WL 3773669 (Apr. 22, 2016) (judge providing affidavit and testimony on behalf of family member in proceeding in another state); Florida Jud. Eth. Adv. Comm. Op. No. 98-15, 1998 WL 35345198 (July 13, 1998) (judge providing information in criminal investigation supporting friend); New York Jud. Adv. Op. No. 98-118, 1998 WL 1674719 (Oct. 22, 1998) (judge providing affidavit as witness to motor vehicle accident); Wisconsin Jud. Eth. Op. No. 09-2, 2009 WL 8484513 (Jan. 30, 2009) (judge providing testimony as private citizen in case in neighboring county).

Among these jurisdictions, only the New York committee has issued opinions that address whether a judge may provide testimony at the request of a party based on the judge's performance of judicial duties, although the New York committee has not attached any

significance to the distinction between a judge's testimony in a private as opposed to an official capacity. *See* New York Jud. Adv. Op. No. 19-79, 2019 WL 5446807 (June 20, 2019); New York Jud. Adv. Op. No. 18-138 (2018); New York Jud. Adv. Op. No. 01-25 (2001). In New York Op. No. 19-79, the request was by a supervising judge who had been asked by the New York Commission on Judicial Conduct to provide the supervising judge's notes of the supervising judge's meetings and corrective actions relating to judges under investigation. The New York Committee opined that the supervising judge could comply with the request, but emphasized that the supervising judge also ethically may decline to comply voluntarily. In New York Op. No. 18-138, the committee concluded that a surrogate who wanted to provide testimony in support of an attorney facing possible discipline based on the attorney's actions before the surrogate could provide the testimony with or without a subpoena. In a footnote, the New York committee noted prior opinions stating a preference to require a subpoena before testifying. In New York Op. No. 01-25, the committee opined that a New York criminal court judge could agree to be interviewed by plaintiffs' counsel in a case challenging the state's funding of appointed counsel in criminal cases, provided that the judge did not express an opinion on the merits of the claims. Although the New York committee has recognized a preference at least in some circumstances that a judge provide information only under subpoena, this Committee concludes that the preference should be clearer and stronger than expressed by the New York committee.

This Committee concludes that in most circumstances when an attorney for a party seeks a judge's testimony related to the judge's performance of judicial duties, the better practice is for the judge not to volunteer testimony or non-public information until the party seeking it has served the judge with a subpoena. As discussed below, in situations in which the judge's testimony may be needed, but the issue is procedural or very straightforward, it is appropriate to cooperate without a subpoena being served first. In those limited circumstances, however, it is best for the judge to mitigate any ethical concerns by meeting, or being available to meet, with attorneys for all parties to the case or proceeding.

We turn now to the Requestor's first question: whether – with or without a subpoena as a predicate – it is appropriate for a judge to meet or confer with the attorney for the party who wishes to have the testimony of the judge. The first concern is whether such a meeting would involve impermissible *ex parte* communications. In the post-conviction context, both parties also were the parties to the criminal trial matter resulting in conviction. By its terms, Rule 102.9 applies only to *ex parte* communications "concerning a pending or impending matter." The conviction most likely marked the conclusion of the primary criminal proceedings, but difficulty arises in deciding whether the possibility of additional proceedings in the criminal case means that the matter is "pending or impending." Further criminal proceedings could arise, for example, from a pending direct appeal that could result in a new trial, a pending motion for modification of sentence under Rule 4-345(e)

(under which the court retains jurisdiction for five years), a sentence with a suspended portion that could produce an alleged violation of probation, or the defendant's right to seek commitment for drug treatment under Md. Code, Health-Gen. § 8-507.

The Committee concludes that the underlying criminal case would be considered "pending or impending" before the trial judge only if a direct appeal remains pending or if some matter is actively before the trial judge. In these circumstances, the judge must avoid any *ex parte* communication and therefore is not permitted to communicate with only one party. If any direct appeal has been decided and if only the potential for reactivation of the proceedings exists, then the matter is not "pending or impending" and the prohibition on *ex parte* communications would not apply. Any contacts would not be considered *ex parte* communications with respect to the pending post-conviction proceeding because the trial judge is not presiding in that separate pending proceeding.

Even if the prohibition on *ex parte* communications does not apply, a judge should exercise great caution before engaging in unilateral, informal contacts with one party alone. As noted above, the central concern is the possible perception that the judge favors one party over another. Thus, if the judge has first required that the party serve a subpoena, the judge may meet with the attorney for the party, but the judge should avoid meeting with one party to the exclusion of another party.

The Committee recognizes there may be circumstances in which the judge's testimony may be needed, but the issue is very simple and straightforward, such as an ambiguity in the trial record that can be easily and conclusively answered. In these limited circumstances, informal contact may be preferable to requiring a subpoena and may avoid the need for the judge to testify altogether. In such circumstances, it may be desirable for judges to make themselves available informally, but only if access is provided to all parties. Cooperation with all parties avoids any perception that the judge is acting in favor of one party over another.

To this point, we have discussed the issues almost entirely in the context of post-conviction proceedings. It is difficult to anticipate other situations in which the testifying judge's knowledge derives from presiding over a prior judicial proceeding, but similar considerations would apply in such situations. A different situation would be a criminal investigation, in which there is no prior proceeding over which the judge presided. If the judge's factual knowledge is essential or important to the investigation, the State is entitled to that information from the judge, and the State should seek that information by issuing a grand jury subpoena. It would then be permissible for the judge to meet with the prosecutor or investigators to provide factual information in lieu of actually appearing before the grand jury. The concerns about a perception of unfairness to an opposing party are diminished for several reasons. First, it is not even clear at that point that the subject of the investigation will become a defendant. Second, confidentiality of the investigation may

prevent any contact with the subject of the investigation. Third, the judge will be disqualified from having any judicial role in any resulting criminal case based on the judge being an actual or potential fact witness.

The Requestor's second question is whether a judge may share non-public information from the judge's chamber materials with the attorney for a party in these circumstances. The prohibition on use or disclosure of non-public information in Rule 18-103.5 applies only when such use or disclosure is made "for any purpose unrelated to the judge's judicial duties." If a judge makes such a disclosure in connection with compelled testimony in a proceeding and based on the judge's performance of judicial duties in an earlier proceeding, the disclosure is part of the judge's judicial duties and is not prohibited by Rule 18-103.5. The judge should be very careful, however, to confine disclosures only to information that is necessary to the issues in the proceeding and to avoid disclosing the judge's mental processes or other information that should not be disclosed. Here again, the better practice is to disclose such non-public information only in response to a subpoena so the disclosure is considered to have been compelled.

B. Recusal

The Requestor's third and fourth questions involve recusal, and they are limited to this post-conviction context. The standards for recusal are well established. Disqualification in appropriate circumstances serves the goal "of the judicial process not only being fair, but appearing to be fair." *Jefferson-El v. State*, 330 Md. 99, 107 (1993) (applying former canons of judicial conduct). At the same time, judges have a "duty to preside when qualified [that] is as strong as their duty to refrain from presiding when not qualified." *Id.* A judge considering recusal must engage in a two-step inquiry with both subjective and objective aspects. Opinion 2021-11 (June 7, 2021) at 2. Subjectively, the judge examines the judge's own ability to remain impartial despite the potentially disqualifying influence. *Id.* If the judge is not confident in the judge's own subjective impartiality, then recusal is required on that basis alone. *Id.* Even if the judge is confident in the judge's ability to remain impartial, the judge also must evaluate the situation objectively to ensure that participation will not "create in reasonable minds a perception of impropriety." Md. Rule 18-101.2(b). "[A] judge is required to recuse himself or herself from a proceeding when a reasonable person with knowledge and understanding of all the relevant facts would question the judge's impartiality." *Matter of Russell*, 464 Md. 390, 402 (2019) (citing *Jefferson-El* and considering recusal of member of Maryland Commission on Judicial Disabilities).

With respect to recusal, the Requestor first asks whether the post-conviction judge must recuse on the basis that a colleague will be a witness in the post-conviction proceedings. The Requestor does not posit any special facts beyond the collegial relationship between the post-conviction judge and the trial judge who will testify. Based on the context, we

assume further that the subject matter of the testimony is some procedural aspect of what occurred during the criminal trial or plea hearing. Assuming that the post-conviction judge answers the subjective inquiry affirmatively – that is, the post-conviction judge believes she or he can assess the trial judge's testimony and all other issues impartially – then there would not appear to be any objective reason to question the post-conviction judge's impartiality. This conclusion is the same whether the testifying trial judge is an active judge on the same bench as the post-conviction judge or a senior judge who regularly sits in that jurisdiction. An objective reason for disqualification likely would arise only if there were some special or unusual aspect to the relationship between the post-conviction judge and the trial judge.

The Requestor next asks whether the trial judge who testifies would be required to recuse in future proceedings that occur in the criminal case involving the same defendant. Again, the trial judge would first have to conduct the subjective inquiry and be confident that the fact of testifying does not affect the trial judge's ability to be impartial. We focus on the objective branch of the inquiry. *Jefferson-El* is instructive. The Court there noted that information derived by a judge entirely from prior judicial proceedings is not considered "personal" and that a trial judge is presumed to be able to remain impartial in handling successive proceedings involving the same defendant. 330 Md. at 107, 110. In that case, however, the trial judge had stated his opinion on the record to the jury that the jury's acquittal of the defendant on a rape charge was an "abomination" and "has no relationship to reality [or] justice." *Id.* at 102. The Court concluded that a member of the public informed of the facts reasonably could believe that the trial judge would not be impartial in a subsequent violation of probation proceeding involving the same defendant. *Id.* at 109.

In contrast, here, if there were no special facts or circumstances that might support an objective reason for partiality, the testifying trial judge would not have to recuse from later proceedings involving the same defendant. If, for example, the testimony by the trial judge related only to a clarification of the record from the criminal trial, there likely would be no reasonable basis for recusal. If the testimony involved questions about the trial judge's fair conduct of the trial or if examination of the trial judge was particularly challenging, then there would be reason to consider carefully whether the fact of testifying created a reasonable basis to question the trial judge's ability to be impartial.

Application: The Maryland 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 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 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.