# Maryland Judicial Ethics Committee

**Opinion Request Number:** 2013-22

**Date of Issue:** October 22, 2013

■ Published Opinion ☐ Unpublished Opinion ☐ Unpublished Letter of Advice

Obligations of a Judge Previously Appointed as Substitute Trustee For Purposes of Residential Foreclosure Proceedings

**Issue**: What are the obligations of a judge previously appointed as a substitute trustee for purposes of foreclosure if it is discovered more than one year after the judge's appointment to the Judiciary that such fiduciary responsibility was never terminated by such foreclosure?

**Answer**: The judge should resign as substitute trustee immediately upon learning that the judge's original appointment as a substitute trustee for purposes of foreclosure was never concluded through sale of the property at issue, regardless of when such appointment occurred.

**Facts**: Residential mortgage foreclosures are typically predicated on deeds of trust ("Deed(s) of Trust") in which the mortgagor authorizes the lender and named trustees to take certain actions related to the loan, including the authority to invoke the power of (foreclosure) sale in the event of a default under the loan and the authority to appoint substitute trustees. Prior to appointment to the District Court, a judge (the "Requestor") had been employed by a firm engaged in the practice of foreclosure and which had numerous financial institutions as clients (the "Firm"). One of the Requestor's duties was to be appointed as a substitute trustee in the event of a residential foreclosure arising from the original Deed of Trust.

In the event of such a foreclosure, a deed of appointment would be filed in the land records office in the applicable Maryland jurisdiction (the "Deed of Appointment"), and thereafter, the substitute trustees would docket a case in the applicable Circuit Court to commence foreclosure proceedings. In most instances, the case would result in a foreclosure sale (the "Sale") and a subsequent conveyance of the property by the substitute trustees through a trustees' deed. Once the property was conveyed pursuant to the deed, the substitute trustees would have no interest in the property.

While the Requestor would not have been appointed as a substitute trustee after 2006, the Requestor has learned that it is possible that some of such appointment(s) might still be effective (thus implicating Rule 3.8 of the Maryland Code of Judicial Conduct, Maryland Rule 16-813), if, for example, after the filing of a Deed of Appointment, a loan was reinstated and a Sale never completed. Under such a scenario, the appointment would remain recorded and the Firm would not have taken any action subsequent to the appointment (as none would be required). For example, recently a matter arose where a title insurance carrier could not locate the (original) trustees' deed for a property in foreclosure, and the Requestor was asked to execute a confirmatory (trustees') deed. The Requestor advised the carrier that he/she could not take such

action and executed a resignation as substitute trustee for such property for recordation in the land records in that county (as would be required under Rule 3.8(a)). While the Firm's partners have advised they do not presently know of any other circumstance/properties where the Requestor might be asked to take further action related to his/her prior appointment, there is no practical way to confirm the absence of such potential responsibility without doing a title search on every case in which the Requestor's name might appear in the jurisdiction's grantee indices, which, given the number of such cases, would be inordinately time consuming and expensive.

The Requestor therefore has inquired regarding the appropriate response were a similar situation to arise in the future and has proposed, as a solution, a course of action whereby he/she would promptly execute a resignation as trustee for the specific property upon learning of such an eventuality. The Requestor, however, is concerned that were such a matter to arise more than a year after his/her appointment to the Judiciary such an action would fall outside the limitation of Rule 3.8(d) of the Code of Judicial Conduct (the "Code"), which provides:

> (d) If a person who *is serving* in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonable practicable, but it no event later than one year after becoming a judge [emphasis added].

**Discussion**: Rule 3.8 of the of the Code states, in part, that:

> (a) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, *trustee*, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.
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> (b) A judge shall not serve in a fiduciary position if the judge as a fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or under its appellate jurisdiction.
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> (c) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.
>
> (d) If a person who *is serving* in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge. [Emphasis added.]

Based upon the foregoing, the Committee first notes that Rule 3.8 generally places limitations on a judge serving in a fiduciary position, and under no circumstances must a judge "become[] involved in adversary proceedings in the court on which the judge serves[.]"

Inasmuch as foreclosure proceedings are adversarial and would entail the judge's participation, as substitute trustee, in such proceedings before the very court which had, albeit long ago, appointed the judge as substitute trustee, the Committee agrees that it would be inappropriate to so serve in any cases which might be "revived" in a manner similar to that already encountered. Accordingly, the Committee agrees that the appropriate course is as the Requestor has proposed, namely to promptly resign as substitute trustee in any matter in which it comes to the Requestor's attention that the Requestor's responsibilities have not been concluded or extinguished.

As to whether doing so more than a year after the Requestor's appointment to the Judiciary would violate Rule 3.8(d), the Committee believes that a practical distinction must be made between fiduciary positions which are *actively held*, or in which the judge *is serving* at the time of the judge's appointment to the Judiciary (and of which the judge should then be expected to be fully aware) and those fiduciary positions which have, in effect, remained dormant through an extended period prior to the judge's appointment and which the judge, though nominally still designated as a substitute trustee, is not *actively holding*. The Committee believes that Rule 3.8(d) is meant to address the former and not the latter, and in support of this construction, the Committee notes that Rule 3.8(d) uses the present tense, "is serving," which reflects more than having merely been appointed years before in a foreclosure case that has since gone "dormant." Accordingly, the Committee believes that the course of action proposed by the Requestor (i.e., formal resignation when any such circumstances come to light) is entirely consistent with the spirit of the Rule.

**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.