

Maryland Judicial Ethics Committee

Opinion Request Number: 2021-16

Date of Issue: September 02, 2021

Published Opinion Unpublished Opinion Unpublished Letter of Advice

A District Court Commissioner May Serve as A Notary Public

Issue: May a District Court Commissioner serve as a notary public?

Answer: Yes.

Facts: The Requestor is a District Court Commissioner who seeks an opinion as to whether the Commissioner may also serve as a notary public.

Analysis: **Article 4**, §45 of the Constitution of Maryland provides that “Notaries Public may be appointed for each county, and the city of Baltimore, in the manner, for the purpose, and with the powers now fixed, or which may hereafter be prescribed by Law.” Md. Code Ann., State Gov’t Article, Title 18, Notarial Acts, governs notary publics and other individuals authorized to perform a notarial act.¹ Section 18-101 establishes how a notary public is appointed and commissioned.

§ 18-101. Appointment and commission.

(a) *Residents of State; delegation of authority.* - (1) Except as provided in paragraph (2) of this subsection, the Governor, on approval of the application by a Senator representing the senatorial district and subdistrict in which the applicant resides or on approval by any Senator if the senatorial office representing the senatorial district and subdistrict in which the applicant resides is vacant, may appoint and commission individuals as notaries public as provided in this title.

(2)(i) A Senator may delegate the Senator’s authority to approve applicants under this subsection to the Secretary of State.

(ii) If a Senator has delegated approval authority under subparagraph (i) of this paragraph, the Governor may appoint and commission an individual as a notary public as provided in this title on approval of the application by the Secretary of State.

(b) *Out-of-state individuals.* – (1) The Governor, on approval of the application by the Secretary of State and a member of the Senate of Maryland, shall appoint and commission out-of-state individuals as notaries public as provided in this title.

¹Prior to October 1, 2020, only an individual who was commissioned as a notary public was authorized to perform notarial acts. As of October 1, 2020, a notarial act may be performed by a judge, clerk, or deputy clerk of a court of the State or a magistrate appointed by a court of the State. A judge or magistrate may not charge a fee to perform a notarial act. Md. Code Ann., State Gov’t § 18-209(b)-(d).

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(2) An out-of-state notary shall be deemed to have irrevocably appointed the Secretary of State as the notary’s agent upon whom may be served any summons, subpoena, subpoena duces tecum, or other process.

A notary public may perform a “notarial act” under the laws of the State of Maryland, which includes:

- (i) taking an acknowledgment;
- (ii) administering an oath or affirmation;
- (iii) taking a verification on oath or affirmation;
- (iv) witnessing or attesting a signature;
- (v) certifying or attesting a copy; and
- (vi) noting a protest of a negotiable instrument.

§ 18-201(j)(2). The notary public may charge a fee as set forth in § 18-107.

District Court Commissioners are “appointed by and serve at the pleasure of the Administrative Judge of the district, subject to the approval of the Chief Judge of the District Court.” Md. Code Ann., Const. Art. IV, § 41G. As a judicial appointee, a Commissioner is subject to the Maryland Code of Conduct for Judicial Appointees (the “Code”), Title 18, Chapter 200 of the Maryland Rules. Rules 18-203.1 through 18-203.15 of the Code address extra-official activities by judicial appointees. The general rule is contained in Rule 18-203.1, which provides:

Extra-Official Activities in General.

Except as prohibited by law or this Code, a judicial appointee may engage in extra-official activities. When engaging in extra-official activities, a judicial appointee shall not:

- (a) participate in activities that will interfere with the proper performance of the judicial appointee’s official duties;
- (b) participate in activities that will lead to frequent disqualification of the judicial appointee;
- (c) participate in activities that would appear to a reasonable person to undermine the judicial appointee’s independence, integrity, or impartiality;
- (d) engage in conduct that would appear to a reasonable person to be coercive; or
- (e) make inappropriate use of court premises, staff, stationery, equipment, or other resources.

Rule 18-203.4 is also applicable to the issue presented:

Rule 18-203.4. Appointment to Governmental Positions.

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A judicial appointee shall not accept appointment to: (a) a Judicial Nominating Commission or (b) any other governmental committee, board, commission, or position, unless it is one that concerns the law, the legal system, or the administration of justice.

Comment [2] to Rule 18-203.4 provides:

A judicial appointee may not accept a governmental appointment that could interfere with the effectiveness and independence of the judiciary, assume or discharge an executive or legislative power, or hold another ‘office’ under the Constitution or laws of the United States or the State of Maryland. See Maryland Declaration of Rights, Articles 8, 33, and 35.

Articles 8 and 33 of the Maryland Declaration of Rights contain general prohibitions:

Article 8. Separation of powers.

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Article 33. Removal of judges; judges not to hold other office, receive fees or perquisites; exception.

[T]he independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People No Judge shall hold any other office, civil or military, or political trust, or employment of any kind, whatsoever, under the Constitution or Laws of this State, or of the United States

Article 35 specifically addresses the position of notary public. It provides in pertinent part:

Article 35. Holding more than one office prohibited; persons in public trust not to receive presents from other states, etc.; positions or memberships not offices for profit.

That no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State. The position of Notary Public shall not be considered an office of profit within the meaning of this Article.

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Article 35 must be read in conjunction with Article 33. Although Article 35 excludes a notary public from the definition of “office of profit” in the prohibition of holding more than one office of profit, Article 33 generally prohibits the holding of more than one office. But the term “office” has been defined as a position that assumes or discharges an executive or legislative power.

In Opinion Request Number: 2016-11 we considered whether a Commissioner could also serve as an election judge. We reviewed decisions of the Court of Appeals and Opinions of the Attorney General that had interpreted Articles 33 and 35. The decisions reviewed made clear that in order to constitute an office the position in issue must require the discretionary exercise of some portion of the sovereignty of the State. We concluded that Md. Code Ann., Elec. Law § 10-303 gives election judges the discretionary authority to exercise an executive function by ordering the arrest of persons who breach the peace at a polling place or violate the State’s election laws and advised that a Commissioner could not also serve as an election judge.

A review of the duties of a notary public as set forth in the law leads the Committee to conclude that serving as a notary public would not require the assumption or discharge of an executive or legislative function. Nor do we believe that serving as a notary public would interfere with the effectiveness and independence of the judiciary or raise issues of integrity and impartiality of the judicial appointee. Accordingly, a District Court Commissioner may serve as a notary public. And while a judge or magistrate is prohibited from charging a fee for notarial acts, we do not believe that this prohibition applies to Commissioners who are authorized to work for entities that judges and magistrates are not. *See* Rule 18-103.11 and Rule 18-203.11.² As with any extra-official activities, however, the Requestor must ensure that any notarial duties do not conflict with his/her duties as a Commissioner.

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.

² Rule 18-103.11 governs “Financial, Business, or Remunerative Activities” of judges, and Rule 18-203.11 governs the same activities for judicial appointees. District Court Commissioners are permitted to be employed part-time for business entities under Rule 18-203.11 – magistrates are not. Nor are judges permitted to be employed by business entities under Rule 18-103.11.

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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.