Maryland Judicial Ethics Committee

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Judges' Signing of Federal U Visa Certifications

Issues: 1. Does a judge have an obligation to respond to a request to complete a certification in connection with the federal U Visa program?

2. After receiving a request for a U Visa certification related to one proceeding, under what circumstances must a judge recuse himself or herself in a subsequent action that involves one or more of the same parties?

Answers: 1. No, a judge is not required to respond to a request for a U Visa certification. A judge may consider the request and may sign the certification in limited circumstances.

2. If the judge completes the requested U Visa certification, the judge likely is required to recuse himself or herself in a proceeding involving the same or similar issues and the same victim or the person accused by the victim.

Facts: The Requestors are members of the Domestic Law Committee of the Maryland Judicial Council. They seek guidance on whether and in what circumstances a Maryland trial judge may sign a certification as part of the federal U Visa process. The Requestors submitted a detailed and helpful explanation of the U Visa program and the issues involved.

The U Visa program, described in detail below, is administered by the United States Citizenship and Immigration Services (USCIS) within the federal Department of Homeland Security (DHS). It offers temporary lawful immigration status to noncitizen victims of certain crimes who cooperate in the prosecution of those crimes. The program is intended to protect persons whose lack of lawful immigration status may make them more vulnerable to victimization and to encourage unlawful immigrant victims to report criminal activity and to assist in the prosecution of that alleged criminal activity.

The federal authorities administering the U Visa program depend in part on other government officials, including state prosecutors and judges, certifying the cooperation of applicants for U Visas in the criminal justice system. This opinion is limited to whether a Maryland judge ethically may sign such a certification and, if so, what ethical limitations may apply to that activity.

Analysis:

A. Potential Code Provisions Implicated

The Maryland Code of Judicial Conduct (the "Code"), Title 18, Chapter 100 of the Maryland Rules, establishes the standards for the applicable conduct of judges.

Rule 18-101.2 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.
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> (b) **Avoiding Perception of Impropriety. ─** A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

Rule 18-101.3 provides that "[a] judge shall not lend the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

Rule 18-102.2(a) requires that "[a] judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly."

Rule 18-102.7 provides:

> A judge shall hear and decide matters assigned to the judge unless recusal is appropriate.

Rule 18-102.9 provides, omitting a series of exceptions included in subsection (a) and omitting subsection (d):

> (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 . . . .
>
> (b) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
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> (c) A judge shall not investigate adjudicative facts in a matter independently, and shall consider only the evidence in the record and any facts that may properly be judicially noticed.

Rule 18-102.10 provides in part:

> (b) With respect to a case, controversy, or issue that is likely to come before the court, a judge shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office.

Rule 18-102.11 provides in part:

> (a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances:
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> * * *
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> (4) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
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> (5) The judge:
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> * * *
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> (C) previously presided as a judge over the matter in another court . . . .

Rule 18-103.1, concerning "Extra-Official Activities in General," provides in part:

> Except as prohibited by law or this Code, a judge may engage in extrajudicial activities. When engaging in extrajudicial activities, a judge shall not:
>
> (a) participate in activities that will interfere with the proper performance of the judge's judicial duties;
>
> (b) participate in activities that will lead to frequent disqualification of the judge; [or]
>
> (c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality . . . .

Rule 18-103.3 provides:

> Except 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.

B. The Federal U Visa Program

The U Visa program was established by the Battered Immigrant Women Protection Act of 2000 within the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), codified in part at 8 U.S.C.

§ 1101(a)(15)(U)(i). The program is administered by USCIS within the federal DHS. It offers temporary lawful immigration status to noncitizen victims of certain crimes who have suffered substantial physical or mental abuse and who cooperate in the detection, investigation, prosecution, or sentencing of that criminal activity. Goals of the program include protecting persons whose lack of lawful immigration status may make them more vulnerable to victimization and encouraging unlawful immigrant victims to report criminal activity and to assist in holding offenders accountable for criminal activity.

A person may apply for U Visa status by filing a petition with the USCIS. The USCIS makes all determinations in connection with such a petition. To grant a petition, the USCIS must find that the person:

- was a victim of a qualifying criminal act;
- has specific, credible, and reliable information about the qualifying crime;
- was, is being, or is likely to be helpful to the certifying agency in the detection, investigation, prosecution, conviction, or sentencing of the qualifying crime;
- suffered substantial physical or mental abuse as a result of the qualifying crime; and
- is admissible to the United States.

This opinion deals entirely with the third of these requirements. A person petitioning the USCIS for U Visa status must submit a DHS Form I-918, Supplement B (U Nonimmigrant Status Certification) ("DHS Form I-918B"). The DHS Form I-918B must be completed by a qualifying agency or official. Under federal law, certifying agencies include "[a] Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity." 8 C.F.R. 214.14(a)(2). A certifying official includes "[a] Federal, State, or local judge." 8 C.F.R. 214.14(a)(3)(ii).

The agency or official signing the DHS Form I-918B subscribes in part as follows:

> Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in **Part 1.** is or was a victim of one or more of the crimes listed in **Part 3.** I certify that the above information is complete, true, and correct to the best of my knowledge . . . . I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

DHS Form I-918B (available at https://www.uscis.gov/sites/default/files/document/forms/i-918supb.pdf (last viewed August 18, 2023) (emphasis in original). Part 1 of the form includes basic identifying information for the victim. Part 3 includes check boxes for thirty-one different "Federal, state, or local criminal offenses (or any similar activity)," including abusive sexual contact, domestic violence, false imprisonment, felonious assault, kidnapping, prostitution, rape, sexual assault, sexual exploitation, stalking, trafficking, and unlawful criminal restraint. Part 3 also requests significant factual information concerning the qualifying criminal activity, including when and where it occurred; a brief description of "the criminal activity being investigated and/or prosecuted and the involvement of the petitioner"; and "a description of any known or documented injury to the victim."

Part 4 of DHS Form I-918B contains the "helpfulness" information. The person completing the form must answer three yes/no questions:

1. Does the victim possess information concerning the criminal activity listed in **Part 3**?

2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above?

3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above?

Id. (emphasis in original). Part 4 also requests an explanation of a "yes" answer to any of these questions and provides space for "any additional information you would like to provide." Although Part 4 is not mentioned specifically in the certification section, the information provided in Part 4 is covered by the general affirmation "that the above information is complete, true, and correct to the best of my knowledge . . . ."

C. Scope of the Request

The Requestors include in their Request three proposed limitations for this Committee's consideration. First, they suggest that a Maryland judge presented with a DHS Form I-918B should have the options (a) to refer the request to an appropriate non-judicial agency, such as a law enforcement agency or a State's attorney's office; (b) to complete the DHS Form I-918B and return it to the requestor; or (c) to deny the request. Second, they suggest that a judge should only consider completing the DHS Form I-918B with respect to past helpfulness in closed cases in which the time for appeal has expired. Third, the Requestors suggest that a judge completing a DHS Form I-918B should alter the Form to

confirm several limitations on the certification. These include (a) that the certification is based on a review of court records and not on a factual investigation; (b) that all information about the underlying criminal activity is described only by attachment of relevant court records; (c) that the certification is limited to past or current helpfulness and does not include any prediction of future helpfulness; and (d) that there is no promise to notify USCIS if the victim refuses to cooperate in the future. The Committee appreciates these suggested limitations and will consider them in its analysis.

To frame the issues, the Committee recognizes at least two situations in which a Maryland trial judge may be presented with a request to complete DHS Form I-918B:

1. The judge is presiding over or has presided over **criminal proceedings** in which the alleged victim requests that the judge complete DHS Form I-918B on her or his behalf as part of the alleged victim's U Visa application.

2. The judge is presiding over or has presided over **civil proceedings** in which one of the parties requests that the judge complete DHS Form I-918B on her or his behalf as part of the party's U Visa application. The civil proceeding may be a hearing on either a petition for a protective order pursuant to Md. Code, Fam. § 4-501 *et seq.* or a petition for a peace order pursuant to Md. Code, Cts. & Jud. Proc. § 3-1501 *et seq.* A request to complete DHS Form I-918B also might be made in connection with other types of civil proceedings, including divorce or custody proceedings. As discussed below, there also have been instances in federal courts when a plaintiff in a non-family civil action seeks certification.

D. General Considerations

At the outset, the Committee recognizes that completing a DHS Form I-918B is a judicial act because it is an action taken by a judge in the judge's official capacity and in connection with some proceeding within the court's jurisdiction. It is not, however, a required action in any type of Maryland proceeding. Put another way, a judge may dispose fully of a criminal or civil matter that comes before the court without acting on the DHS Form I-918B. Because of this, a Maryland judge has the option to decline to consider completing a DHS Form I-918B without making any determination that the requesting individual does or does not satisfy the "helpfulness" requirement of the U Visa program. The Committee

will consider the ethical implications if a judge chooses to consider the DHS Form I-918B, but a judge does not have a duty to consider it.

There may be concern that completing the certification in a DHS Form I-918B amounts to an impermissible character reference for the victim in violation of Maryland Rule 18-103.3. The Committee does not believe this rule is implicated. The quality certified is "helpfulness." In the context of completed Maryland proceedings, this is likely to turn primarily on the victim's willingness to appear for the proceedings and to testify if called as a witness for the State or as a party in a civil action. Although it is unlikely that a victim who is fundamentally incredible would also be regarded as "helpful," a judge does not need to make specific credibility determinations to conclude that the victim was "helpful." More broadly, the relatively narrow "helpfulness" conclusion does not amount to a general vouching for good character. Maryland Rule 18-103.3 therefore would not be violated by a judge making a certification based on completed proceedings that occurred before the judge.

Completing a requested DHS Form I-918B on the basis of completed proceedings also would not amount to the judge lending the prestige of office to a person in violation of Maryland Rule 18-101.3. The action advances the interests of the victim who requests the certification, but it is no different than a judge deciding an issue on the merits in favor of a litigant.

The Committee also concludes that completing a DHS Form I-918B in appropriate circumstances does not amount to making an inappropriate public statement about a proceeding in violation of Maryland Rule 18-102.11(a)(4). If the judge makes the certification on the basis of the record of proceedings over which the judge presided, then the certification could not be considered an independent statement that might signal the judge's pre-judgment of an issue.

For similar reasons, Rule 18-103.1 is not implicated. Completing a DHS Form I-918B is not required as part of a Maryland proceeding before a judge, but it is still an official judicial act. It therefore does not involve extra-judicial activity governed by Rule 18-103.1.

The Committee concludes that if a DHS Form I-918B certification otherwise is appropriate, the Court should ensure that it is not done *ex parte*. The request for the certification and the Court's action on it are not a necessary part of the proceeding before the judge, but they nevertheless are connected to and based on that adversarial proceeding. The judge should follow Maryland Rule 18-102.9 and should ensure that all parties to the proceeding are notified of the request and the judge's action on it. The judge should also allow a reasonable opportunity for any party to the proceeding to respond to the request.

E. Certifications in Connection with Criminal Proceedings

Maryland judges of course do not participate directly in conducting criminal investigations and prosecutions. They have defined roles during investigations, such as issuing search warrants when appropriate and supervising grand juries, and they preside over criminal proceedings and trials, but it is critical that judges remain independent of the prosecutorial role. *See, e.g., Sharp v. State*, 446 Md. 669, 700 (2016) ("To avoid a minefield of issues, we advise trial courts to comport with both *Barnes* [*v. State*, 70 Md. App. 694 (1987)] and current ABA Standard 14–3.3 and refrain from directly making plea offers to defendants in criminal cases."); *Barnes v. State*, 70 Md. App. 694, 707 (1987) ("The trial judge, in our view, improperly interjected himself into the plea bargaining process as an active negotiator, infringing upon the function reserved to counsel in the adversary process."). Maintaining the independent judicial role promotes compliance with the bedrock impartiality principles of Rules 18-101.2(a), 18-102.2(a), 18-102.10(b), and 18-102.11(a).

Federal law recognizes this limitation on a judge as a certifying official completing a DHS Form I-918B. The federal statutory definition requires that the applicant "has been helpful, is being helpful, or is likely to be helpful" to federal, state, or local authorities "investigating or prosecuting criminal activity" that falls within the statute. 8 U.S.C. § 1101(a)(15)(U)(i)(III). The implementing federal regulations expand the scope of "investigation or prosecution" somewhat: "***Investigation or prosecution*** refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, *conviction*, or *sentencing* of the perpetrator of the qualifying crime or criminal activity." 8 C.F.R. 214.14(a)(5) (second emphasis added). The agency explained this particular expansion of the terms "investigation or prosecution" as necessary to preserve the independent role of judges:

> USCIS is defining the term to include the conviction and sentencing of the perpetrator because these extend from the prosecution. [Attorney General Guidelines for Victim and Witness Assistance] at 26-27. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications. INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1). Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term "investigation or prosecution" should be interpreted broadly as in the AG Guidelines.

72 Fed. Reg. 53,020 (Sept. 17, 2007). By identifying conviction and sentencing as the procedural points at which a judge may certify a victim's helpfulness in a prosecution,

USCIS recognizes that a judge ordinarily should make a DHS Form I-918B certification only when the criminal proceedings have been completed. This is consistent with important ethical considerations.

To make the certification contained in DHS Form I-918B, a judge must make three basic determinations: (1) that there was qualifying criminal activity; (2) that the party requesting the certification was the victim of the criminal conduct; and (3) that the victim has been or will be helpful in the prosecution of the criminal conduct. If the criminal proceedings have been completed with a conviction on the relevant charges, the presiding judge can make those determinations based on the record and consistent with the outcome. If the criminal proceedings have not been completed, making those determinations on a partial or non-existent record risks impairing the judge's impartiality. The judge's conclusions that criminal conduct has been committed and that the requesting party is the victim may be viewed as pre-judging issues that have not yet been resolved with the presentation of all evidence in an adversarial process. The judge may be perceived as crossing over into the law enforcement or prosecutorial roles of investigation and prosecution. The additional conclusion that the victim has been or will be helpful in the prosecution may be perceived as an endorsement of the victim's credibility. The judge has an ethical obligation both to remain impartial and to avoid even the perception of partiality. That obligation is best discharged by waiting until the completion of criminal proceedings before deciding whether to make a DHS Form I-918B certification.

Completion of the criminal proceedings in this context means at the least that the jury has rendered its verdict convicting the defendant on relevant charges or that the court in a bench trial has found the defendant guilty. In most cases, it would be preferable to wait until after the conclusion of the proceedings with sentencing, especially, for example, if the defendant has filed a motion for new trial. In the Committee's opinion, it is not necessary for the judge to wait for the completion of any appeal, but a reversal on appeal may require further action by the judge. If a reversal vacates the conviction, thereby altering the basis for the judge's certification, the judge should notify USCIS of that fact and withdraw the certification if necessary. A reversal on appeal also may affect the judge's ability to preside over a retrial, as discussed more fully below.

There are situations in which the criminal proceedings are concluded without a verdict, either by a jury or by the court, and when it may still be appropriate for a judge to complete a DHS Form I-918B. For example, if a case results in a guilty plea after a preliminary hearing at which the victim testified, the conviction by guilty plea establishes the criminal conduct and the victim of it and the judge also may have a basis to assess the helpfulness of the victim. There may be other situations where a case is concluded without an adjudicated outcome, such as an agreement to place the matter on the stet docket. In that

case, the judge would have to assess the circumstances carefully to determine if signing the form would be permissible under the Code.

F. Certification in Connection with Civil Proceedings

If a Maryland judge is asked to complete a DHS Form I-918B in connection with a civil proceeding, the request implicates the same ethical considerations that are involved with criminal proceedings plus the additional issue whether the civil proceedings can be deemed to involve helpfulness in connection with "investigating or prosecuting criminal activity." 8 U.S.C. § 1101(a)(15)(U)(i)(III). It is beyond the scope of the Committee's function to opine on this issue of federal law, and the Committee has not attempted a comprehensive review of federal or state cases on the subject. The Committee will identify several representative decisions, however, to identify the issues.

United States District Judge Stephanie A. Gallagher reviewed federal caselaw on the issue in *Villalta Canales v. Caw*, 552 F. Supp. 3d 534 (D. Md. 2021). In the underlying civil suit, plaintiff sued Maryland Department of Natural Resources police officers and State entities, alleging they unlawfully detained him while he and a relative cut down a tree without a tree expert license and then continued to detain him to investigate civil immigration issues. *Id.* at 534-35. The parties settled the underlying civil claims, and plaintiff then filed a "Motion for U Visa Certification." *Id.* The court identified the issue as "whether Plaintiff's allegations in this civil suit, which have not and will not be assessed on their merits due to a recent settlement between the parties, can validly be construed as being 'helpful' to an 'investigation or prosecution' when there is no pending investigation or prosecution of the alleged qualifying crimes." *Id.* at 536. Plaintiff argued that the violations of the Fourth Amendment he alleged could constitute qualifying crimes and that he only had to make a *prima facie* showing of such criminal activity to establish that he had been helpful in "detecting" it. *Id.*

Reviewing cases, including *Mercado-Guillen v. McAleenan*, 2019 WL 1995331 (N.D. Cal. May 6, 2019), *Agaton v. Hosp. & Catering Servs., Inc.*, 2013 WL 1282454 (W.D. La. Mar. 28, 2013), *Herrera Lopez v. Walker*, 2019 WL 937311 (E.D. Tenn. Feb. 26, 2019), and *Baiju v. U.S. Dep't of Labor*, 2014 WL 349295 (E.D.N.Y. Jan. 31, 2014), the court observed that several federal district courts had concluded that "U visa certification is not appropriate where the court's only role has been to oversee a civil proceeding brought by an applicant and there is no pending investigation or prosecution of the alleged qualifying criminal activity at issue in the civil case." *Id.* at 537. The court found unpersuasive *Villegas v. Metro. Gov't of Nashville*, 907 F. Supp. 2d 907 (M.D. Tenn. 2012), and *Garcia v. Audubon Communities Mgmt., LLC*, 2008 WL 1774584 (E.D. La. Apr. 15, 2008). In *Villegas*, plaintiff alleged that local or state detention officials violated her constitutional rights when they shackled her during the final stages of labor, delivery, and post-partum recovery. 907 F. Supp. 2d at 908. After the court granted partial summary judgment on

liability to plaintiff but before full adjudication of the claims,[1] the federal court granted plaintiff's motion for U Visa certification. The court held that the conduct that it had held was a violation of constitutional rights could constitute criminal conduct. *Id.* at 910-11. By proving these violations civilly, plaintiff "made a *prima facie* showing that she was a victim of the qualifying potential criminal activity." *Id.* at 912. By "contact[ing] various federal and state law enforcement authorities regarding the alleged criminal activity and suppl[ying] them with the Court's findings," plaintiff demonstrated her past or possible future helpfulness in the investigation and prosecution of the potential criminal activity. *Id.* at 912-13.

The Committee also notes two opinions by the same New York State Family Court judge in *In re Clara F.*, 52 Misc. 3d 640, 32 N.Y.S.3d 871 (Fam. Ct. Queens Co. 2016), and *In re Patricia C.*, 54 Misc. 3d 1202(A), 50 N.Y.S.3d 27 (Fam. Ct. Queens Co. 2016). In both actions, the petitioner filed a "family offense petition" that included allegations that could constitute criminal offenses. After civil proceedings in the Family Court, final protective orders were issued. In *Patricia C.* but not in *Clara F.*, the petitioner stated that she had also filed a criminal complaint. Both petitioners submitted *ex parte* requests for the court to sign DHS Forms I-918B. An unusual feature of these actions was that the judge who presided over the protective order hearings had retired, so the judge denying the certifications had not presided over the contested proceedings. In the earlier decision, *Clara F.*, the court expressed skepticism that a judge presiding over a civil proceeding with no connection to any criminal prosecution could properly sign a DHS Form I-918B certification, but the court relied on the narrower rationale that it could not certify the facts required because "this Court had absolutely no role in the adjudication of the underlying family offense proceeding." 52 Misc. 3d at 646, 32 N.Y.S.3d at 876. The court stated that Clara F. might be able to obtain the desired certification from a Family Court judge in Westchester County who presided over separate protective order proceedings and who was still an active judge. *Id.* at 646-47, 32 N.Y.S.3d at 876. In contrast, in the subsequent decision in *Patricia C.*, the same court relied more fundamentally on the "inability" of a judge who presided over a civil proceeding to certify "that it presided over an action which resulted in the conviction or sentencing of a perpetrator for the commission of qualifying criminal activity." 54 Misc. 3d 1202(A) at *4-5, 50 N.Y.S.3d 27 at *4-5. Noting that Patricia C. said she had made a complaint to the police, the court stated that the alleged victim could request the certification from the New York Police Department or "where

[1] The court subsequently conducted a trial on damages and entered final judgment. Defendants appealed, and the United States Court of Appeals for the Sixth Circuit reversed the district court's underlying grant of summary judgment and the award of damages based on it. *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563 (6th Cir. 2013).

there was a criminal prosecution of the perpetrator, the applicant can request certification from the NYPD, the District Attorney's office in the county in which the prosecution occurred, or the judge who presided over the criminal action." *Id.* at *5.

These decisions demonstrate disagreement among courts over whether civil proceedings alone may ever support a judge certifying a party's helpfulness in connection with the investigation or prosecution of criminal conduct. The Committee does not express an opinion on that dispute concerning federal law. The dispute, however, highlights ethical concerns that arise in this situation. If the theory on which a judge *could* sign a certification based on a civil proceeding only is that the judge may conclude from its own civil findings that there is a *prima facie* case for criminal conduct, then the certification is necessarily forward-looking to a potential criminal prosecution. Although based on findings made in a completed civil matter, the judge still would be certifying helpfulness in a way that could impair the judge's impartiality in the criminal prosecution if one occurs. At the least, this appearance of partiality would likely require the judge to recuse himself or herself if the criminal prosecution came before that judge. In a jurisdiction with multiple judges, this may not create a significant administrative problem, but in a jurisdiction with only one or a few judges, this could create an administrative burden.

The Committee concludes that a judge risks violating the Code by completing a DHS Form I-918B certification based only on civil proceedings even if those civil proceedings have been completed. The certification necessarily relates to potential criminal charges and therefore, in many situations, would create a risk of a perception of partiality in those subsequent criminal proceedings. Although that risk could be avoided by recusal, it is preferable that the risk be avoided altogether.

G. Limitations on Certifications

As noted above, the Requestors provided specific ways in which they suggested a DHS Form I-918B should be modified by a Maryland judge before signing it. The Committee agrees with the proposed modifications and will state them as ways a certifying judge should limit her or his certification.

First, it is preferable for a certifying judge to state that the certification is based on information derived from court records and from the judge's observations during proceedings before the judge and not on any independent investigation. The certification should be supported with relevant court records where possible.

Second, the judge should explicitly limit the certification to past helpfulness and should explicitly avoid any prediction of helpfulness by the victim in the future.

Third, consistent with the second limitation, a certifying judge should strike from the certification the final sentence: "I further certify that if the victim unreasonably refuses to

assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS." This sentence should be unnecessary in light of limiting the certification to past helpfulness, and a judge should avoid any promise of future action concerning the victim's cooperation.

H. Advisory Opinions from Other States

The judicial ethics advisory authorities in two states have issued opinions on the issues involved in this opinion. The North Carolina Judicial Standards Commission issued Formal Advisory Opinion 2014-03 on August 8, 2014 (available at https://www.nccourts.gov/assets/inline-files/14-03.pdf?VersionId=drrV9Xkz5anYT9LVKt1SamUPx9vqpC4s?drrV9Xkz5anYT9LVKt1SamUPx9vqpC4s) (last viewed August 18, 2023), and the Minnesota Board on Judicial Standards issued its Opinion 2015-2 on June 26, 2015 (available at http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-2.pdf) (last viewed August 18, 2023). Those opinions diverge on some points and merit discussion here.

The North Carolina Commission opined that North Carolina judges should not sign DHS Forms I-918B and that they should not participate in a federal registry of "certifying officials." The Commission also opined that if a judge has signed a DHS Form I-918B, the judge should disqualify himself or herself from any criminal matter involving that victim. The registry issue considered by the North Carolina Commission is not applicable here, and the Committee is not aware today of any federal listing of judges who are designated as eligible or available to sign DHS Forms I-918B. The Committee also notes that some of the judicial ethics provisions then in effect in North Carolina differ from current provisions in effect in Maryland.

The North Carolina Commission was particularly concerned with the possibility of a judge certifying a victim's potential helpfulness in a future criminal matter:

> [C]ertification by a judge as to the potential "helpfulness" of a witness to the prosecution of a criminal matter would seem to violate the North Carolina Code of Judicial Conduct's prohibition on a judge providing voluntary character testimony, under Canon 2B. A judge should not make personal recommendations to a federal agency predicting how useful a victim or witness might or might not be to a future prosecution. Such assessments are, in essence, the endorsement of the victim's honesty, reliability, potential for cooperation and other character traits.

Formal Advisory Opinion 2014-03 at 2. The Commission was also concerned that "the form clearly solicits information more appropriately provided by law enforcement or

prosecutors." *Id.* Here again, the Commission focused on the problem of prospective determinations by a judge: "A judge's determination as to the credibility of victims should be formed through the hearing and trial process, and not be determined prior to adjudication. Such active involvement in securing witnesses for the prosecution and predetermining their helpfulness puts the judge in an inappropriate role that could reasonably suggest bias, or the appearance of bias, on the part of the judge in potential violation of Canon 2A and Canon 3 which require a judge to act to promote public confidence in the impartiality of his or her office." *Id.* at 2-3. The Commission also opined that "forecast[ing] the helpfulness of a potential witness" could be viewed as improperly making a public comment about the merits of a pending proceeding. *Id.* at 2.

The Minnesota Board discussed the North Carolina advisory opinion within its discussion and reached conclusions that differ in part. Its different conclusions, however, were based in large part on limiting certifications to completed cases. The Minnesota Board opined:

> [T]he [Minnesota] Code [of Judicial Conduct] does not generally prohibit a judge from signing an I-918B certification. However, a judge may not sign a certification when a judge does not have an adequate basis for the averments made in the certification. A judge should disclose the certification to the parties to the case.
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> The appropriateness of an I-918B certification depends on the circumstances.

Opinion 2015-2 at 1. The Minnesota Board considered four possible procedural situations based largely on the federal regulations that "indicate that the appropriate time for judges to determine helpfulness is following conviction, not during the investigation or prosecution of a criminal matter." *Id.* First, the Board concluded that signing a DHS Form I-918B after a defendant is convicted and sentenced "or the case is otherwise completed" is appropriate. *Id.* Second, the Board noted that the federal regulations do not contemplate a judge presiding over a pending criminal case signing a certificate before completion of the case, but "whether a judge should sign an I-918B form prior to conviction is primarily an issue of law that does not implicate the Code." *Id.* Third, the Minnesota Board noted the disagreement in federal cases over whether a judge should ever sign a DHS Form I-918B certification based on a civil proceeding:

> In such matters, a judge may lack a sufficient basis for such a certification. However, given the unsettled state of the law, whether a judge in a civil case should sign an I-918B form is primarily an issue of law that does not implicate the Code.

Id. Fourth, the Board recommended against a Minnesota judge signing a DHS Form I-918B if the judge did not preside over the case involving the victim. *Id.*

The Committee finds the Minnesota Board's discussion and conclusions to be persuasive. Although the North Carolina Commission reached an ultimately contrary conclusion, the Committee agrees with some of that Commission's reasoning. The North Carolina Commission emphasized the problems that would be encountered if a judge certified a victim's helpfulness prospectively, before any adjudications were completed in a criminal case. As discussed above, the Committee agrees that a judge should not sign a DHS Form I-918B based on anticipated cooperation in a criminal proceeding because doing so could impair or appear to impair the judge's impartiality in the criminal proceeding and because doing so could appear to involve the judge in prosecutorial functions. On two specific points, the Committee disagrees with the North Carolina Commission. When a certification is appropriately based on the victim's helpfulness in a completed prosecution that results in a conviction, that certification does not amount to an improper character reference for the victim. In that situation, an adjudication has occurred that at least implicitly involves a credibility determination in favor of the victim, and the judge's certification of helpfulness does not necessarily carry any more meaning than that the victim appeared and cooperated in the criminal trial or other proceeding. The Committee also disagrees that making a certification could be characterized as an improper public statement about a separate proceeding.

I. Summary of Conclusions

In summary, the Committee concludes:

1. A Maryland judge is not prohibited in all circumstances from completing a DHS Form I-918B, nor is a judge required to entertain a request from an alleged victim to complete DHS Form I-918B. In many instances, it may be preferable for a judge to refer the request to the prosecuting authority or to another law enforcement agency.

2. If a Maryland judge entertains a request to complete a DHS Form I-918B, the judge should avoid *ex parte* communications and should ensure that all parties in the underlying proceeding are aware of the request.

3. If a Maryland judge chooses to complete a DHS Form I-918B, the judge should do so only when the necessary conclusions can be made based on completed proceedings. If the victim is likely to appear before the court either in further proceedings in the same matter or in other related proceedings, completing the DHS Form I-918B is not advisable because the judge's impartiality may be questioned in further proceedings involving the victim

4. The Committee does not decide whether it is ever permissible under federal law for a judge to complete a DHS Form I-918B certification based only on civil proceedings, but the potential for additional proceedings, particularly criminal proceedings, is increased in those circumstances, thereby increasing the risk of proceedings in which the judge's impartiality might be questioned.

5. If a Maryland judge completes a DHS Form I-918B, the judge should limit responses to matters supported by the court record and should avoid certifying or promising future action by the judge.

6. If a Maryland judge completes a DHS Form I-918B, the judge should then recuse himself or herself in any subsequent proceeding involving the same or similar issues and the same victim or the person accused by the victim.

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.