

# JUDICIAL INQUIRY COMMISSION

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ADVISORY OPINION 02-799

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## PROVIDING LEGAL ADVICE

### ISSUES

May a judge who serves as a member of the volunteer state militia as a Judge Advocate give a legal opinion in that capacity to another member regarding business of the State Defense Force? **Answer:** No.

### FACTS

A circuit judge serves as a member of the volunteer state militia, the Alabama State Defense Force, as a Judge Advocate. He has been asked to give a legal opinion in that capacity to another member regarding business of the State Defense Force.

### DISCUSSION

Canon 5F of the Alabama Canons of Judicial Ethics states that “[a] judge should not practice law.” The canons do not contain a definition of “practice law.” The statutory definition for purposes of regulating the practice of law appears to require acting in a representative capacity, as a vocation, or for some consideration. ALA. CODE 1975 §34-3-6 (b). However, ALA. CODE 1975 §34-3-14 provides that “[a]ny judge of a court of record in this state who . . . renders any professional services or *gives any legal advice*, must on conviction be fined . . . not less than \$100.00 nor more than \$1,000.00.” In addition, “[t]he practice of law by full-time judges has long been prohibited in every American jurisdiction, whether or not it is conducted for compensation.” J. Shaman, S. Lubet, J. Alfini, *Judicial Conduct and Ethics*, §7.20, at

page 238 (3rd ed. 2000). Professors Shaman, Lubet and Alfini conclude that any ambiguity concerning whether a particular activity constitutes the “practice of law” should be resolved against the permissibility of the activity. *Id.*, at §7.21, page 241. The Commission has previously decided under Canon 5F that a judge serving in an advisory capacity with a state/federal public works project was prohibited from giving legal advice or in any way acting as a lawyer in that position. Advisory Opinion 89-358.

The Commission also observes that Canon 5B provides, in pertinent part, that a judge may serve as an officer, director, trustee or *nonlegal advisor* of an educational, religious, charitable, fraternal or civic organization. Under this provision, the Commission has previously advised that a judge may not draft bylaws and articles of incorporation for a charitable organization (Advisory Opinion 77-28), nor provide legal advice to a hospital for which he serves as a trustee. Advisory Opinion 83-185.

It is the opinion of the Commission that a circuit judge who serves as a member of the volunteer state militia is prohibited by Canon 5F from giving a legal opinion to another member regarding business of the State Defense Force.

The Alabama constitution contains an additional relevant provision: “No judge of any court of this state shall, during his continuance in office, engage in the practice of law . . .” ALA. CONST. 1901, amend. 328, §6.08(a). The Commission is not authorized to give advisory opinions concerning the

application of constitutional or statutory law; its opinion authority extends only to application of the Alabama Canons of Judicial Ethics. Therefore, it cannot provide an opinion as to whether the proposed conduct would be in violation of Amendment 328, §6.08(a). However, a violation of the state constitution would also constitute a violation of Canon 2A, which requires a judge to respect and comply with the law.

### REFERENCES

Advisory Opinions 77-28, 83-185 and 89-358.

Alabama Canons of Judicial Ethics, Canons 2A, 5B and 5F.

ALA. CODE 1975 §34-3-6 (b) and §34-3-14.

ALA. CONST. 1901, amend. 328, §6.08(a).

J. Shaman, S. Lubet, J. Alfini, *Judicial Conduct and Ethics*, §§7.20 and 7.21 (3rd ed. 2000).

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This opinion is advisory only and is based on the specific facts and questions submitted by the judge who requested the opinion pursuant to Rule 17 of the Rules of Procedure of the Judicial Inquiry Commission. For further information, you may contact the Judicial Inquiry Commission, P. O. Box 303400, Montgomery, Alabama 36130-3400; tel.: (334) 242-4089; fax: (334) 353-4043; E-mail: [jic@alalinc.net](mailto:jic@alalinc.net).