

## JUDICIAL INQUIRY COMMISSION

DATE ISSUED: AUGUST 1, 2003

ADVISORY OPINION 03-820

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### SERVICE ON ACTIVE DUTY AS A JUDGE ADVOCATE GENERAL

#### ISSUES

Does service on active duty as a judge advocate general in the United States Army constitute a violation of the Alabama Canons of Judicial Ethics? **Answer:** No.

#### FACTS

A district judge serves as a judge advocate general in the National Guard and Reserve. He was deployed out of state last year for homeland defense to perform duties that included providing legal advice concerning the mobilization of soldiers, and he later was sent overseas where his duties included reviewing targets for legality per the Geneva Convention, overseeing investigations of alleged war crimes, giving advice concerning rules of engagement and other operational law issues during fly-zone operations, and writing a legal annex for a consequence management handbook.

#### DISCUSSION

In Advisory Opinion 02-799, the Commission addressed an inquiry concerning the propriety of a judge who was a member of the volunteer state militia providing legal advice to another member regarding the business of the militia. The Commission concluded that this conduct was prohibited by Canon 5F, which states that “[a] judge should not practice law.”

As the Commission noted in Advisory Opinion 02-799, the term “practice law” is not defined in the canons. One of the authorities the Commission considered in reaching the

conclusion that the activity then at issue would constitute “practicing law” was §34-3-11 of the Alabama Code, which makes it a misdemeanor for any judge of a court of record in this state to “give any legal advice.” The Commission had previously decided 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 observed that Canon 5B does not permit a judge to serve as a legal advisor to a civic or charitable organization.

Canon 1 provides as follows:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. *The provisions of this Code should be construed and applied to further that objective.*

(Emphasis added).

There is a significant distinction between an active judge providing legal advice to a state militia unit either after hours or on weekends and a judge performing legal duties to which he is assigned when called to active duty in the service of United States armed forces. It does not appear to the Commission that there is any significant risk that acting as a judge advocate general on active duty with federal armed services would erode public confidence

in the judiciary. There also does not appear to be any realistic prospect that the advice or advocacy efforts the latter would entail would create a potential appearance of either undue advantage to the judge/ advocate or of reciprocal favoritism. Such work is unlikely to become the subject of any litigation, nor would an appearance be created that a judicial position was being exploited.

In light of Canon 1 and the foregoing observations, it is the opinion of the Commission that service on active duty as a judge advocate general in the United States military does not constitute a violation of Canon 5F.

While the Commission may not give opinions interpreting laws other than the canons, we also note that the Supremacy Clause of the United States Constitution may possibly control to override provisions of Alabama law on the issue in question. Judges are generally permitted to serve in federal military forces. Section 6.08(b) of Amendment 328 to the Alabama Constitution and §31-2-36 of the Alabama Code exempt service in the military from the prohibition against a judge holding another position of public trust. The Illinois Judicial Ethics Committee has concluded that, once called to active duty, no state rules can restrict the military's right to assign a reservist to whatever activity is needed. Illinois Judicial Ethics Committee, Opinion No. 97-8.

#### REFERENCES

Advisory Opinions 02-799.

Alabama Canons of Judicial Ethics, Canons 1 and 5F.

Ala. Const., amend. 328, §6.08(b).

Ala. Code 1975, §31-2-36.

Illinois Judicial Ethics Committee, Opinion No. 97-8.

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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).