



## Connecticut Committee on Judicial Ethics

### Informal Opinion Summaries

**2023-03 (May 25, 2023)**

**Extrajudicial Activities; Practice of Law; Rule 3.10; Practice Book §§ 2-44A & 2-66;  
Conn. Gen. Stat. § 51-47; 10 U.S. Code § 7037**

**Issue:** May a state Superior Court Judge, who is also a member of the U.S. Army Reserve Judge Advocate General's Corps ("JAG"), Military Occupation Specialty (MOS) code of 27A, engage in the practice of law pursuant to 10 U.S. Code § 7037 while on military orders outside the state of Connecticut?

**Background and Facts:** Judge advocates are commissioned officers in one of the U.S. Armed Forces that serve as legal advisors to the command in which they are assigned. Their functions include providing legal advice and assistance in a wide variety of practice areas, as well as serving as prosecutors and defense counsel in courts-martial. JAG officers must be graduates of ABA-accredited law schools and admitted to practice law in any state, commonwealth, or territory. See <https://www.goarmy.com/careers-and-jobs/specialty-careers/law.html> Army JAG officers represent and advise soldiers and commanders in the areas of criminal law, legal assistance, administrative law and operational law. These officers also represent and advise on behalf of the army in the areas of civil litigation, international law, labor law, contract and fiscal law, environmental law and national security law.

The inquiring Judicial Official ("JO") provided the following facts:

- 1) As a JAG/27A, the JO is currently assigned as an International Law Officer (ILO) in the 352 Civil Affairs Command (CACOM) with assigned duties and responsibilities as follows:

"Provide assessments of the governance and the rule of law at the national and subnational level of foreign nation's judicial systems, including the impact of local custom and indigenous methods and the incorporation of internationally accepted legal standards and practices in support of CACOM, subordinate unit and Joint Task Force (JTF) operations. Provide support for training of CACOM personnel in the law of armed conflict (LOAC) and applicable operational law including foreign host nation

legal systems and Status of Forces Agreements (SOFAs). Provide advice to CACOM commanders on international law, operational law, rule of law and governance.”

- 2) The JO will not be serving as an advocate on matters that concern the civilian justice system, such as rendering legal advice and opinions on environmental law, fiscal law, tort claims, administrative law matters, or discipline.
- 3) In the JO’s current assignment, the JO will not be engaged in any of the following activities: assisting military personnel in drafting personal legal documents such as wills or powers of attorney or advising in civil law areas such as consumer affairs and domestic relations.
- 4) The JO does not provide legal advice to individual service members.
- 5) As a member of the JAG Corps, the JO’s service includes, but is not limited to, the following types of activities: teaching or training in the law of armed conflict, operations law and international law and rendering legal advice in a military capacity on a purely military issue without a civil law counterpart.
- 6) In the JO’s current assignment as a JAG, the JO does not appear in any state, county, or federal courts. The limited days of legal work that the JO performs relates to internal Civil Affairs Command planning, operations, and soldier conduct matters.
- 7) If the JO remains a JAG, the frequency of legal work is approximately 24 to 30 days per year during the monthly unit training assemblies and, generally, no legal work during annual ten-day summer training which is focused on non-legal military training and soldier skills development. Note that even while at monthly training assemblies, the JO may not be engaged in legal work due to participating in other non-legal training and briefings. The JO will be paid when on military duty based on the JO’s rank. If the JO is not eligible for paid military time off from work, the JO will apply vacation or personal leave when military duty falls on a weekday.

**Relevant Code of Judicial Conduct, Practice Book, Statutory and U.S. Code Provisions:**

Rule 3.10 (Practice of Law), Practice Book § 2-44A (Definition of the Practice of Law) and § 2-66 (Practice by Court Officials), Conn. Gen. Stat. § 51-47 (Salaries of judges. Practice of law prohibited. Membership on board of directors of bank prohibited. Longevity payments.), and 10 U.S.C. §7037 (Judge Advocate General, Deputy Judge Advocate General, and general officers of Judge Advocate General’s Corps: appointment; duties)

Rule 3.10 of the Code of Judicial Conduct states: “Except as provided herein, a *judge shall not practice law*. A judge may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family but is prohibited from serving as the family member's lawyer in any forum.” (Emphasis added.)

Subsection (a) of Practice Book § 2-66 provides that “[n]o lawyer who is a judge of the Supreme Court, Appellate Court or Superior Court shall *practice law in any state or federal court*.” (Emphasis added.)

Practice Book § 2-44A provides the following general definition of the practice of law: “[t]he practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.” Subsection (b) sets forth twelve exceptions, including “[p]erforming activities which are preempted by federal law.”

Connecticut General Statutes § 51-47 (c) provides that a judge, “shall be an elector and a resident of this state, shall be a member of the bar of the state of Connecticut and *shall not engage in private practice . . .*” (Emphasis added.)

10 U.S.C. § 7037 sets forth the appointment and duties of JAG officers:

(a) The President, by and with the advice and consent of the Senate, shall appoint the Judge Advocate General, the Deputy Judge Advocate General, and general officers of the Judge Advocate General's Corps, from officers of the Judge Advocate General's Corps, who are recommended by the Secretary of the Army. The term of office of the Judge Advocate General and the Deputy Judge Advocate General is four years.

(b) The Judge Advocate General shall be appointed from those officers who at the time of appointment are members of the bar of a Federal court or the highest court of a State, and who have had at least eight years of experience in legal duties as commissioned officers.

(c) The Judge Advocate General, in addition to other duties prescribed by law-

- (1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army;
- (2) shall direct the members of the Judge Advocate General's Corps in the performance of their duties; and
- (3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions.

(d) Under regulations prescribed by the Secretary of Defense, the Secretary of the Army, in selecting an officer for recommendation to the President under subsection (a) for

appointment as the Judge Advocate General or Deputy Judge Advocate General, shall ensure that the officer selected is recommended by a board of officers that, insofar as practicable, is subject to the procedures applicable to selection boards convened under chapter 36 of this title.

(e) No officer or employee of the Department of Defense may interfere with-

- (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or
- (2) the ability of judge advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders.

**Discussion:** The issue of whether a Superior Court judge may continue to serve as a member of the U.S. Army U.S. Army Reserve Judge Advocate General's Corps is case of first impression for this Committee. The Committee begins its discussion by reviewing the law in Connecticut prohibiting judges from engaging in the practice of law. Rule 3.10 of the Code of Judicial Conduct prohibits judges from engaging in the practice of law except that a judge may act as a self-represented party and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family. Similarly, Connecticut General Statutes § 51-47 (c) provides that a judge, "shall be an elector and a resident of this state, shall be a member of the bar of the state of Connecticut and shall not engage in *private practice* . . . ." (Emphasis added.) Finally, Practice Book § 2-66 prohibits Supreme, Appellate, and Superior Court judges from practicing law in any state or federal court. However, none of the above-cited provisions provide a definition for "private practice" or "practice of law"; this definition is found in the Connecticut Practice Book and through case law.

Practice Book § 2-44A defines the "practice of law." The general definition contained in subsection (a) states: "the practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person." Section 2-44A also contains various examples of what constitutes the practice of law including, among other things: giving advice or counsel to persons concerning their legal rights or responsibilities with regard to any matter involving duties, obligations or liabilities; drafting legal documents or agreements; and giving advice or counsel to any person or representing the interests of such person in a transaction where an interest in property is transferred. Section 2-44A also contains examples of activities that **do not** constitute the practice of law including, among other things: selling legal document forms approved by a Connecticut lawyer; acting as a lay representative authorized by an administrative agency; serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator; acting as a legislative lobbyist; and *performing activities that are preempted by federal law*.

As for case law, our state Supreme Court has “held that, in determining whether certain conduct constitutes the practice of law, the decisive question is whether the conduct is ‘commonly understood to be the practice of law.’” *Bysiewicz v. Dinardo*, 298 Conn. 748, 774, 6 A.3d 726 (2010). Further, “[a]ttempts to define the practice of law have not been particularly successful. The reason for this is the broad field covered. The more practical approach is to consider each state of facts and determine whether it falls within the fair intendment of the term. (Citations omitted; internal quotation marks omitted). *Office of Chief Disciplinary Counsel v. Czkeirda*, Superior Court, judicial district of Litchfield, Docket No. CV-20-6024832-S (December 23, 2020, *Moore, J.*).

Research indicates that at least twenty-six states and the District of Columbia have addressed the issue, albeit in varying ways.

Fifteen states have either amended their versions of ABA Rule 3.10 or added a comment to that rule stating that the rule does not extend to judges while on military duty. The seven jurisdictions that have amended their rules include: Delaware, Hawaii, Indiana, Kansas, Oregon, Pennsylvania, and Washington. The eight jurisdictions that have added a comment to their rules include: Arizona, Georgia, Iowa, Massachusetts, Missouri, Nebraska, Oklahoma, and Tennessee. In contrast, North Dakota added a comment to its version of ABA Rule 3.10 stating that the practice of law by a JAG officer is prohibited, unless the duties are “judicial in nature.” In D.C., the rules permit judges to perform “judicial functions pursuant to military service” as an arbitrator or mediator, but it has not yet addressed whether its version of ABA 3.10 applies to judges in military service. And finally, Rhode Island amended its rule to say that “[u]pon written request to the Supreme Court, a judge may engage in the limited practice of law pursuant to his or her military service.”

Additionally, the judicial ethics advisory committees of several states have considered the issue. See below ethics advisory opinions from in Alabama, Alaska, Illinois, Kentucky, Maryland, Nevada, Virginia, Washington, and West Virginia. It is interesting to note that the New York Advisory Committee on Judicial Ethics declined to opine as to whether a judge could serve as a JAG officer in the Army Reserve, U.S. Air Force Reserve, or New York Guard because the Committee viewed the inquiries as raising issues outside the Committee’s purview. See New York Advisory Committee on Judicial Ethics Opinions [15-200](#), [19-06](#), and [Joint Opinion 02-03 and 02-17](#).

## **Alabama**

[Alabama Judicial Inquiry Commission Advisory Opinion 02-799](#) – The Alabama Judicial Inquiry Commission determined that a judge who serves as a member of the volunteer state militia as a Judge Advocate may not give a legal opinion in that capacity to another member regarding business of the State Defense Force.

[Alabama Judicial Inquiry Commission Advisory Opinion 03-820](#) – The Alabama Judicial Inquiry Commission concluded that a judge on active-duty service as a Judge Advocate General in the United States Army does not constitute a violation of the Alabama Canons of Judicial Ethics. The Alabama commission distinguished this case from its prior opinion (Advisory Opinion 02-799) by stating that:

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 the 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.

The Alabama commission noted that the Supremacy Clause of the United States Constitution may possibly control to override provisions of Alabama law on the issue in question. It also cited the opinion issued by the Illinois Judicial Ethics Committee noting 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. 97-08](#).

## **Alaska**

[Alaska Commission on Judicial Conduct Advisory Opinion #2007-01](#) – A judge may serve as a National Guard judge advocate while in state military status if the judge’s role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military. Examples of duties that do not impact the judge’s impartiality or appearance of impartiality include: teaching and training in the law of armed conflict, operations law, and international law and providing legal advice in a military capacity on a purely military issue.

## **Illinois**

[Illinois Judicial Ethics Committee Opinion 97-08](#)- A judge on reserve duty with the Judge Advocate General may perform duties that amount to the practice of law and may be compensated for those services. The Committee determined that Article VI of the U.S. Constitution, the supremacy clause, would give the federal government control. Once recalled to active duty, no state rules can restrict the military’s rights to assign the reservist to whatever activity is needed.

## **Kentucky**

[Ethics Committee of the Kentucky Judiciary, Judicial Ethics Opinion JE-16 \(October 1980\)](#) – A judge may participate in a National Guard or Reserve Unit as a Judge Advocate Officer. The Committee does not regard service in the Judge Advocate Division as the practice of law under the Canons. The Committee stated: “Like other citizens, judges owe a duty to their country. If they perform that duty by way of military service, they must serve in whatever capacity they are assigned. If a judge is assigned to the Judge Advocate General department, his work is outside the scope of our Canons because of its special nature and because the judge is, in effect, on leave from his judgeship during his military service.”

## **Maryland**

[Maryland Judicial Ethics Committee Advisory Opinion 2018-26](#)

The Committee concluded that Md. Rule 18-103.10 (judge shall not practice law) does not restrict the ability of a judge who is on active duty as a JAG officer to perform assigned duties, without regard as to whether performance of those duties would constitute the practice of law in a civilian context. The Committee cautioned that other provisions of the Code apply, such as the judge should take care that he/she does not use the prestige of judicial office for the judge’s benefit or for the benefit of others, the judge should bear in mind that the performance of his/her duties may require disclosure/disqualification from a case after the judge resumes judicial service, and a judge in reserve status should be vigilant that extrajudicial activities do not “interfere with the proper performance of a judge’s judicial duties.”

## **Nevada**

[Nevada Standing Committee on Judicial Ethics and Election Practices, Opinion JE07-007](#) – A justice of the peace serving in the Air Force Reserve as a judge advocate general (JAG) in another state does not violate judicial canons.

## **Virginia**

[Commonwealth of Virginia Judicial Ethics Advisory Committee Opinion 03-4](#) – A judge may serve as an officer in the Judge Advocate General’s Corps without violating the proscription against practicing law within the meaning of Canon 4(G). The Committee cautioned that “the judge must act within the dictates of appropriate military authority. . . . [and] must be alert to the fact that certain types of legal assistance resemble the services provided by civilian attorneys. Performing those types of duties may give the impression that the judge is practicing law and could be a violation of Canon 2 of the Canons of Judicial Conduct.”

## Washington

[Washington Judicial Ethics Advisory Opinion 04-08](#) - A judge may serve as an officer of the Judge Advocate General's Corps without violating WA const. art. IV, §19 (judges of a court of record shall not practice law in any court in this state) and therefore is not in violation of the Canons. The judge, while performing functions for the Judge Advocate General Corps, must confine that conduct to those activities authorized for officers of the Judge Advocate General's Corps. The opinion also cites General Rule 24 (b)(9) which defines the practice of law but excludes any activities that are preempted by federal law.

## West Virginia

[West Virginia Judicial Investigation Commission, JIC Advisory Opinion 2014-18](#) – A judge may not simultaneously serve as a Family Court judge, if elected, and a JAG officer with the West Virginia Air National Guard as a reservist. The Commission determined that the services that the judge would provide as a JAG officer clearly constitute the practice of law.

**Recommendation:** The Preamble to the Code of Judicial conduct states that “[i]nherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.” See Code of Judicial Conduct, Section (1) of the Preamble. Judges work towards this goal when they promote public confidence and avoid conduct that would create a perception of impropriety. Rule 3.10 implements the foundational premise of the Code by limiting the circumstances in which a Connecticut judge would appear before a Connecticut court and by limiting the individuals to whom the judge may give legal advice.

As indicated in the discussion above, the majority of jurisdictions have found the contemplated activity to be permissible and many states have revised their rules to permit the practice of law pursuant to military service. However, two jurisdictions, West Virginia and Alabama, have concluded that service as a JAG officer would violate the Code's prohibition against the practice of law. In the Committee's opinion, these two cases are distinguishable.

The present situation can be distinguished from the [West Virginia Judicial Investigation Commission, JIC Advisory Opinion 2014-18](#) in an important way: under the facts of the West Virginia case, the JAG officer would be performing majority of the service in the judge's home state and would be providing legal services to individual services members, whereas in the present inquiry, the JO would be performing services as a JAG officer outside of Connecticut (in Maryland) and no legal services would be provided to individual service members. At issue in [Alabama Judicial Inquiry Commission Advisory Opinion 02-799](#) was whether a judge may serve as a member of the volunteer state militia, the Alabama State Defense Force, as a Judge



Advocate. The Alabama commission itself distinguished this opinion one year later by stating that “[t]here 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 the United States armed forces.” (Emphasis added.) The Committee believes the same distinction can be applied to the current inquiry which involves a Judicial Official who is a U.S. Army reservist serving under military orders.

The Committee agrees with the conclusions articulated by the Alaska Commission on Judicial Conduct in Advisory Opinion #2007-01. The Alaska commission states that:

The purpose behind the prohibition of the practice of law is to ensure that the judge is not viewed in any way as an advocate or a less than impartial arbiter of the law. Judges are prohibited from assuming any role that could lead to the appearance that the judge is an advocate. Consequently, judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system.

[Alaska Commission on Judicial Conduct Advisory Opinion #2007-01](#)

The Alaska advisory opinion specifically lists activities that would not be allowed (such as serving as a legal advisor or military defense counsel, assisting military personnel in drafting legal documents such as wills or powers of attorney, and advising in civil law areas) as well as those that are allowed (such as conducting legal training or advising on a purely military issue).

Based on the facts presented, including that: (1) the Judicial Official will not be providing legal advice to individual service members; (2) the Judicial Official will not be serving as an advocate on matters that concern the civilian justice system; (3) the Judicial Official’s service will be limited to teaching or training in the law of armed conflict, operational law, and international law and rendering legal advice in a military capacity on purely military issues; (4) the Judicial Official will not appear in any state, county, or federal court; (5) the frequency of the military legal work is approximately 30 days per year; and (6) the Judicial Official will take either paid military time off, vacation, or personal leave as appropriate, the Committee concludes that the Judicial Official may serve as a U.S. Army Reserve JAG and engage in the practice of law pursuant to 10 U.S. Code § 7037 while on military orders outside the state of Connecticut. In addition, the Committee cautions that if the Judicial Official’s JAG Corps duties change (i.e., involves drafting legal documents, prosecution and defense, a greater time

commitment, etc.), the Judicial Official needs to be mindful of the relevant Code provisions and may need to request an additional advisory opinion based on the new circumstances.

[Connecticut Committee on Judicial Ethics](#)