



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
(304) 558-0169 • FAX (304) 558-0831

October 24, 2014

Re: JIC Advisory Opinion 2014-18.

Dear

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. You want to know if you can simultaneously serve as a Family Court Judge, if elected, and a JAG officer. The factual scenario giving rise to your request is as follows: You are contemplating running for Family Court Judge in 2016. You are presently pursuing a direct commission from the West Virginia Air National Guard as a reservist Judge Advocate General ("JAG"). You indicate that upon receiving the commission, you would be obligated to serve for a period of six years. You further indicate that the time constraints imposed by this obligation would include one weekend a month and two weeks per year. You could be posted anywhere but believe the majority of your service will occur within West Virginia.

JAG officers provide a full range of general and specialized legal services to the armed forces. Among other things, JAG officers provide legal services to their commanding officers on a variety of matters and may provide legal services to individual service members as well. You anticipate initially providing legal advice to wing commanders about sexual harassment issues and handling other general matters such as drafting wills. JAGs do not handle divorce cases but you acknowledged that you might receive questions about divorce/custody matters. You also acknowledge that you do not have the ability to select your assignment and that you could also be used as a prosecutor or defense attorney in military criminal cases.

Canon 4G states that "[a] judge shall not practice law. Notwithstanding this prohibition, 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." The Commentary declares:

This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters including matters, involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or members of the judge's family.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

The Code defines "member of the judge's family" as a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

The proscription against practicing law is reinforced by Article 8, Section 8 of the West Virginia Constitution. The provision states that "no justice of the supreme court of appeals or judge of an intermediate appellate court or of a circuit court shall practice the profession of law during the term of his office. . . ." W. Va. Constitution Art. VIII, § 8.

W. Va. Code § 51-2A-4(b) also specifically bans a family court judge from engaging in the outside practice of law. The provision states:

A family court judge may not engage in any other business, occupation or employment inconsistent with the expeditious, proper and impartial performance of his or her duties as a judicial officer. A family court judge is not permitted to engage in the outside practice of law and shall devote full time to his or her duties as a judicial officer.

Id.

The Supreme Court of Appeals of West Virginia first defined the practice of law on March 28, 1947. *See* Committee on Unlawful Practice of Law Advisory Opinion 2007-1. A person practices law whenever he/she "furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill." *Id.* There is no "precise and comprehensive definition of the practice of law and it does not attempt to prescribe limits to the scope of that activity."

Id. However, the following activity, with or without compensation and whether or not in connection with another activity, is included in the practice of law: (1) to undertake to advise another in any matter involving the application of legal principles to facts, purposes or desires; (2) to undertake to prepare for another legal instruments of any character; and (3) to undertake to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures. *Id.*

West Virginia's definition is consistent with other jurisdictions. For example, Arizona defines "the practice of law" as:

"[T]hose acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries." . . . Those acts include but are not limited to assisting or advising in the preparation of legal documents or writings, advising regarding legal rights or liabilities, and representing another before a court or administrative agency. They also include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation.

Matter of Fleischman, 188 Ariz. 106, 110, 933 P.2d 563, 567 (1997) (judge censured for practicing law by acting as a company representative during contract renewal negotiations with Nike and advising the entity regarding negotiation strategies).

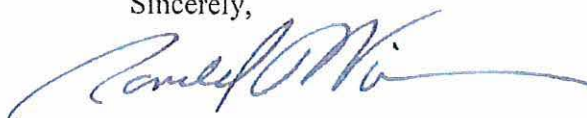
Based upon the foregoing, it is the opinion of the Commission that the services that you would provide as a JAG officer clearly constitute the practice of law. Therefore, you cannot concurrently serve as a Family Court Judge and a JAG officer.

The Commission notes that our decision is consistent with other jurisdictions. In Alabama Advisory Opinion 02-799, the Alabama Judicial Inquiry Commission found that a judge who was a member of a volunteer state militia may not provide legal advice to another member regarding the business of the militia because it constituted the practice of law. In Alaska Advisory Opinion 07-1, the Alaska Commission on Judicial Conduct stated that a judge may serve as a National Guard judge advocate if the judge's role is limited to performing duties that do not resemble services provided by civilian attorneys for members of the military. The Alaska Commission also stated that a judge may not render legal advice and opinions on environmental law, fiscal law, tort claims, administrative law matters, and discipline; serve as a recorder, legal advisory or military

defense counsel; draft personal legal documents for military personnel; or give advice in civil law areas such as consumer affairs and domestic relations.

We hope this opinion fully addresses the issue which you have raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ronald E. Wilson", with a long horizontal flourish extending to the right.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat