

Maryland Judicial Ethics Committee

Opinion Request Number: 2018-26

Date of Issue: June 29, 2018

■ Published Opinion □ Unpublished Opinion □ Unpublished Letter of Advice

A Judge May Serve as a Judge Advocate Officer in the Reserve of an Armed Service of the United States

By a letter to the Chair of the Ethics Committee dated June 13, 2018, the Chief Judge of the Court of Appeals has requested from the Committee an opinion concerning “the proper application of the Maryland Code of Judicial Conduct, specifically, Rules 18-103.10 and 18-103.12, to the service of [a judge] as a Judge Advocate in [a Reserve of an Armed Service of the United States].”¹

The Committee concludes:

1. Rule 18-103.10 restricts the ability of a judge to practice law. The problems that the rule is intended to address—improper use of the prestige of judicial office and actual or perceived impropriety on a judge’s part—do not arise when a judge performs duties assigned to him/her while the judge is in military service, even if the assigned duties involve the practice of law.
2. Even though Rule 18-103.10 does not restrict a judge’s ability to serve as a Judge Advocate, the other provisions of the Code of Judicial Conduct remain applicable.
3. Rule 18-103.12 permits a judge who serves in Reserve or active status to accept the standard compensation for such service.

Background: Each of the armed services of the United States—the Army, Air Force, Coast Guard, Marine Corps, and Navy—maintains a reserve of trained personnel for active deployment as needed. Additionally, each armed service has judge advocates (“JAG officers”), that is, commissioned officers who provide legal services to the armed service. The Chief Judge’s inquiry concerns judges who are JAG officers in a Reserve.

JAG officers must be graduates of accredited law schools and admitted to practice law in a state. Some JAG duties, e.g., providing advice as to the law of rules of engagement, or representing the Government in courts martial or administrative disciplinary proceedings, are highly specialized. But others—such as providing legal advice on environmental, contract, maritime, and administrative law issues—are analogous to

¹ The Chief Judge’s request is made pursuant to Md. Rule 18-306, which states in pertinent part:

- (a) A request for the opinion of the Committee may be made only by:
 - (1) a State official in the Judicial Branch, as to the proper interpretation of an ethics provision as applied to that State official; or
 - (2) the Chief Judge of the Court of Appeals, as to the proper interpretation of an ethics provision.

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professional services provided by civilian lawyers. In addition, JAG officers provide legal services such as preparing wills and powers of attorney for personnel prior to their overseas deployment.² Finally, some JAG officers serve as military judges and hearing officers in courts martial and administrative disciplinary proceedings. While JAG officers may indicate a preference as to possible duties, actual assignments are mandatory.

Members of a Reserve are required to annually perform at least forty-eight “duty drills”³ and two weeks of active duty.⁴ Reserve officers receive standard amounts of compensation according to rank and time of service.

Discussion

(A)

Md. Rule 18-103.10 states:

(a) In General. Except as expressly allowed by this Rule, a judge shall not practice law.

(b) Exceptions.

(1) A judge may act self-represented in a matter involving the judge or the judge’s interest and, if without compensation, may give legal advice to and draft or review documents for a member of the judge’s family.

(2) To the extent expressly allowed by law and subject to other applicable provisions of this Code, a part-time judge of an orphans’ court who is an attorney may practice law, provided that:

(A) the judge shall not use the judge’s judicial office to further the judge’s success in the practice of law; and

(B) the judge shall not appear as an attorney in the court in which the judge serves.

Md. Rule 18-103.10 is based on Rule 3.10 of the American Bar Association Model Code of Judicial Ethics (2007). Neither Md. Rule 18-103.10 nor ABA Rule 3.10 addresses whether, in the context of performing his/her duties as a JAG officer, a judge

² Pursuant to federal law, and subject to regulation by the Secretary of Defense, the Judge Advocate Generals of the Army, Navy, Air Force, and Coast Guard, and the Staff Judge Advocate to the Commandant of the Marine Corps, are responsible for providing legal assistance to, among other persons, members of the armed services on active duty and their dependents. *See* 10 U.S.C. § 1044.

³ Each drill is four hours long. Some drills must be performed by a reservist in person at a military base. Other drills can be completed on-line.

⁴ Sometimes, a Reserve JAG Officer may be able to satisfy his/her active duty obligation by performing additional drills.

may perform acts which would constitute the practice of law in a civilian context. This issue has arisen frequently in the years since the 9/11 attacks. *See* Marla Greenstein, *Can Sitting Judges “Practice Law” as Members of the Judge Advocate General’s Corps?* 56 *Judges’ Journal* (Winter, 2017).

The Committee’s research indicates that at least twenty-three states and the District of Columbia have addressed the issue, albeit in varying ways.

A number of 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.⁵ These jurisdictions include: Arizona, Delaware, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Missouri, Nebraska, Oklahoma, Oregon, Pennsylvania, Tennessee and Washington. On the other hand, North Dakota has added a comment to its version of ABA Rule 3.10 to the effect that the practice of law by a JAG officer on active duty is prohibited by the rule, “unless the duties are judicial in nature.”⁶ The District of Columbia has amended its version of ABA Rule 3.9 (“Service as Arbitrator or Mediator”) to permit judges to perform “judicial functions pursuant to military service,” but has not yet addressed whether its version of ABA Rule 3.10 applies to judges in military service.⁷

Additionally, the judicial ethics advisory committees of several states have considered the issue.⁸ The ethics advisory bodies in Alabama, Illinois, Kentucky, Nevada, and Virginia have issued opinions concluding that judges may serve as JAG officers without violating ABA Rule 3.10’s general prohibition against the practice of law by judges. The

⁵ Although there are minor variations in language, Oregon’s approach is typical. Rule 4.8 of the Oregon Code of Judicial Conduct provides in pertinent part (emphasis added):

Rule 4.8 Practice of Law

(A) A judge described in Rule 1.2(A) shall not practice law, unless:

(1) acting pro se;

(2) giving legal advice to, and drafting and reviewing documents for, a member of the judge’s family;
or

(3) acting pursuant to military service.

* * *

⁶ *See* North Dakota Code of Judicial Conduct Rule 3.10 Comment [2].

⁷ Compare District of Columbia Code of Judicial Conduct Rules 3.9 (“Service as Arbitrator or Mediator”) and 3.10 (“Practice of Law”).

⁸ Additionally, the New York Advisory Committee on Judicial Ethics declined to opine as to whether a judge could serve in the Army Reserve as a JAG officer because the Committee viewed the issue as raising issues outside of the Committee’s purview. *See* New York Advisory Committee on Judicial Ethics Op. 15-200.

Alaska Commission on Judicial Conduct advised that that judges on active duty could provide legal advice only upon a “purely military issues . . . without a civil law counterpart[.]”⁹ West Virginia’s judicial advisory body concluded that judges who are JAG officers may not perform duties that would constitute the practice of law if done in a civil context.¹⁰

Returning to the issue before us, a foundational premise of the Code of Judicial Conduct is 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.” Md. Rule 18-100.4. Judges work towards this goal when they act positively to promote public confidence in the judiciary and when they avoid conduct that would undermine such confidence.¹¹ Md. Rule 18-103.10 implements this policy in an important way by limiting the circumstances in which a Maryland judge would appear before a Maryland court, or a Maryland judge would use the prestige of judicial office to benefit private parties.

It is difficult for the Committee to comprehend how public confidence in Maryland’s judiciary could be shaken because a judge serves his or her country as a JAG officer.¹² We agree with our colleagues on Alabama’s Judicial Inquiry Commission that:

It does not appear . . . 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.

Alabama Judicial Inquiry Commission Advisory Opinion No. 03-820 (2003).

⁹ See Alaska Advisory Op. No. 2007-001 (2007).

¹⁰ West Virginia Judicial Investigation Commission Advisory Opinion 2014-18.

¹¹ See Rule 18-101.2:

- (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.
- (b) Avoiding Perception of Impropriety. A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

¹² The Committee is aware that Maryland judges have served as JAG officers in the Reserves in the past. See “*Judiciary on Active Duty*” 7 Justice Matters (June, 2003).

We are aware that the Alaska Judicial Advisory Committee has concluded that its version of Md. Rule 18-103.10 limits judges to providing advice to “purely military issues . . . without a civil law counterpart.”¹³ We are concerned that attempting to observe a distinction between “purely military” and other legal issues might be unworkable. This is because a JAG officer’s duties are assigned to him or her by superior officers. A JAG officer should be able to obey orders without a concern that doing so might constitute a violation of the Code of Judicial Conduct.

For these reasons, the Committee concludes that Md. Rule 18-103.10 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.¹⁴

The Committee cautions that, although Rule 18-103.10 does not restrict a judge’s ability to follow orders, other provisions of the Code apply even though the judge is on active service. For example, a judge serving on active duty must take care that he/she does not use the prestige of judicial office either for the judge’s benefit or for the benefit of others. *See* Md. Rule 18-101.3.¹⁵ Moreover, the judge should bear in mind that the performance of his/her duties may require disclosure and, possibly, disqualification from a case after the judge resumes judicial service in Maryland. *See* Md. Rule 18-102.11.¹⁶

¹³ Alaska Commission on Judicial Conduct Advisory Opinion 2007-01.

¹⁴ The Committee is aware that it issued two opinions in the mid-1990’s, which addressed whether a judge could serve as the State Judge Advocate or as a military judge in the Maryland Army National Guard. The Committee advised that acting in either capacity would violate the prohibition against a judge’s practicing law contained in the then-current version of the Maryland Code of Judicial Conduct. The two Judicial Ethics Committee opinions were not published and therefore applied only to the judge requesting them. *See* Md. Rule 18-308. Even if the unpublished opinions have precedential value, and they do not, or pertained to the question of a judge’s active duty service as a JAG officer, which they did not, the passage of time would warrant re-examination of the issue.

¹⁵ Rule 18-101.3 states:

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.

¹⁶ Rule 18-102.11 states:

(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:

(1) The judge has a personal bias or prejudice concerning a party or a party’s attorney, or personal knowledge of facts that are in dispute in the proceeding.

* * *

(c) A judge subject to disqualification under this Rule, other than for bias or prejudice under

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Finally, a judge in Reserve status should be vigilant that extrajudicial activities do not “interfere with the proper performance of a judge’s judicial duties.” *See* Md. Rule 18-103.1(a).¹⁷

(B)

Rule 18-103.12 permits judges to “accept reasonable compensation for extrajudicial activities . . . unless such acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

A reasonable person would not conclude that a judge’s independence, integrity, or impartiality is undermined if a judge accepts compensation for his/her Reserve or active duty in amounts commensurate with the judge’s rank and experience. A judge may also accept standard reimbursement for travel, lodging, and similar expenses. Any compensation and reimbursement must be reported on the judge’s annual financial disclosure form.

Application: The 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

(footnote continued . . .)

subsection (a)(1) of this Rule, may disclose on the record the basis of the judge’s disqualification and may ask the parties and their attorneys to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and attorneys agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

¹⁷ Rule 18-103.1 states in pertinent 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[.]

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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.