

This is in response to your question whether a staff judge advocate (SJA) and a G-series commander have the legal authority to deny a judge advocate's request to perform off-duty employment in "after hours" private law practice.

Factual Background

For purposes of this opinion, an assistant staff judge advocate at Wing [A] located in State [A], who is licensed to practice law in State [B], wishes to practice law remotely in State [B] "after hours." State [B] is three time zones ahead of and 2,000 miles away from Wing [A]. The judge advocate defines "after hours" to mean weekends and after 1700 hours during the week. Though the intended practice areas are generally "transactional" (contracts, estate planning, consumer disputes), there is a possibility that the judge advocate's clients in State [B] will need him to appear in court in State [B] during the week to represent their interests. The judge advocate advises that he either will take leave to travel to State [B] to appear in court for his clients when necessary, or if this is not possible, retain the services of another State [B] attorney to handle court appearances for his clients. The judge advocate intends to secure his client's written consent for such an arrangement, and to disclose his on-going association with the United States Air Force and Judge Advocate General Corps. The judge advocate advises that he is a member in good standing in State [B] and carries professional-liability (malpractice) insurance (having been in private practice in State [B] prior to joining the Air Force).

The judge advocate submitted a typical form for "Application and Approval for Off-Duty Employment," asserting the above facts. He also certified that he understood "the applicable provisions of the Joint Ethics Regulation," and certified that the off-duty employment would not "[b]ring discredit upon the Air Force, Department of Defense or U.S. Government," "[i]nterfere with or be incompatible with [his] government duties," "[r]equire absences during normal military duty hours," or "[a]ppear to involve a conflict of interest."

The judge advocate's SJA recommended to the G-series orders commander that she deny the judge advocate's off-duty employment request. The SJA advised that the judge advocate is relatively new and his work performance has not been strong and advises that the judge advocate needs to devote his full attention and energy to his military duties. The SJA notes that the workload at Wing [A] legal office is high and his judge advocates routinely work late into the evenings during the week and occasionally on weekends, particularly when preparing for courts-martial. The G-series orders commander denied the request on her SJA's advice.

Standards

The Joint Ethics Regulation (JER) and Air Force instructions require pre-approval of judge advocate off-duty employment. There is a provision in JER that requires just this pre-approval for a DoD employee who is required to file a financial disclosure report, *see* JER, para. 2-206 (and

providing a mechanism for approval), and a separate provision in the JER that requires just this pre-approval for all other DoD employees not otherwise covered, JER para 2-303:

In addition to subsection 2-206 of this Regulation, above, except to the extent that when procedures have been established by higher authority for any class of DoD employee (e.g., DoD 6025. 13-R, section 4.7, Off-Duty Employment by DoD Healthcare Practitioners (Reference (p))), Agency Designees may require DoD employees under their jurisdiction to report any outside employment or activity prior to engaging in the employment or activity. See subsection 3-304 of this Regulation, below [*relating to the process and repeating in 3-304(c) the following two subsections*].

- a. The commander, head of the organization, or supervisor may prohibit the employment or activity if he believes that the proposed outside activity will detract from readiness or pose a security risk.
- b. If action is not taken to prohibit the employment or activity, the DoD employee is free to engage in the employment or activity in keeping with other restrictions of this Regulation.

Further, AFI 51-110, *Professional Responsibility Program*, 26 May 17, includes provisions related to pre-approval of off-duty employment. See AFI 51-110, para 10. Those provisions require Petitioner to receive the written approval of his SJA or equivalent to engage in off-duty employment, which in this case, he has not received. See AFI 51-110, para 10.3.2.

In addition to the “detract from readiness” limitation of JER para 2-303(a), the provisions of AFI 51-110, para 10, also limit a judge advocate’s authorized off-duty employment in a number of ways relevant here:

An Air Force attorney’s primary professional responsibility is to the Air Force, and Air Force attorneys are expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. Care must be taken to ensure that off-duty legal activities do not conflict with official duties. An activity conflicts with official duties if it is prohibited by an applicable statute or regulation or would require the attorney’s disqualification from matters that are so central or critical to the performance of official duties that the attorney’s ability to perform such duties would be materially impaired. (emphasis added).

AFI 51-110, para 10.4.2.4. limits off-duty employment in situations that could “cause a reasonable person to question the integrity of AFJAGC programs or operations.” Though it applies to approved off-duty employment, AFI 51-110 also requires judge advocates to “adhere to applicable professional responsibility and standards of conduct rules.” AFI 51-110, para 10.4.

Analysis

Here, the G-series orders commander had a plethora of lawful reasons to exercise her discretion to deny Petitioner’s request to pursue an off-duty law practice. The judge advocate’s SJA did not approve the request as required by AFI 51-110, para 10.3.2 and did so for reasons that are not

arbitrary or capricious. Additionally, the management of a daily law practice for clients who would necessarily require work or communication on their cases during the duty day (and in State [B], far from Wing [A]) has the likely potential to detract from Petitioner's readiness to accomplish his assigned military duties as prohibited by JER para 2-303 and AFI 51-110, para 10. This focus of readiness challenges here is buttressed by concerns over the judge advocate's duty performance, which will not be improved by the distraction of carrying a caseload of non-military work for his State [B] clients.

Further, to allow an Air Force member to pursue off-duty employment with the demands and fluctuating schedule of the judge advocate's military duties runs the substantial risk of causing his clients "to question the integrity of AFJAGC programs or operations." AFI 51-110, para 10.4.2.4. In this regard, it is difficult to foresee how the judge advocate can comply with Rules 1.1 and 3.2 of both the Air Force and State [B]'s Rules of Professional Conduct with the time limitation he offers. Both of those rules require a lawyer to "provide competent representation ... [which] requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation" and to "make reasonable efforts to expedite litigation consistent with the interests of the client." Putting aside the judge advocate's level of competence in the proposed practice areas, assuming he complied with the time limitation he suggests (and does not perform client work during the duty day), he will be forced to substantially limit his ability to prepare client matters, delay communication with clients and third-parties, and delay appearances in court for his clients (presumably until he can take leave to travel to State [B] or secure the services of a State [B] attorney to appear in court in his place). Though the Rules do allow the judge advocate's potential clients to limit the scope of his representation (if reasonable) to account for these time limitations, the high potential for negative client outcomes carries a substantial risk of undermining the Air Force's reputation by having allowed this judge advocate to have engaged in that unduly limited practice.

Conclusion

Though judge advocates may engage in off-duty employment in the practice of law, approval for such off-duty employment is not automatic. In fact, there are numerous restrictions on such off-duty employment to ensure that a judge advocate is focused on their readiness to effectively discharge their primary obligation of serving the United States Air Force as a judge advocate general (24/7, 365). Though the results in a given case will be fact dependent, here the potential for the requested off-duty employment to "detract from readiness," and create situations that cause third-parties "to question the integrity of AFJAGC programs or operations," supports the decision to disapprove the request.