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MEMORANDUM FOR DISTRIBUTION C
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FROM: AF/JA

SUBJECT: Air Force Guidance Memorandum for AFI 51-110, *Professional Responsibility Program*

RELEASABILITY: There are no releasability restrictions on this publication.

By Order of the Secretary of the Air Force, this AF Guidance Memorandum (AFGM) provides policy changes to AFI 51-110, *Professional Responsibility Program* (dated 5 August 2014). Compliance with this Memorandum is mandatory. To the extent its directions are inconsistent with other Air Force publications, the information herein prevails, in accordance with AFI 33-360, *Publications and Forms Management*.

In advance of a rewrite of AFI 51-110, the Attachment to this Memorandum is updated to provide new guidance for the placement of subject attorneys on probation or interim suspension. This publication applies to the same personnel to which AFI 51-110 applies as set forth in AFI 51-110, paragraph 2. An asterisk (*) indicates newly revised material.

Ensure all records created as a result of processes prescribed in this Memorandum are maintained in accordance with AF Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule (RDS) located at <https://afrims.amc.af.mil/>.

This memorandum becomes void after one-year has elapsed from the date of this memorandum, or upon publication of an Interim Change or rewrite of the affected publication, whichever is earlier.

CHRISTOPHER F. BURNE
Lieutenant General, USAF
The Judge Advocate General

Attachment
Guidance Changes

ATTACHMENT
Guidance Changes

The below changes to AFI 51-110, dated 5 August 2014, are effective immediately.

3.3. TJAG's Professional Responsibility Administrator (TPRA). TPRA is assigned to the Professional Development Directorate (HQ USAF/JAX). TPRA will carry out overall administration and management of TJAG's Professional Responsibility Program. TPRA reports to TJAG through the Director, Professional Development Directorate, on all professional responsibility matters. TPRA will provide general guidance on professional responsibility matters to AFJAGC members and will refer matters and provide assistance to TJAG's Advisory Committee on Professional Responsibility and Standards as appropriate. TPRA will provide monthly case reports to the Director, Professional Development Directorate (HQ USAF/JAX) and Advisory Committee.

3.4.3. The permanent members of the Advisory Committee are the Director, USAF Judiciary (AFLOA/JAJ), Director, Civil Law and Litigation (AFLOA/JAC), and Deputy Director, Administrative Law (HQ USAF/JAA). If any permanent member is conflicted from serving or otherwise unavailable, the Director, Professional Development Directorate, may replace the member with the director or associate director of any Air Staff or AFLOA directorate, provided that the substitute member is in the grade of O-6/GS-15 or higher. Additionally, the Reserve Advisor to TJAG (HQ USAF/JA) will augment the Advisory Committee in any case involving Reserve and ANG members. The Air Force Paralegal (5J) Career Field Manager, Professional Development Directorate (HQ USAF/JAX), will augment the Advisory Committee in any case involving a military paralegal. TJAG may appoint members to the Advisory Committee when necessary to provide expertise in a particular area or to replace a member when no substitute is available from Air Staff or Air Force Legal Operations Agency directorate. The senior active duty member on the Advisory Committee will be the chairperson.

Attachment 7

AIR FORCE STANDARDS FOR CRIMINAL JUSTICE

The *Air Force Standards for Criminal Justice* (AFSCJ or the *Standards*) are directly adapted from the *American Bar Association (ABA) Standards for Criminal Justice*. The *Standards* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although in adapting the *Standards* every effort was made to resolve inconsistencies, in the event of conflict, the Uniform Code of Military Justice (UCMJ), MCM, Air Force Instructions (AFI), the *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*), case law, and the *Air Force Uniform Code of Judicial Conduct* (AFUCJC) will control. In the event of conflict between the *Standards* and the ethics rules of a lawyer's licensing state, the *Standards* will control in trials by courts-martial and related proceedings.

The AFSCJ applies to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps, USAF. This includes host nation lawyers, paralegals, and other host nation personnel employed overseas by the Department of the Air Force, to the extent the *Standards* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants), with no other connection to the Air Force. Staff judge advocates (SJA) and Air Force military defense counsel working with defense counsel from outside the Air Force should ensure outside counsel are aware of the *Standards* and have ready access to them.

Some of the ABA standards are not applicable to the unique requirements of military practice, and consequently, were not included. Air Force standards that contain substantive modifications are annotated accordingly. Terminology changes made to conform a standard to Air Force practice are not so annotated. The following chapters of the *ABA Standards* apply to Air Force practice, except as indicated or qualified in the text.

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CHAPTER 1 THE PROSECUTION FUNCTION

SECTION I. General Standards

Standard 3-1.1. The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 3-1.2. The Function of the Prosecutor

(a) [Omitted]

(b) The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion in the performance of his or her function.

(c) [Modified] As a trial counsel, the prosecutor represents both the United States and the interests of justice. The duty of the prosecutor is to seek justice, not merely to convict.

(d) [Modified] It is the duty of the prosecutor to know and be guided by the standards of conduct applicable to military counsel by the Uniform Code of Military Justice (UCMJ); Manual for Courts-Martial (MCM); AFI 51-201, Administration of Military Justice; and the Air Force Rules of Professional Conduct (AFRPC or “Rule(s)”).

(e) [Modified] As used in this chapter, the term “unprofessional conduct” denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility in force. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance.

DISCUSSION

The term “prosecutor” as used throughout this section includes not only the trial counsel, but also the office of the SJA. Inclusion of the SJA within the definition of the term “prosecutor” should not be construed to suggest that it reflects a general, disqualifying partiality by SJAs. Where the standard refers to “trial counsel,” it specifically means the lawyer detailed to the court-martial. See Rule 3.8, Special Responsibilities of a Trial Counsel; Rule for Courts-Martial (R.C.M.) 502(d)(5), Duties of Trial and Assistant Trial Counsel. Prosecutors are also obligated to know and follow the AFRPC and the other standards under subsection (d). Although Trial Counsel should be cautious to avoid the appearance of undue command influence, Trial Counsel should normally be allowed to identify his or her client as the “United States” and advocate on behalf of client. See RCM 502(d)(5) (“[t]he trial counsel shall prosecute cases on behalf of the United States ...”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”); *United States v. Golston*, 53 M.J. 61, 63 (C.A.A.F. 2000) (“trial counsel at a court-martial is the representative of the United States Government, and he or she should act accordingly.”)

Standard 3-1.3. Conflicts of Interest

(a) [Modified] A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. In some instances, as defined in the AFRPC, failure to do so will constitute unprofessional conduct.

[(b) – (h) omitted]

DISCUSSION

Particular care must be exercised when the trial counsel has had any previous professional contact with the accused, either through the legal assistance program or otherwise. In such circumstances, he or she must notify the SJA, defense counsel and the military judge (if appropriate) as soon as possible. See *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987); *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987); and *United States v. Payton*, 23 M.J. 379 (C.M.A. 1987). See also Rules 1.7 to 1.13.

Standard 3-1.4. Public Statements

(a) A prosecutor should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the prosecutor knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this standard.

DISCUSSION

All trial counsel and SJAs should also be aware of the provisions of AFI 51-201, Administration of Military Justice, Chapter 12, regarding releasing information to members of the news media. See also Rule 3.6, Trial Publicity; and Standards 8-1.1 and 8-2.2.

Standard 3-1.5 Duty to Respond to Misconduct

(a) [Modified] Where a trial counsel knows that another person associated with the legal office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation or violation of the law, the trial counsel should ask the person to reconsider the action or inaction which is at issue if such a request is aptly timed to prevent such misconduct and is otherwise feasible. If such a request for reconsideration is unavailing, inapt or otherwise not feasible or if the seriousness of the matter so requires, the trial counsel should refer the matter to the SJA.

(b) [Modified] If the SJA insists upon action, or a refusal to act, that is clearly a violation of the law, the trial counsel may take further remedial action, including revealing the information necessary to remedy this violation to appropriate government officials outside the legal office, including superior lawyers in the functional chain.

SECTION II. Organization Of The Prosecution Function

Standard 3-2.1. Prosecution Authority to be Vested in a Public Official

Standard 3-2.2. Interrelationship of Prosecution Offices within a State**Standard 3-2.3. Assuring High Standards of Professional Skill****Standard 3-2.4. Special Assistants, Investigative Resources, Experts****Standard 3-2.5. Prosecutor's Handbook; Policy Guidelines and Procedures**

[All omitted]

Standard 3-2.6. Training Programs

[Modified] Training programs should be established within legal offices and regional offices for new personnel and for continuing education of the staff.

DISCUSSION

The SJA of the special court-martial convening authority is responsible for training the trial counsel in his or her office. The senior trial counsel should also take an active role in training trial counsel within his or her region. See Rule 1.1, Competence.

Standard 3-2.7. Relations With the Police [Omitted]**Standard 3-2.8. Relations with the Courts and Bar**

(a) It is unprofessional conduct for a trial counsel intentionally to misrepresent matters of fact or law to the court.

(b) A trial counsel's duties necessarily involve frequent and regular official contacts with the military judge or military judges of the prosecutor's jurisdiction. In such contacts, the trial counsel should carefully strive to preserve the appearance as well as the reality of the correct relationship which professional traditions and canons require between advocates and military judges.

(c) It is unprofessional conduct for a trial counsel to engage in unauthorized *ex parte* discussions with or submission of material to a military judge relating to a particular case which is or may come before the military judge.

(d) A trial counsel should not fail to disclose to the court legal authority in the controlling jurisdiction known to the trial counsel to be directly adverse to the trial counsel's position and not disclosed by defense counsel.

(e) A trial counsel should strive to develop good working relationships with defense counsel in order to facilitate the resolution of ethical problems. In particular, trial counsel should assure defense counsel that if counsel finds it necessary to deliver physical items which may be relevant to a pending case or investigation to the trial counsel, the trial counsel will not offer the fact of such delivery by defense counsel as evidence before members for purposes of establishing defense counsel's client's culpability. However, nothing in this standard shall prevent a trial counsel from offering evidence of the fact of such delivery in a subsequent proceeding for the purpose of proving a crime or fraud in the delivery of the evidence.

DISCUSSION

See the standards in Chapter 3 for more specific guidance with respect to the limits placed on *ex parte* contacts between detailed military judges and counsel. See also Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of the Tribunal; *United States v. Copening*, 32 M.J. 512 (A.C.M.R. 1990); and *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989).

Standard 3-2.9. Prompt Disposition of Criminal Charges

- (a) A trial counsel should avoid unnecessary delay in the disposition of cases. A trial counsel should not fail to act with reasonable diligence and promptness in prosecuting an accused.
- (b) A trial counsel should not intentionally use a procedural device for delay for which there is no legitimate basis.
- (c) The prosecution function should be so organized and supported with staff and facilities to enable it to dispose of all criminal charges promptly. The trial counsel must be punctual in attending court and in the submission of all motions, briefs and other papers. The trial counsel should emphasize to all witnesses the importance of punctuality in attending court.
- (d) It is unprofessional conduct intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (e) An SJA, without attempting to get additional resources, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations.

DISCUSSION

In military practice, in some circumstances, noncompliance with procedural rules and unnecessarily delaying a trial is itself an offense. See Article 98, UCMJ; Rule 3.2, Expediting Litigation; Rule 3.3, Candor Toward the Tribunal, subsection (a)(1); and Rule 3.4, Fairness to Opposing Party and Counsel, subsections (a), (c), and (d).

Standard 3-2.10. Supercession and Substitution of Prosecutor [Omitted]

Standard 3-2.11. Literary or Media Agreements

[Omitted as inapplicable; see DOD 5500.7R, Chapter 2, and Rule 1.8, Conflict of Interest: Prohibited Transactions.]

SECTION III. Investigation for Prosecution Decision

Standard 3-3.1. Investigative Function of the Prosecutor

- (a) A trial counsel ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the trial counsel has an affirmative responsibility to investigate suspected criminal activity when it is not adequately dealt with by other agencies.
- (b) An SJA should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or recommend prosecution. An SJA should not use other improper considerations in exercising such discretion.
- (c) It is unprofessional conduct for a trial counsel knowingly to use illegal means to obtain evidence or to employ, instruct or encourage others to use such means.
- (d) [Modified] A trial counsel should not improperly discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give.
- (e) It is unprofessional conduct for a trial counsel to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.

- (f) It is unprofessional conduct for a trial counsel to promise not to prosecute for prospective criminal activity, except where such activity is part of an officially supervised investigative or law enforcement program.
- (g) Unless a trial counsel is prepared to forgo impeachment of a witness by the trial counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present the impeaching testimony, a trial counsel should avoid interviewing a prospective witness except in the presence of a third person.

DISCUSSION

Although a witness may not be obligated to submit to an interview with defense counsel under all circumstances, trial counsel must not induce a refusal to speak with the defense. See *United States v Irwin*, 30 M.J. 87 (C.M.A. 1990); *United States v. Morris*, 24 M.J. 93 (C.M.A. 1987); Rule 1.1, Competence; Rule 3.7, Lawyer as Witness; Rule 3.8, Special Responsibilities of a Trial Counsel; and Rules 4.1 to 4.4, Transactions With Persons Other Than Clients.

Standard 3-3.2. Relations with Prospective Witnesses

- (a) [Modified] It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of appearing in court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a witness may be provided consistent with guidance in the Joint Travel Regulations, provided there is no attempt to conceal the fact of reimbursement.
- (b) A trial counsel should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a trial counsel to advise a witness whenever the trial counsel knows or has reason to believe that the witness may be the subject of a criminal prosecution. However, a trial counsel should not so advise a witness for the purpose of influencing the witness in favor of or against testifying.
- (c) The trial counsel should readily provide victims and witnesses who request it information about the status of cases in which they are interested.
- (d) The trial counsel should seek to insure that victims and witnesses who may need protections against intimidation are advised of and afforded such protections where feasible.
- (e) The trial counsel should ensure that victims and witnesses are given notice as soon as practicable of scheduling changes which will affect the victims' or witnesses' required attendance at judicial proceedings.
- (f) The trial counsel should not require victims and witnesses to attend judicial proceedings unless their testimony is essential to the prosecution or is so required by law. When their attendance is required, the trial counsel should seek to reduce to a minimum the time they must spend at the proceedings.
- (g) The trial counsel should seek to insure that victims of serious crimes or their representatives are given timely notice of: (1) judicial proceedings relating to the victim's case; (2) disposition of the case, including pretrial agreements, trial and sentencing; and (3) any decision or action in the case which results in the accused's provisional or final release from custody.
- (h) Where practical, the trial counsel should seek to insure that victims of serious crimes or their representatives are given an opportunity to consult with and to provide information to the trial counsel prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.

DISCUSSION

Payments to witnesses in the military are governed by the Joint Travel Regulations.

In the circumstances described in subsection (b), prosecutors generally should advise the prospective witness of his or her Article 31, UCMJ, rights. In these situations, Article 31(b) warnings are warranted based on the prosecutor's relationship to the witness, *United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981), ("because of military rank, duty, or other similar relationship, there might be subtle pressure on a subject to respond to an inquiry"); and on the purpose of the questioning, *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990) (inquiry must be part of a law enforcement or disciplinary investigation). A rights advisement is not required every time a military member questions another military member whom the questioner suspects of having committed an offense. The relationships of the individuals and the particular circumstances will determine the need. See Rules 4.1 to 4.4, Transactions with Persons Other than Clients.

Standard 3-3.3. Relations with Expert Witnesses

(a) A trial counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject. To the extent necessary, the trial counsel should explain to the expert his or her role in the trial as an impartial expert called to aid the fact finders, and the manner in which the examination of the witnesses is conducted.

(b) It is unprofessional conduct for a trial counsel to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

DISCUSSION

See *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987), concerning relationships with expert witnesses, and Rule 4.1, Truthfulness in Statements to Others.

Standard 3-3.4. Decision to Charge**Standard 3-3.5. Relations with Grand Jury****Standard 3-3.6. Quality and Scope of Evidence before Grand Jury****Standard 3-3.7. Quality and Scope of Evidence for Information****Standard 3-3.8. Discretion as to Noncriminal Disposition**

[All omitted]

Standard 3-3.9. Discretion in the Charging Decision

(a) It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.
 [(b) through (g) omitted]

DISCUSSION

The convening authority ultimately determines what charges will be referred and whether to convene a court-martial. Trial counsel must inform the SJA for the convening authority immediately upon discovering that there is insufficient evidence to support a conviction of any

charge. Judicial economy would suggest that an accused should be charged with all known offenses and tried once; however, this is not required. See R.C.M. 307(c)(4). An accused should not be brought to trial on charges greater in number or degree than can be reasonably supported with evidence at the trial. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition. See R.C.M. 306(b). See also Rule 3.8, Special Responsibilities of a Trial Counsel.

Standard 3-3.10. Role in First Appearance and Preliminary Hearing
[Omitted]

Standard 3-3.11. Disclosure of Evidence by the Prosecutor

- (a) [Modified] It is unprofessional conduct for a trial counsel to intentionally fail to disclose to the defense, as soon as practicable, the existence of evidence known to the trial counsel which reasonably tends to negate the guilt of the accused as to an offense charged, or which reasonably tends to reduce the degree of guilt of the accused of an offense charged, or which reasonably tends to reduce the punishment of the accused.
- (b) The trial counsel should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.
- (c) It is unprofessional conduct for a trial counsel intentionally to avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused.

DISCUSSION

For specific guidance on discovery in general, see R.C.M. 701(a); Rule 3.4(d), Fairness to Opposing Party and Counsel; Standards 11-2.1 to 11-2.6; and *United States v. Trimper*, 28 M.J. 460 (C.M.A. 1989).

SECTION IV. Plea Discussions

Standard 3-4.1. Availability for Plea Discussions

- (a) The trial counsel should be willing to consult with defense counsel concerning disposition of charges by plea.
- [(b) omitted]
- (c) It is unprofessional conduct for a trial counsel knowingly to make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused.

DISCUSSION

Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the SJA, convening authority, or their duly authorized representatives. See R.C.M. 705(d).

Standard 3-4.2. Fulfillment of Plea Discussions

- (a) It is unprofessional conduct for a trial counsel to make any promise or commitment concerning the sentence which will be imposed or concerning a suspension of the sentence. A trial counsel may properly advise the defense what position will be taken concerning disposition.
- (b) It is unprofessional conduct for a trial counsel to imply a greater power to influence the disposition of a case than is actually possessed.
- (c) It is unprofessional conduct for a trial counsel to fail to comply with a plea agreement, unless an accused fails to comply with a plea agreement or other extenuating circumstances are present.

Standard 3-4.3 Record of Reasons for Nolle Prosequi Disposition [Omitted]**SECTION V. The Trial****Standard 3-5.1. Calendar Control** [Omitted]**Standard 3-5.2. Courtroom Professionalism**

(a) The trial counsel should support the authority of the court and dignity of the trial courtroom by strict adherence to the rules of decorum, and by manifesting an attitude of professional respect toward the military judge, opposing counsel, witnesses, accused, court members, and others in the courtroom.

(b) When court is in session, the trial counsel should address the court, not opposing counsel, on all matters relating to the case.

(c) A trial counsel should comply promptly with all orders and directives of the court, but the trial counsel has a duty to have the record reflect adverse rulings or judicial conduct which the trial counsel considers prejudicial. The trial counsel has a right to make respectful requests for reconsideration of adverse rulings.

(d) Trial counsels should cooperate with courts and the organized bar in developing codes of decorum and professional etiquette for each jurisdiction.

DISCUSSION

The Chief Trial Judge, USAF Trial Judiciary (HQ USAF/JAT), and/or the Chief Regional Military Judge for the trial judiciary region in which the trial is located may promulgate rules for courts-martial within that region. See also Standard 6-3.1; Rule 3.2, Expediting Litigation; Rule 3.3, Candor Toward The Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 3-5.3. Selection of Court Members

(a) The trial counsel should prepare himself or herself prior to trial to discharge effectively the prosecution function in the selection of the court and the exercise of challenges for cause and peremptory challenges.

(b) In those cases where it appears necessary to conduct a pretrial investigation of the background of court members, investigatory methods of the trial counsel should neither harass nor unduly embarrass potential court members or invade their privacy and, wherever possible, should be restricted to an investigation of records and sources of information already in existence.

(c) The opportunity to question court members should be used solely to obtain information for the intelligent exercise of challenges. A trial counsel should not intentionally use the *voir dire* to present factual matters which the trial counsel knows will not be admissible at trial or to argue the trial counsel's case to the court members.

DISCUSSION

This standard refers specifically to *voir dire* and trial counsel's preparation for *voir dire*. See R.C.M. 912, regarding questionnaires submitted to detailed court members. If the trial counsel is aware of any matters which might be grounds for a valid challenge for cause against a member, he or she should so advise the SJA for the convening authority prior to trial. See also *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976).

Standard 3-5.4. Relations with Court Members

- (a) [Modified] It is unprofessional conduct for a trial counsel to communicate privately with court members concerning a case before or during trial. The trial counsel should avoid the reality or the appearance of any such improper communications.
- (b) The trial counsel should treat court members with deference and respect, but should avoid the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
- (c) [Modified] After discharge of the members from further consideration of a case, it is unprofessional conduct for the trial counsel to intentionally make comments to or ask questions of a court member for the purpose of harassing or embarrassing the member in any way which will tend to influence judgment in future cases.

DISCUSSION

It is permissible for the trial counsel to ask a court member for a critique of his or her performance in the trial, so long as such request does not involve soliciting from the court member his or her vote on the findings and/or sentence. It is also permissible for the trial counsel to communicate the time and place court members should report or other similar administrative matters. See Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 3-5.5. Opening Statement

The trial counsel's opening statement should be confined to a statement of the issues in the case and remarks on evidence the trial counsel intends to offer which the trial counsel believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

Standard 3-5.6. Presentation of Evidence

- (a) It is unprofessional conduct for a trial counsel knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.
- (b) It is unprofessional conduct for a trial counsel knowingly and for the purpose of bringing inadmissible matters to the attention of the military judge or court members to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the military judge or court members.
- (c) It is unprofessional conduct for a trial counsel to permit any tangible evidence to be displayed in the view of the military judge or court members, which would tend to prejudice fair consideration by the military judge or members until such time as a good faith tender of such evidence is made.
- (d) It is unprofessional conduct to tender tangible evidence in the view of the court members if it would tend to prejudice fair consideration by the members, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

DISCUSSION

In a trial before members, if the trial counsel has reason to believe that there will be an objection to an item of evidence, the evidence should be offered in an Article 39(a), UCMJ, session, and a

ruling on admissibility obtained from the military judge. See Military Rules of Evidence (M.R.E.) 103(c).

Standard 3-5.7. Examination of Witnesses

- (a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
- (b) [Modified] The trial counsel's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A trial counsel should not abuse the power of cross-examination to discredit or undermine a witness if the trial counsel knows the witness is testifying truthfully.
- (c) A trial counsel should not call a witness in the presence of court members who the trial counsel knows will claim a valid privilege not to testify.
- (d) It is unprofessional conduct for a trial counsel to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

DISCUSSION

If the trial counsel is informed in advance that a witness will claim a privilege, and the trial counsel wishes to contest the claim or demonstrate the witness's unavailability, the matter should be treated without the members present in an Article 39(a), UCMJ, session. See M.R.E. 104 and Rule 3.4, Fairness to Opposing Party and Counsel. This rule by no means precludes trial counsel from legitimately impeaching witnesses as to the accuracy and completeness of their recollections, their biases, their ability to perceive the facts and events, etc.

Subsection (b) has been modified to recognize a trial counsel's dilemma when faced with a witness who incorrectly believes he or she is testifying truthfully, or who offers an ill-considered, but true, opinion. In the second sentence of the subsection, the word "use" in the ABA Standard has been replaced by the word "abuse."

Standard 3-5.8. Argument to the Court Members

- (a) The trial counsel may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the trial counsel intentionally to misstate the evidence or mislead the court members as to inferences that they may draw.
- (b) It is unprofessional conduct for the trial counsel to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence, or the guilt of the accused.
- (c) The trial counsel should not use arguments calculated to inflame the passions or prejudices of the court members.
- (d) The trial counsel should refrain from any argument which would divert the court from its duty to decide the case on the evidence.
- (e) [Added] It is the responsibility of the military judge to ensure that argument to the court members is kept within proper, accepted bounds.

DISCUSSION

Arguments on findings are governed by R.C.M. 919. Sentencing arguments are regulated by R.C.M. 1001(g). It is permissible, in sentencing argument, to refer to deterrence of others from committing a similar offense as that of the accused, as long as such argument is reasonably balanced with the other sentencing goals. The military judge always has a *sua sponte* obligation to ensure that arguments are proper, and, if improper argument occurs, to immediately give

appropriate curative instructions, even in the absence of objection by the defense. See also Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 3-5.9. Facts Outside the Record

It is unprofessional conduct for the trial counsel to intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.

DISCUSSION

This standard in military practice would apply not only to the trial counsel, but also to counsel from the Appellate Government Division who are assigned to the case on appeal. See Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Standard 4-7.9. C.f., M.R.E. 201 and 201A.

Standard 3-5.10. Comments by Prosecutor after Trial

The prosecutor should not make public comments critical of the findings or sentence, whether rendered by military judge or court members.

DISCUSSION

See AFI 51-201, Chapter 12; ABA Standard 8-1.1, Extrajudicial Statements by Lawyers; and Rule 3.6, Trial Publicity.

SECTION VI. Sentencing

Standard 3-6.1. Role in Sentencing

(a) The trial counsel should not make the severity of sentences the index of his or her effectiveness. To the extent that the trial counsel becomes involved in the sentencing process, he or she should seek to insure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

[(b) and (c) omitted]

DISCUSSION

See R.C.M. 1001.

Standard 3-6.2. Information Relevant to Sentencing [Omitted]

DISCUSSION

See R.C.M. 1001 for sentencing procedures. The trial counsel will disclose to the defense, upon request, the information described in R.C.M. 701(a)(5).

**CHAPTER 2
THE DEFENSE FUNCTION**

SECTION I. Role of Defense Counsel

Standard 4-1.1. The Function of the Standards

These standards are intended to be used as a guide to professional conduct and performance. They are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction. They may or may not be relevant in such judicial evaluation, depending upon all the circumstances.

Standard 4-1.2. Role of Defense Counsel

- (a) Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as an entity consisting of the military judge, court members (where appropriate), trial counsel and defense counsel.
- (b) The basic duty the defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.
- (c) [Omitted]
- (d) The defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.
- (e) The defense counsel, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts and codes, canons, or other standards of professional conduct. The defense counsel has no duty to execute any directive of the accused which does not comport with law or such standards. The defense counsel is the professional representative of the accused, not the accused's alter ego.
- (f) It is unprofessional conduct for a defense counsel intentionally to misrepresent matters of fact or law to the court.
- (g) Defense counsel should disclose to the tribunal legal authority in the controlling jurisdiction known to defense counsel to be directly adverse to the position of the accused and not disclosed by the prosecutor.
- (h) It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, applicable in defense counsel's jurisdiction. The functions and duties of defense counsel are the same whether defense counsel is assigned or (in the case of civilian lawyers) privately retained.
- (f) As used in this chapter, the term "unprofessional conduct" denotes conduct which, in either identical or similar language, is or should be made subject to disciplinary sanctions pursuant to codes of professional responsibility. Where other terms are used, the standard is intended as a guide to honorable conduct and performance.

Standard 4-1.3. Delays: Punctuality (a) Defense counsel should act with reasonable diligence and promptness in representing a client.

- (b) Defense counsel should avoid unnecessary delay in the disposition of cases. Defense counsel should be punctual in attending court and in the submission of all motions, briefs and other papers. Defense counsel should emphasize to the client and all witnesses the importance of punctuality and attending court.
- (c) It is unprofessional conduct for defense counsel intentionally to misrepresent facts or otherwise mislead the court in order to obtain a continuance.
- (d) Defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis.
- (e) [omitted]

DISCUSSION

Implicit in this standard is the understanding that defense counsel must provide effective representation to each and every client. The term "unnecessary delay" should be interpreted as delays beyond the time reasonably necessary to adequately prepare and represent each client. What is "reasonably necessary" will vary based upon several factors, including the number and complexity of cases counsel is responsible for, the availability of resources and witnesses and a variety of other factors.

By way of illustration, the omitted subsection (e) addresses lawyers who accept more employment than they can effectively handle. While military defense counsel do not enjoy the luxury of voluntarily limiting the number of clients they represent, they must be equally mindful of the limits of their effectiveness. Such limitations may affect appointment of counsel. See Rule 1.2, Establishment and Scope of Representation; Rule 1.3, Diligence; Rule 3.2, Expediting Litigation; and Rule 3.3, Candor Toward the Tribunal.

Standard 4-1.4. Public Statements

Defense counsel should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if defense counsel knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

DISCUSSION

See Rule 3.6, Trial Publicity, and Standard 8-1.1.

Standard 4-1.5 Advisory Committee on Professional Responsibility and Standards

[Modified] Counsel should be aware of The Judge Advocate General's Advisory Committee on Professional Responsibility and Standards. The committee consists of the Directors of Civilian Professional Development, Plans and Programs, the USAF Judiciary, and Civil Law and Litigation. Defense counsel inquiries to the Advisory Committee that are submitted through the Trial Defense Division enjoy the same confidentiality as the client is entitled to through the lawyer-client relationship. The Advisory Committee may issue binding advisory opinions with the concurrence of The Judge Advocate General.

Standard 4-1.6. Trial Lawyer's Duty to Administration of Justice [Omitted]

DISCUSSION

Generally, this standard encourages all experienced trial lawyers to qualify themselves and stand ready to undertake the defense of an accused. It was omitted as not entirely consistent with the establishment and administration of an independent defense bar within the Air Force.

Conceivably, it could apply in the case of individually requested counsel, who must be qualified and certified under Article 27(b), UCMJ, in order to act in that capacity. The same standards govern a defense counsel's conduct regardless, of whether or not he or she is assigned to the Air Force Trial Defense Division. See R.C.M. 502(d)(6).

SECTION II. Access to Counsel

Standard 4-2.1. Communication

Standard 4-2.2. Referral Service for Criminal Cases**Standard 4-2.3. Prohibited Referrals**

[All omitted]

DISCUSSION

See AFI 51-201

SECTION III. Lawyer-Client Relationship**Standard 4-3.1. Establishment of Relationship**

(a) Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation and whether defense counsel will continue to represent the accused if there is an appeal. Counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

(b) To ensure the privacy essential for confidential communication between a lawyer and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication between client and lawyer relating to any legal action arising out of charges or incarceration.

DISCUSSION

See generally, M.R.E. 502; AFI 31-205, *The Air Force Corrections System*; Rule 1.4, Communication; and Rule 1.6, Confidentiality of Information.

Standard 4-3.2. Interviewing the Client

(a) As soon as practicable the defense counsel should seek to determine all relevant facts known to the accused. In so doing, counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) It is unprofessional conduct for the Defense counsel to instruct the client or to intimate to the client in any way that the client should not be candid in revealing facts so as to afford the defense counsel free rein to take action which would be precluded by counsel's knowing of such facts.

Standard 4-3.3. Fees

[Omitted]

DISCUSSION

Military lawyers do not charge or collect fees; however, civilian lawyers practicing before Air Force courts-martial are bound by state and federal bar standards. See ABA Rule 1.5, Fees.

Standard 4-3.4. Obtaining Publication Rights from the Accused

[Omitted as inapplicable; see DOD 5500.7R, Chapter 2, and Rule 1.8, Conflict of Interest: Prohibited Transactions.]

Standard 4-3.5. Conflicts of Interest

- (a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.
- (b) Defense counsel should disclose to the accused at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the accused's selection of a lawyer to represent him or her or the lawyer's continued representation. Such disclosure should include communication of information reasonably sufficient to permit the client to appreciate the significance of any conflict or potential conflict of interest.
- (c) Except for preliminary matters such as initial hearings, counsel should not undertake to defend more than one accused in the same criminal case if the duty to one accused may conflict with the duty to another. The potential for conflict of interest is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants, except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the accused represented, and in either case, that:
- (i) each accused gives an informed consent to such multiple representation; and
 - (ii) the consent of each accused is made a matter of judicial record.
- In determining the presence of consent by each accused, the military judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether each accused fully comprehends the difficulties that a defense counsel sometimes encounters in defending multiple clients.
- [(d) through (k) omitted]

DISCUSSION

See generally, *Wheat v. United States*, 108 S.Ct. 1692 (1988); *United States v. Newak*, 24 M.J. 238 (C.M.A. 1987); *United States v. Devitt*, 24 M.J. 307 (C.M.A. 1987); *United States v. Hurtt*, 22 M.J. 134 (C.M.A. 1986); also, *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981); R.C.M. 502(d)(2); and Rules 1.7 to 1.9, Conflict of Interest.

Standard 4-3.6. Prompt Action To Protect the Accused

Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Counsel should consider all procedural steps which in good faith may be taken, including, for example, moving to seek pretrial release of the accused, obtaining psychiatric examination of the accused when a need appears, moving for change of venue or continuance, moving to suppress illegally obtained evidence, moving for severance from jointly charged defendants, and seeking dismissal of the charges.

DISCUSSION

See R.C.M. 502(d)(6); Rule 1.3, Diligence; Rule 3.1, Meritorious Claims and Contentions; Rule 3.2, Expediting Litigation; and Rule 3.3, Candor Toward the Tribunal.

Standard 4-3.7. Advice and Service on Anticipated Unlawful Conduct

- (a) It is a defense counsel's duty to advise a client to comply with the law, but the lawyer may advise concerning the meaning, scope, and validity of the law.
- (b) It is unprofessional conduct for a Defense counsel to counsel a client in or knowingly assist a client to engage in conduct which counsel knows to be illegal or fraudulent but defense counsel may discuss the legal consequences of any proposed course of conduct with a client.

- (c) [Modified] It is unprofessional conduct for a Defense counsel to agree in advance of the commission of a crime that counsel will serve as counsel for the accused, except as part of a *bona fide* effort to determine the validity, scope, meaning, or application of the law.
- (d) A defense counsel shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (e).
- (e) [Added] A defense counsel may reveal such information to the extent the lawyer reasonably believes necessary:
- (i) to prevent the client from committing a criminal act that the defense counsel believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or
 - (ii) to establish a claim or defense on behalf of the defense counsel in a controversy between counsel and client, to establish a defense to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a defense counsel's representation of the client.
 - (iii) to prevent the client from attempting suicide or causing serious bodily harm to herself or himself; or
 - (iv) to assist Air Force authorities in locating the client when those authorities believe the client may attempt suicide or cause serious bodily harm to herself or himself.

DISCUSSION

Subparagraph (d) was substituted and subparagraph (e) was added in order to eliminate inconsistency with Rule 1.6, Confidentiality. A defense counsel's duty to a client is a strong one. There may be situations where a defense counsel can act to avoid and prevent ongoing or potential misconduct without violating client confidences, and these alternatives should be considered first. Only in the very extreme and limited circumstances described above may a lawyer be excused from his fundamental obligation to preserve client confidences. Submissions by an appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), are included in the category of complaints against counsel discussed in subsection (e)(2); however, counsel may not reveal confidences that are either beyond the scope or irrelevant to such complaints. See Rule 1.2, Establishment and Scope of Representation; Rule 1.6, Confidentiality of Information; and Standard 4-7.7.

Subparagraphs (e)(iii) and (e)(iv) were added to preclude even the appearance of an ethical violation if a counsel discloses either confidences or information pertaining to the representation of a client to prevent a client from attempting suicide or physically harming himself or herself. These additions derive primarily from the fact that self-injuries are criminal acts under the UCMJ. Counsel in such circumstances should disclose only so much information as is necessary to prevent the client from harming himself or herself and should not forego opportunities to prevent clients from harming themselves via means other than disclosure of protected information.

Standard 4-3.8. Duty To Keep Client Informed

(a) Defense counsel has a duty to keep the accused informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.

(b) Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

DISCUSSION

See R.C.M. 502(d)(6) and Rule 1.4, Communication.

4.3.9. Obligations of Hybrid or Standby Counsel [Omitted]

SECTION IV. Investigation and Preparation

Standard 4-4.1. Duty To Investigate

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

DISCUSSION

See R.C.M. 502(d)(6); R.C.M. 701; Rule 1.1, Competence; and *United States v Polk*, 32 M.J. 150 (C.M.A. 1991).

Standard 4-4.2. Illegal Investigation

It is unprofessional conduct for defense counsel knowingly to use illegal means to obtain evidence or information or to employ, instruct, or encourage others to do so.

DISCUSSION

See Rule 3.4, Fairness to Opposing Party and Counsel; Rule 5.1, Responsibilities of a Supervisory Lawyer; and Rule 5.3, Responsibilities Regarding Nonlawyer Assistants.

Standard 4-4.3. Relations with Prospective Witnesses

(a) Defense counsel, in representing an accused, should not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) It is unprofessional conduct to compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse a witness for the reasonable expenses consistent with guidance in the Joint Travel Regulations, provided there is no attempt to conceal reimbursement.

(c) It is not necessary for defense counsel or an investigator for the defense, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel.

(d) A defense counsel should not discourage or obstruct communication between prospective witnesses and the trial counsel. It is unprofessional conduct to advise any person, other than a client, or cause such person to be advised to decline to give to the trial counsel or counsel for co-defendants information which such person has a right to give.

(e) Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, counsel should avoid interviewing a prospective witness, except in the presence of a third person.

DISCUSSION

See Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.7, Lawyer as Witness; Rule 4.1, Truthfulness in Statements to Others; Rule 4.2, Communication With Person Represented by Counsel; Rule 4.3, Dealing with Unrepresented Person; and Rule 4.4, Respect for Rights of Third Persons. But see *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988), and *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988).

Subsection (c) recognizes that a defense counsel need not advise a prospective military witness of his or her rights. *Contra United States v. Duga*, 10 M.J. 206, 210 (C.M.A. 1981) ("because of military rank, duty, or other similar relationship, there might be subtle pressure on a subject to respond to an inquiry"). But see *United States v. Loukas*, 29 M.J. 385, 387 (C.M.A. 1990) (inquiry must be part of a law enforcement or disciplinary investigation).

Standard 4-4.4. Relations with Expert Witnesses

- (a) A defense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the information of the expert's opinion on the subject. To the extent necessary, counsel should explain to the expert his or her role in the trial as an impartial witness called in to aid the fact finders, and the manner in which the examination of witnesses is conducted.
- (b) It is unprofessional conduct for a defense counsel to pay an excessive fee for the purpose of influencing the expert's testimony or to fix the amount of the fee contingent upon the testimony the expert will give or the result in the case.

DISCUSSION

See *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987); Rule 3.4, Fairness to Opposing Party and Counsel; Rule 4.1, Truthfulness in Statements to Others; and Rule 4.3, Dealing With Unrepresented Person.

Standard 4-4.5. Compliance with Discovery Procedure

Defense counsel should make a reasonably diligent effort to comply with a legally proper discovery request.

DISCUSSION

See generally, R.C.M. 701(b); Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and AFSCJ, Chapter 5.

4-4.6. Physical Evidence

- (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d)
- (b) Unless required to disclose, defense counsel should return the item to the source from whom the defense counsel received it, except as provided in paragraphs (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining

to the possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which the defense counsel: (1) intends to return it to the owner; (2) reasonably fears that the return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to examine, inspect, or use the item in any way as part of the defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c)(1), he or she should do so in the way best designed to protect the client's interests.

SECTION V. Control and Direction of Litigation

Standard 4-5.1. Advising the Accused

(a) After informing himself or herself fully on the facts and the law, the defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) It is unprofessional conduct for the defense counsel intentionally to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) The defense counsel should caution the client to avoid communication about the case with the witnesses, except with the approval of counsel, to avoid any contact with court members or prospective court members, and to avoid either the reality or the appearance of any other improper activity.

DISCUSSION

See Rule 1.2, Establishment and Scope of Representation; Rule 1.4, Communication; Rule 2.1, Advisor; Rule 3.1, Meritorious Claims and Contentions; Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 4-5.2. Control and Direction of the Case

(a) [Modified] Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

- (i) which pleas to enter;

- (ii) whether to accept a pre-trial agreement
 - (iii) whether to waive trial by court members, or if the accused elects trial by court members, whether to request enlisted members; and
 - (iii) whether to testify in his or her own behalf.
- (b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what court members to challenge, what trial motions should be made, and what evidence should be introduced.
- (c) If a disagreement on significant matters of tactics or strategy arises between the defense counsel and the accused, the defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship.

DISCUSSION

See Rule 1.2, Establishment and Scope of Representation; Rule 1.6, Confidentiality of Information; R.C.M. 502(d)(6); R.C.M. 910; and Standard 4-8.2.

SECTION VI. Disposition without Trial

Standard 4-6.1. Duty to Explore Disposition without Trial

- (a) Whenever the law, nature, and circumstances of the case permit, the defense counsel should explore the possibility of an early diversion of the case from the criminal process.
- (b) A defense counsel may engage in plea discussions with the convening authority through the SJA. Under no circumstances should a defense counsel recommend that an accused accept a plea agreement unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.

DISCUSSION

See R.C.M. 705 and 910(f)(1). Examples of "diversions" from the criminal process in military practice are resignations for the good of the service, requests for administrative discharge in lieu of court-martial, retirement requests, etc. See also Rule 1.2, Establishment and Scope of Representation; Rule 1.4, Communication; and Rule 2.1, Advisor.

Standard 4-6.2. Plea Discussions

- (a) Defense counsel should keep the accused advised of developments arising out of plea discussions conducted with the trial counsel.
- (b) Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the trial counsel.
- (c) It is unprofessional conduct for a defense counsel knowingly to make false statements concerning the evidence in the course of plea discussions with the trial counsel.
- (d) It is unprofessional conduct for a defense counsel to seek concessions favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case.
- (e) [Modified] Defense counsel representing two or more clients in the same or related cases should not participate in making an aggregated agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved.

DISCUSSION

See Rule 1.4, Communication; Rules 1.7 to 1.9, Conflict of Interest; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; R.C.M. 502, 705, and 910; and AFI 51-201, Chapter 6. See also *United States v. Newak*, 24 M.J. 238 (C.M.A. 1987).

SECTION VII. Trial

Standard 4-7.1. Courtroom Professionalism

- (a) As an officer of the court, the defense counsel should support the authority of the court and the dignity of the trial courtroom by strict adherence to the codes of professionalism, and by manifesting a professional attitude toward the military judge, opposing counsel, witnesses, court members, and others in the courtroom.
- (b) Defense counsel should not engage in unauthorized *ex parte* discussions with or submission of material to a military judge relating to a particular case which is or may come before the judge.
- (c) When court is in session, defense counsel should address the court and should not address the trial counsel directly on all matter relating to the case.
- (d) The defense counsel should comply promptly with all orders and directives of the court, but the defense counsel has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests. Defense counsel has a right to make respectful requests for reconsiderations of adverse rulings.
- (e) Counsel should cooperate with courts and the organized bar in developing codes of professionalism for each jurisdiction.

DISCUSSION

The Chief Trial Judge, USAF Trial Judiciary may promulgate rules for courts-martial. See *United States v. Klein*, 20 M.J. 26, 28 (C.M.A. 1985) ("Counsel should not hesitate, in the zealous representation of their clients, to pin the military judge down to preserve an issue"). See also Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.2. Selection of Court Members

- (a) The defense counsel should prepare himself or herself before trial to discharge effectively his or her function in the selection of court members, including the raising of any appropriate issues concerning the method by which the court panel was selected and the exercise of both challenges for cause and peremptory challenges.
- (b) In those cases where it appears necessary to conduct a pretrial investigation of the background of court members, investigatory methods of a defense counsel should neither harass nor unduly embarrass potential court members or invade their privacy and, wherever possible, should be restricted to an investigation of records and sources of information already in existence.
- (c) The opportunity to question court members personally should be used solely to obtain information for the intelligent exercise of challenges. Defense counsel should not intentionally use the *voir dire* to present factual matters which counsel knows will not be admissible at trial or to argue the defense counsel's case to the court members.

DISCUSSION

See R.C.M. 912; Rule 3.3, Candor Toward The Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 4.4, Respect for Rights of Third Persons; and *United States v. Credit*, 2 M.J. 631 (A.F.C.M.R. 1976).

Standard 4-7.3. Relations with Court Members

- (a) [Modified]It is unprofessional conduct for defense counsel to communicate privately with court members concerning the case before or during the trial. The defense counsel should avoid the reality or appearance of any such improper communications.
- (b) Defense counsel should treat court members with deference and respect, avoiding the reality or appearance of currying favor by a show of undue solicitude for their comfort or convenience.
- (c) After discharge of the court members from further consideration of the case, it is unprofessional conduct for a defense counsel to intentionally make comments to or ask questions of a court member in any way which will tend to influence judgment in future service as a court member. If the defense counsel believes that the findings or sentence may be subject to legal challenge, counsel may properly communicate with court members to determine whether such challenge may be available.

DISCUSSION

Nothing precludes a lawyer from seeking a critique or clemency recommendation from a court member. What is prohibited are "improper" communications which may be further defined by the Uniform Rules of Practice Before Air Force Courts-Martial. See M.R.E. 606(b) and R.C.M. 923. It is permissible for defense counsel to ask a court member to critique his or her performance in the trial, so long as the request does not involve soliciting the court member's vote on findings or sentence. See also Standard 3-5.4, and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.4. Opening Statement

Defense counsel's opening statement should be confined to a brief statement of the issues in the case and evidence counsel intends to offer which the counsel believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted into evidence.

DISCUSSION

See R.C.M. 502(d)(6); Rule 3.3, Candor Toward the Tribunal; and Rule 3.4, Fairness to Opposing Party and Counsel.

Standard 4-7.5. Presentation of Evidence

- (a) It is unprofessional conduct for a defense counsel knowingly to offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity.
- (b) It is unprofessional conduct for a defense counsel knowingly and for the purpose of bringing inadmissible matter to the attention of the military judge or court members to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the military judge or court members.

- (c) It is unprofessional conduct to permit any tangible evidence to be displayed in the view of the military judge or court members which would tend to prejudice fair consideration of the case by the military judge or members until such time as a good faith tender of such evidence is made.
- (d) It is unprofessional conduct to tender tangible evidence in the presence of the military judge or court members if it would tend to prejudice fair consideration of the case, unless there is a reasonable basis for its admission in evidence. When there is any substantial doubt about the admissibility of such evidence, it should be tendered by an offer of proof and a ruling obtained.

DISCUSSION

In a trial before members, when defense counsel has reason to anticipate an objection to certain evidence, the evidence should be offered in an Article 39(a), UCMJ, session outside the members' presence. See M.R.E. 103(c); Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.6. Examination of Witnesses

- (a) The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.
- (b) A defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination.
- (c) A defense counsel should not call a witness in the presence of the members who the lawyer knows will claim a valid privilege not to testify.
- (d) It is unprofessional conduct for a defense counsel to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking.

DISCUSSION

See M.R.E. 104; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 4-7.7. Argument to the Court Members

- (a) In closing argument to the court members, the defense counsel may argue all reasonable inferences from the evidence in the record. It is unprofessional conduct for a defense counsel intentionally to misstate the evidence or mislead the court members as to the inferences it may draw.
- (b) It is unprofessional conduct for a defense counsel to express a personal belief or opinion in the accused's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
- (c) A defense counsel should not make arguments calculated to appeal to the prejudices of the court members.
- (d) A defense counsel should refrain from argument which would divert the court members from their duty to decide the case on the evidence.
- (e) [Added] It is the responsibility of the military judge to ensure that final argument to the court members is kept within proper, accepted bounds.

DISCUSSION

Closing arguments on findings are regulated by R.C.M. 919. Sentencing arguments are controlled by R.C.M. 1001(g). Subsection (d) should be read as to apply to arguments on findings. Defense counsel may argue broader issues and the consequences of the conviction during sentencing arguments within the context of the appropriate purposes of sentencing. See Rules 3.3, Candor Toward the Tribunal; 3.4, Fairness to Opposing Party and Counsel; and 3.5, Impartiality and Decorum of the Tribunal. Compare Standard 3-5.8.

Standard 4-7.8. Facts Outside the Record

It is unprofessional conduct for a defense counsel intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which a court can take judicial notice.

DISCUSSION

See Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and M.R.E. 201 and 201A.

Standard 4-7.9. Post-Trial Motions

The trial defense counsel's responsibility includes presenting appropriate motions, after findings and before sentence, to protect the accused's rights.

DISCUSSION

Examples include, but are not limited to, motions to hold charges multiplicitous for sentencing and motions for pretrial confinement credit, etc.

Standard 4-7.10. False Testimony by the Accused [Added]

(a) If the accused has admitted to defense counsel facts which establish guilt and counsel's independent investigation has established that the admissions are true, but the accused insists on the right to trial, counsel must discourage the accused from taking the witness stand to testify falsely.

(b) If, in advance of trial, the accused insists that he or she will take the stand to testify falsely, the defense counsel may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of counsel's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the accused insists upon testifying falsely in his or her own behalf, it is unprofessional conduct for the defense counsel to lend aid to the perjury or use the perjured testimony. Before the accused takes the stand in these circumstances, the defense counsel should make a record of the fact that the accused is taking the stand against the advice of counsel in some appropriate manner. The defense counsel may identify the witness as the accused and may ask appropriate questions of the accused when it is believed that the accused's answers will not be perjurious. As to matters for which it is believed that the accused will offer perjurious testimony, counsel should not conduct direct examination. A defense counsel may not later argue the accused's known false version of the facts to the court members as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

(d) [Added] In the event that the accused clearly testifies falsely on a material matter, despite counsel's advice and other actions to dissuade the accused from doing so, defense counsel shall disclose the perjury to the court. In a trial by members, defense counsel should disclose the perjury to the military judge *ex parte*.

DISCUSSION

Lawyers should be cautioned that the "lying client" situation is rare. These rules apply when the lawyer knows the accused has committed perjury. Lawyers should recognize that "the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked." *Nix v. Whiteside*, 475 U.S. 157, 191; 106 S.Ct. 988, 1006 (1986). Suspicions are not enough. See *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). As implicitly recognized in subsections (a) and (b), the client has ultimate authority to decide whether he or she will testify. The lawyer may not attempt to preempt the "lying client" problem by refusing to allow the client to take the stand.

Counsel must carefully balance the obligation to preserve client confidences (Rule 1.6) and the duty of candor to the court (Rule 3.3). Although subsection (d) requires disclosure of false testimony to the court, counsel must be careful to limit such disclosure in order to preserve all other client confidences.

Just as subsection (c) admonished counsel to make appropriate records before trial when the accused will take the stand against the advice of counsel, post-trial records should be equally clear. In a situation where counsel has been surprised by a client's unexpected perjury on the stand, counsel should consult the chief senior defense counsel immediately after trial and prepare a written record for his or her files.

This section was withdrawn by the ABA Standing Committee on Association Standards for Criminal Justice before submission to the ABA House of Delegates in 1979. It is included here, with significant modifications, to provide needed guidelines consistent with the requirements of Rules 1.6 and 3.3, and the guidance provided in dicta in the Supreme Court plurality decision of *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986).

SECTION VIII. After Conviction

Standard 4-8.1. Sentencing

(a) The defense counsel should, at the earliest possible time, be or become familiar with the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either sentencing or parole stages. The consequences of the various dispositions available should be explained fully by the defense counsel to the accused.

(b) [Modified] Defense counsel should present to the court any ground which will assist in reaching a proper disposition favorable to the accused.

(c) [Omitted]

(d) Defense counsel should alert the accused to the right of allocution and to the possible dangers of making a judicial confession in the course of allocution which might prejudice an appeal.

(e) [Added] Trial defense counsel should take all appropriate post-trial actions to seek relief from the convening authority in the form of clemency or approving findings or a sentence less severe than that adjudged. *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

DISCUSSION

See R.C.M. 1001(c).

Standard 4-8.2. Appeal

(a) After conviction, the defense counsel should explain to the accused the meaning and consequences of the court's judgment and the accused's appellate rights. The defense counsel should give the accused his or her professional judgment as to whether or not there is a meritorious ground for appeal and as to the probable results of an appeal. The defense counsel should also explain to the accused the advantages and disadvantages of an appeal. The decision to withdraw a case from appellate review must be the accused's own choice.

[(b) Omitted]

DISCUSSION

See R.C.M. 1102, 1105, and 1106(f); Rule 1.4, Communication; Rule 3.1, Meritorious Claims and Contentions; and Standard 4-5.2.

Standard 4-8.3. Counsel on Appeal

(a) Appellate defense counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit.

(b) Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence including any that might require initial presentation in a post conviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

(c) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

(d) [Omitted]

(e) [Omitted]

DISCUSSION

See Rule 1.16, Declining or Terminating Representation; and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Standard 4-8.4. Conduct of Appeal

(a) Appellate counsel should be diligent in perfecting an appeal and expediting its prompt submission to the appellate court.

(b) Appellate counsel should be accurate in referring to the record and the authorities upon which counsel relies in the presentation to the court of briefs and oral argument.

(c) [Modified] It is unprofessional conduct for Appellate Counsel to intentionally refer to or argue on the basis of facts outside the record on appeal, unless such facts are matters of common public knowledge based on ordinary human experience, matters of which the court may take judicial notice, or other matters that are properly before the court.

DISCUSSION

Subsection (c) was slightly modified to add other matters properly before the court. This recognizes unique aspects of military practice such as the fact finding powers of the Air Force Court of Criminal Appeals (Article 66(c), UCMJ), and consideration of post-trial matters such as the *Goode* response and other clemency materials. See generally, Rule 1.3, Diligence; Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; Rule 3.5, Impartiality and Decorum of the Tribunal; Articles 61-67 and 70, UCMJ; R.C.M. 1202 and 1205; *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Standard 4-8.5. Post-Conviction Remedies

After a conviction is affirmed on appeal, appellate counsel should determine whether there is any ground for relief under other post-conviction remedies. If there is a reasonable prospect of a favorable result, counsel should explain to the appellant the advantages and disadvantages of taking such action. Appellate counsel is not obligated to represent the accused in a post-conviction proceeding unless counsel has agreed to do so. In other respects, the responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.

DISCUSSION

"Post-conviction remedies" refers to remedies beyond legal appeals, such as applications to the Board for Correction of Military Records or submissions to the Clemency and Parole Board. See Rule 1.4, Communication; Rule 2.1, Advisor; and Rule 3.1, Meritorious Claims and Contentions.

Standard 4-8.6. Challenges to the Effectiveness of Counsel

(a) If an appellate defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case did not provide effective assistance, he or she should not hesitate to seek relief for the accused on that ground.

(b) If an appellate defense counsel, after investigation, is satisfied that another defense counsel who served in an earlier phase of the case provided effective assistance, he or she should so advise the client and may decline to proceed further.

(c) If defense counsel concludes that he or she did not provide effective assistance in an earlier phase of the case, defense counsel should explain this conclusion to the accused and seek to withdraw from representation with an explanation to the court of the reason therefor.

(d) Counsel whose conduct of a criminal case is drawn into question is entitled to testify concerning the matters charged and is not precluded from disclosing the truth concerning the accusation to the extent defense counsel reasonably believes necessary, even though this involves revealing matters which were given in confidence.

DISCUSSION

Counsel must continue to balance the obligation to preserve client confidences against his or her right and need to respond to allegations of ineffective assistance or misconduct. Disclosures must be limited in order to preserve confidences beyond the scope and unrelated to the allegations. Subsection (b) is limited by the application of *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). See Rule 1.6, Confidentiality of Information; Rule 3.1, Meritorious Claims and Contentions; Rule 3.7, Lawyer as Witness; Rule 4.4, Respect for Rights of Third Persons; and Rule 8.3, Reporting Professional Misconduct.

CHAPTER 3 SPECIAL FUNCTIONS OF THE MILITARY JUDGE

SECTION I. Basic Duties

Standard 6-1.1 General Responsibility of the Military Judge

(a) The military judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the military judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and, if necessary, to adjudge an appropriate sentence, and the military judge should not allow the proceedings to be used for any other purpose.

(b) The military judge should require that every proceeding before him or her be conducted with unhurried and quiet dignity, and should aim to establish such physical surroundings as are appropriate to the administration of justice. The military judge should give each case individual treatment, and the judge's decisions should be based on the particular facts of that case. The military judge should conduct the proceedings in clear and easily understandable language, using interpreters when necessary.

(c) The military judge should be sensitive to the important roles of the trial counsel, defense counsel, witnesses, court members and the interests of the accused, victim and public; and the judge's conduct toward them should manifest professional respect, courtesy, and fairness.

DISCUSSION

See R.C.M. 801(a); AFI 51-201, paragraph 1.3; ABA Code of Judicial Conduct; and Rule 3.5, Impartiality and Decorum of the Tribunal.

Standard 6-1.2. Community Relations

(a) The military judge may promote efforts to educate the community on the operation of the criminal justice system. However, in endeavoring to educate the community, the judge should avoid activity which would give the appearance of impropriety or bias.

(b) The trial judge should not discuss pending or impending cases, and should avoid responding to personal criticism or complaints about particular decisions, other than to correct factual misrepresentation in the reporting of the ruling.

Standard 6-1.3. Adherence to Standards

The military judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the codes of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice.

DISCUSSION

Since the Air Force military judge is involved in the direct enforcement of discipline, his or her own integrity and adherence to Air Force standards of conduct and appearance must be above reproach. *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989). See also AFI 51-201, paragraph 1.3.

Standard 6-1.4. Appearance, Demeanor, and Statements of the Judge The military judge's appearance, demeanor, and statements should reflect the dignity of the judicial office and enhance public confidence in the administration of justice. The wearing of the judicial robe in the courtroom will contribute to these goals.

DISCUSSION

A judge must be particularly careful that his or her demeanor, facial expressions, and tone of voice do not convey unintended messages to the court members or other trial participants. Air Force practice dictates that military judges will wear the black judicial robe when presiding over open sessions of courts-martial, except under combat or field conditions.

Standard 6-1.5. Obligation To Use Court Time Effectively and Fairly

(a) The military judge has the obligation to avoid delays, continuances, and extended recesses, except for good cause. In the matter of punctuality, the observance of scheduled court hours, and the use of working time, the military judge should be an exemplar for all other persons engaged in the criminal case. The judge should require punctuality and optimum use of working time from all such persons.

(b) The military judge should respect the personal and professional demands on the lives of counsel, the accused, court members, witnesses, and victims, and should schedule and utilize court time remaining sensitive to these needs.

DISCUSSION

This standard again emphasizes the need for the military judge to have total control over the proceedings. The judge must remain sensitive to the perceptions of the accused, court members, and any spectators. If the court is recessed until a specified time, and in the interim the military judge grants an extension to the recess, the judge should ensure that all participants in the trial are aware of the extension and of the new time for reconvening. When the court is reconvened, it is good practice for the judge to announce on the record the fact that an additional delay was granted.

Standard 6-1.6. Duty To Maintain Impartiality

(a) The military judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow military, family, social, or other relationships to influence judicial conduct or judgment.

- (b) During the course of official proceedings, the military judge should avoid contact or familiarity with the accused, victims, witnesses, counsel, or members of the families of such persons which might give the appearance of bias or partiality
- (c) A military judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, disability, age or sexual orientation.
- (d) [Modified] It is the responsibility of the military judge to attempt to eliminate, both in chambers and in the courtroom, bias or prejudice due to race, sex, religion, national origin, disability, age, or sexual orientation.
- (e) A military judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.

DISCUSSION

See *United States v. Berman*, supra.

Standard 6-1.7. Judge's Duty Concerning Record of Judicial Proceedings

[Modified] The military judge has a duty to see that the reporter makes a true, complete, and accurate record of all proceedings, and to ensure that events in the trial are accurately described for the record and that all parties present in the courtroom are accounted for whenever the court is convened or reconvened.

Standard 6-1.8. Proceedings In and Outside of the Courtroom

- (a) The military judge should maintain a preference for live public proceedings with all parties physically present.
- (b) All significant proceedings, whether or not public, should be on the record. Relevant decisions in proceedings not on the record should be reflected in the record.
- (c) The military judge should place or permit counsel to place any germane matter on the record which has not been previously recorded.
- (d) When electronic procedures for transmission or recording are used, the proceedings transmitted or recorded should reflect the decorum of the courtroom. When the right to counsel applies, such procedures should not result in a situation where only the prosecution or defense counsel is physically present before the judge.

Standard 6-1.9. Obligation to Perform and Circumstances Requiring Recusal

- (a) The military judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned.
- (b) Military judges have an obligation to perform their judicial function and avoid recusal when not warranted.

DISCUSSION

See R.C.M. 902. A military judge must disqualify himself or herself if any of the conditions listed in R.C.M. 902(b) exist. The military judge shall, upon motion of either party or *sua sponte*, decide whether he or she is disqualified.

Standard 6-1.10. Issuance or Review of Warrants

Standard 6-1.11. Communications Concerning Prisoner Status

[All omitted]

SECTION II. General Relations with Counsel and Witnesses

Standard 6-2.1. Ex Parte Discussions of a Pending Case

The military judge should insist that neither the trial counsel nor the defense counsel, nor any other person, discuss a pending case with the judge *ex parte*, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice. The military judge should ensure that all such *ex parte* communications are subsequently noted on the record.

DISCUSSION

It is acceptable, in Air Force practice, for the military judge to discuss matters with trial or defense counsel individually which are administrative in nature, which deal with the logistics of the trial, or which involve the control of the judge's docket. Judges must also consider the effect of R.C.M. 802 on *ex parte* discussions. See *United States v. Garcia*, 24 M.J. 518 (A.F.C.M.R. 1987).

Standard 6-2.2. Duty To Witnesses

The military judge should permit full and proper examination and cross-examination of witnesses, but should require the interrogation to be conducted fairly and objectively and with due regard for the dignity and legitimate privacy of the witnesses

Standard 6-2.3. Duty To Control Length and Scope of Examination

The military judge should permit reasonable latitude to counsel in the examination and cross-examination of witnesses, but should not permit unreasonable repetition or permit counsel to pursue clearly irrelevant lines of inquiry.

DISCUSSION

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to produce additional evidence. See M.R.E. 614. In taking such action, the court must not depart from an impartial role. See also *United States v. Stroup*, 29 M.J. 224 (C.M.A. 1989); *United States v. Lents*, 32 M.J. 636 (A.C.M.R. 1991).

Standard 6-2.4. Duty of Judge on Counsel's Objections and Requests for Rulings

The military judge should respect the obligation of counsel to present objections to procedures and to the admissibility of evidence, to request rulings on motions, to make offers of proof, and to have the record show adverse rulings and reflect conduct of the judge which counsel considers prejudicial. Counsel should be permitted to state succinctly the grounds of his or her objections or requests; but the judge should nevertheless control the length, manner and timing of argument.

Standard 6-2.5. Duty of Judge to Respect Privileges

The military judge should respect the obligation of counsel to refrain from speaking on privileged matters and should avoid putting counsel in a position where counsel's adherence to the obligation, such as by a refusal to answer, may tend to prejudice the client. Unless the privilege is waived or is otherwise inapplicable, the military judge should not request counsel to comment on evidence or other matters where counsel's knowledge is likely to be gained from privileged communications.

DISCUSSION

See Discussion, Standard 4-7.7.

Standard 6-2.6. Duty to Court Members

(a) The military judge has the responsibility to treat the court members with dignity. This includes the responsibility both to inform the court members of anticipated scheduling and to assure that the court members have an opportunity to deliberate on a reasonable schedule. The military judge should also endeavor to assure that the court members have comfortable surroundings.

(b) The military judge should conduct the trial in such a way as to enhance the court members' ability to understand the proceedings and to perform its fact-finding function.

SECTION III. Maintaining Order in the Courtroom

Standard 6-3.1. Special Rules for Order in the Courtroom

The military judge, preferably before a criminal trial or at its beginning, should prescribe and make known the ground rules relating to conduct which the parties, the trial counsel, the defense counsel, the witnesses, and others will be expected to follow in the courtroom, and which are not set forth in the MCM or in the published rules of court.

DISCUSSION

The presiding military judge has the ultimate authority as to procedures to be followed in an individual court-martial.

Standard 6-3.2 Security in Court Facilities

The military judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum in the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact.

Standard 6-3.3. Colloquy between Counsel

The military judge should make known before trial that no colloquy, argument, or discussion directly between counsel in the presence of the judge or court members will be permitted on matters relating to the case, except that, if a brief conference between counsel might tend to expedite the trial, the judge will grant them leave to confer.

Standard 6-3.4. Courtroom Demeanor

(a) The military judge should be a model of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should remain neutral regarding the proceedings at all times, suppress personal predilections, control his or her temper and emotions, and be patient, respectful, and courteous to defendants, court members, witnesses, victims, lawyers, and others with whom the military judge deals in an official capacity. The military judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom.

(b) The military judge should require similar conduct of staff, court officials and others subject to the military judge's direction and control.

Standard 6-3.5. Judge's Use of Powers to Maintain Order

(a) The military judge should maintain order and decorum in judicial proceedings. The military judge has the obligation to use his or her judicial power to prevent distractions from and disruptions of the trial.

(b) When it becomes necessary during the trial for the military judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the military judge should do so outside the presence of the court members, if possible. Any such comment should be in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

Standard 6-3.6. The Accused's Election to Represent Himself or Herself at Trial

(a) An accused should be permitted, at the accused's election, to proceed in his or her trial without the assistance of counsel only after the military judge makes thorough inquiry and is satisfied that the accused:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the accused is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to counsel.

(b) When a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

DISCUSSION

See R.C.M. 506(d), regarding waiver of the right to counsel by the accused. The military judge may grant the request after pointing out to the accused that he or she has no legal training, that there are dangers and disadvantages in failing to raise motions and objections in a timely fashion and in conducting improper examination and cross-examination of witnesses, and that no special consideration can be granted merely because the accused proceeds *pro se*. See also *United States v. Beatty*, 25 M.J. 311 (C.M.A. 1987); *United States v. Bowie*, 21 M.J. 453 (C.M.A. 1986), cert. denied 107 S.Ct. 8 (1987).

Standard 6-3.7. Standby Counsel for Pro Se Accused

(a) When an accused has been permitted to proceed without the assistance of counsel, the military judge should consider the appointment of standby counsel to assist the accused when called upon. Standby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole. Standby counsel should ordinarily be appointed in cases expected to be long or complicated, or in which there are multiple accused, and in any case in which a severe sentence might be imposed.

(b) The military judge should clearly notify both the defendant and standby counsel of their respective roles and duties.

(c) When standby counsel is appointed to provide assistance to the *pro se* accused only when requested, the military judge should ensure that counsel not actively participate in the conduct of the defense unless requested by the accused or directed to do so by the court. When standby counsel is appointed to actively assist the *pro se* accused, the military judge should ensure that the accused is permitted to make final decisions on all matters, including strategic and tactical matters relating to the conduct of the case.

DISCUSSION

The standby counsel must be certified under Article 27(b), UCMJ, and may remain at the counsel table available to assist the accused throughout the trial. See *United States v. Beatty* and *United States v. Bowie*, both supra.

Standard 6-3.8. The Disruptive Accused

An accused may be removed from the courtroom during trial when the accused's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive accused. If removed, the accused should be required to be present in the court building while the trial is in progress. The removed accused should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed accused who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

DISCUSSION

Trial may proceed without the presence of an accused who has disrupted a court-martial, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom. The record of trial must clearly reflect the reasons for removing the accused. See R.C.M. 804(b), Discussion. Disruptive behavior of the accused may also constitute contempt. See R.C.M. 809.

Standard 6-3.9. Misconduct of *Pro Se* Accused

If an accused who is permitted to proceed without the assistance of counsel engages in conduct which is so disruptive, including disobeying or failing to respond to judicial orders or rulings, that the trial cannot proceed in an orderly manner, the court should, after appropriate warnings, revoke the permission and require representation by counsel. If standby counsel has previously been appointed, the counsel should be asked to represent the accused. When appropriate, the trial should be recessed only long enough for counsel to make the necessary preparations to go forward with the trial.

DISCUSSION

The right of the military accused to proceed *pro se* may be revoked if the accused is disruptive or fails to follow basic rules of decorum and practice. See R.C.M. 506(d) and R.C.M. 804.

Standard 6-3.10. Misconduct of Spectators and Others

(a) Any person who engages in conduct which disturbs the orderly process of the trial may be admonished or excluded, and, if such conduct is intentional, may be punished for contempt. Any person whose conduct in a criminal proceeding tends to menace the accused, an attorney, a victim, a witness, a juror, a court officer, the military judge, or a member of the accused's or victim's family may be removed from the courtroom.

(b) When a victim or a member of a victim's or an accused's family is removed from the courtroom during trial, he or she should ordinarily be allowed to return upon assurance of good behavior.

DISCUSSION See R.C.M. 806.

Standard 6-3.11. Lawyers from Other Jurisdictions [Omitted]**SECTION IV. Use of the Contempt Power****Standard 6-4.1. Power to Impose Sanctions**

The court has the inherent power to protect the integrity and fair administration of the criminal justice process by imposing sanctions. The military judge has the power to cite and, if necessary, punish summarily anyone who, in the judge's presence in open court, willfully obstructs the course of criminal proceedings.

DISCUSSION

See Article 48, UCMJ, and R.C.M. 809(a) and its discussion for procedures and limitations on the contempt power in military practice. See also *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988).

Standard 6-4.2. Imposition of Sanctions

If the military judge determines to impose sanctions for misconduct affecting the trial, the military judge should ordinarily impose the least severe sanctions appropriate to correct the abuse and deter repetition and should do so outside the presence of the court members, if possible. In weighing the severity of the possible sanction for disruptive courtroom conduct to be applied during the trial, the military judge should consider the risk of further disruption, delay, or prejudice that might result from the character of the sanction or the time of its imposition.

Standard 6-4.3. The Sanction of Contempt

The sanction of contempt should not be imposed by the military judge unless:

- (a) it is clear from the identity of the offender and the character of his or her acts that the disruptive conduct was willfully contemptuous; or
- (b) the conduct warranting such sanction was preceded by a clear warning that such conduct was impermissible and that specified sanctions might be imposed for its repetition.

Standard 6-4.4. Notice of Intent to Use Contempt Power; Postponement of Adjudication

(a) The military judge should, as soon as practicable after he or she is satisfied that courtroom misconduct requires contempt proceedings, inform the alleged offender of the judge's intention to institute such proceedings.

(b) The military judge should consider deferring adjudication of contempt for courtroom misconduct of an accused, an attorney, or a witness until after the trial, and should defer such a proceeding unless prompt punishment is imperative.

DISCUSSION

See *Burnett*, supra.

Standard 6-4.5. Notice of Nature of the Conduct and Opportunity to Be Heard

Before imposing any punishment for criminal contempt, the military judge should give the offender notice of the nature of the conduct and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Standard 6-4.6. Imposition of Sanctions and Referral to Another Judge

The judge before whom courtroom misconduct occurs may impose appropriate sanctions, including punishment for contempt, but should refer the matter to another judge whenever the presiding judge has any doubt about his or her ability to preside over the matter impartially, or if the presiding judge's objectivity can reasonably be questioned.

CHAPTER 4 FAIR TRIAL AND FREE PRESS

SECTION I. Conduct of Lawyers in Criminal Cases.

Standard 8-1.1. Extrajudicial Statements by Lawyers

(a) A lawyer should not make or authorize the making of an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of prejudicing a criminal proceeding.

(b) Statements relating to the following matters are ordinarily likely to have a substantial likelihood of prejudicing a criminal proceeding:

(1) the prior criminal record (including arrests, indictments, or other charges or crime) of a suspect or accused;

(2) the character or reputation of a suspect or accused;

(3) the opinion of the lawyer on the guilt of the accused, the merits of the case or the merits of the evidence in the case;

(4) the existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make a statement;

(5) the performance of any examinations or tests, or the accused's refusal or failure to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(6) the identity, expected testimony, criminal records, or credibility of prospective witnesses;

(7) the possibility of a plea of guilty to the offense charged, or other disposition; and

(8) information which the lawyer knows or has reason to know would be inadmissible as evidence in a trial.

(c) Notwithstanding paragraphs (a) and (b), statements relating to the following matters may be made:

(1) the general nature of the charges against the accused, provided that there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty;

(2) the general nature of the defense to the charges or to other public accusations against the accused, including that the accused has no prior criminal record;

(3) the name, age, residence, occupation, and family status of the accused;

(4) information necessary to aid in the apprehension of the accused or to warn the public of any dangers that may exist;

(5) a request for assistance in obtaining evidence;

(6) the existence of an investigation in progress, including the general length and scope of the investigation, the charge or defense involved, and the identity of the investigating officer or agency;

(7) the facts and circumstances of an arrest, including the time and place, and the identity of the arresting officer or agency;

(8) the identity of the victim, where the release of that information is not otherwise prohibited by law or would not be harmful to the victim;

(9) information contained within a public record, without further comment; and

(10) the scheduling or result of any stage in the judicial process.

(d) Nothing in this standard is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, to preclude any lawyer from replying to charges of misconduct that are publicly made against him or her, or to preclude or inhibit any lawyer from making an otherwise permissible statement which serves to educate or inform the public concerning the operations of the criminal justice system.

DISCUSSION

Ordinarily, the general nature of a defense to the charges in Standard 8-1.1(c)2 should only be given by defense personnel.

Standard 8-1.2. Rule of Court [Omitted]

SECTION II. The Conduct of Law Enforcement Officers, Judges, and Court Personnel in Criminal Cases

Standard 8-2.1. Release of Information by Law Enforcement Agencies

(a) The provisions of Standard 8-1.1 are applicable to the release of information to the public by law enforcement officers and agencies.

(b) Law enforcement officers and agencies should not exercise their custodial authority over an accused individual in a manner that is likely to result in either:

(1) the deliberate exposure of a person in custody for the purpose of photographing or televising by representatives of the news media; or

(2) the interviewing by representatives of the news media of a person in custody, except upon request or consent by that person to an interview after being informed adequately of the right to consult with counsel and of the right to refuse to grant an interview.

(c) Nothing in this standard is intended to preclude any law enforcement officer or agency from replying to charges of misconduct that are publicly made against him or her or from participating in any legislative, administrative, or investigative hearing, nor is this standard intended to supersede more restrictive rules governing the release of information concerning juvenile offenders.

Standard 8-2.2. Disclosures by Court Personnel

Court personnel shall not disclose to any unauthorized person information relating to a pending criminal case that is not part of the public records of the court and that may be prejudicial to the right of the United States or the accused to a fair trial.

DISCUSSION

AFI 51-201, Chapter 13, Section D sets out the information which may be provided to the media.

Standard 8-2.3. Conduct of Military Judges

Military judges should refrain from any conduct or the making of any statements that may be prejudicial to the right of the United States or of the accused to a fair trial.

DISCUSSION

Military judges will refer all press requests received by them to the servicing SJA and the installation public affairs officer.

SECTION III. The Conduct of Judicial Proceedings in Criminal Cases**Standard 8-3.1. Prohibition of Direct Restraints on Media**

Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.

Standard 8-3.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

[Omitted]

Standard 8-3.3. Change of Venue or Continuance [Omitted]**Standard 8-3.4. Severance**

In cases in which there is a substantial likelihood that one or more of the accused will not receive a fair trial because of potentially prejudicial publicity against another accused, the court shall grant severance on motion of either the prosecution or the defense.

Standard 8-3.5. Selecting the Court Members

The following standards govern the selection of a court panel in those criminal cases in which questions of possible prejudice are raised.

(a) [Modified] If there is a substantial possibility that individual court members will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each member with respect to exposure shall take place outside the presence of other chosen and prospective court members. An accurate record of this examination shall be kept by the court reporter. The questioning shall be conducted for the purpose of determining what the prospective court member has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective member that an inability to cast aside any preconceptions would be a dereliction of duty.

[(b) through (d) omitted]

DISCUSSION

Grounds for challenge for cause of a court member are included in R.C.M. 912(f). An accurate record of *voir dire* proceedings will automatically be obtained in Air Force practice, since a sworn court reporter must record all open sessions of the trial.

Standard 8-3.6. Conduct of the Trial

The following standards govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised.

(a) Whenever appropriate, in view of the notoriety of a case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

[(b) through (c) omitted]

(d) In any case that appears likely to be of significant public interest, an admonition in substantially the following instruction shall be given before the end of the first day if the court members are not sequestered:

During the time you serve on this court-martial panel, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your findings meet certain standards; for example, a witness may testify about events personally seen or heard but not about matters told to the witness by others. Also, witnesses must be sworn to tell the truth and must be subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction. If the process of selecting a court-martial panel is a lengthy one, an admonition shall also be given to each member as he or she is selected. At the end of each day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form shall be given: For the reasons stated earlier in the court-martial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this court.

(e) [Omitted]

DISCUSSION

Since Air Force court panels are not sequestered, it is necessary for the military judge to be sensitive to the possibility of exposure of the court members to information about the case from various news media, and instructions such as the ones in this standard would be necessary in appropriate cases. The members are usually instructed that, if they become aware of information about the case from sources other than evidence properly admitted at trial, they must immediately inform the military judge, so that an inquiry may be conducted to determine their suitability for further service on the panel.

Standard 8.3.7. Setting Aside the Verdict [Omitted]

Standard 8.3.8. Broadcasting, Televising, Recording and Photographing Courtroom Proceedings [Omitted]

CHAPTER 5 DISCOVERY AND PROCEDURE BEFORE TRIAL

SECTION I. General Principles

Standard 11-1.1. Objectives of Pretrial Procedures

(a) Procedure prior to trial should, consistent with the constitutional rights of the accused:

- (i) promote a fair and expeditious disposition of the charge, whether by diversion, plea, or trial;
 - (ii) provide the accused with sufficient information to make an informed plea;
 - (iii) permit thorough preparation for trial and minimize surprise at trial;
 - (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
 - (v) minimize the procedural and substantive inequities among similarly situated accused;
- and
- (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings; and
 - (vii) minimize the burden upon victims and witnesses
- (b) These needs can be served by:
- (i) full and free exchange of appropriate discovery;
 - (ii) simpler and more efficient procedures; and
 - (iii) Procedural pressures for expediting the processing of cases.

Standard 11-1.2. Applicability

[Modified] These standards should be applied in all criminal cases.

DISCUSSION

In military practice, discovery standards apply in all courts-martial.

Standard 11-1.3. Definition of “Statement”

- (a) When used in these standards, a “written statement” of a person shall include:
- (i) any statement in writing that is made, signed, or adopted by that person; and
 - (ii) the substance of a statement of any kind made by that person that is embodied or summarized in any writing or recording, whether or not specifically signed or adopted by that person. The term is intended to include statements contained in police or investigative reports, but does not include attorney work product.
- (b) When used in these standards, an “oral statement” of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

SECTION II. Discovery Obligations of the Prosecution and Defense

Standard 11-2.1. Prosecutorial Disclosure

- (a) The trial counsel should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing, and photographing of disclosed documents or tangible objects:
- (i) All written and all oral statements of the accused or co-accused that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.
 - (ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the

offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) [Modified] Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae.

(v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained for or belong to the accused. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) [Modified] Any record of prior criminal convictions, pending charges, or probationary status of the accused or any co-accused.

(vii) Any material, documents, or information relating to lineups, photos, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused.

(b) If the trial counsel intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the accused's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the trial counsel should inform the defense of that fact.

(d) If any tangible object which the trial counsel intends to offer at trial was obtained through a search and seizure, the trial counsel should disclose to the defense any information, documents, or other material relating to the acquisition of such objects.

DISCUSSION

See R.C.M. 701 and its Discussion. See also Rule 3.3, Candor Toward the Tribunal; Rule 3.4, Fairness to Opposing Party and Counsel; and Rule 3.8, Special Responsibilities of a Trial Counsel.

Discovery under military law is generally broader and more direct than in most civilian courts. See *United States v. Mouganel*, 6 M.J. 589 (A.F.C.M.R. 1978).

Article 46, UCMJ, provides that the prosecution and defense shall have equal opportunity to obtain witnesses and other evidence, and the United States Court of Appeals for the Armed Forces has interpreted Article 46 to mean that "the defense is entitled to equal access to all evidence, whether or not it is apparently exculpatory." *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986); *United States v. Reece*, 25 M.J. 93 (C.M.A. 1987). See also R.C.M. 703(f).

Standard 11-2.2. Defense Disclosure

(a) The defense should, within a specified and reasonable time prior to trial, disclose to the prosecution the following information and material and permit inspection, copying, testing, and photographing of disclosed documents and tangible objects:

(i) The names and addresses of all witnesses (other than the accused) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(ii) [Modified] Any reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons that the accused intends to offer as evidence at trial. For each such expert witness, the defense should also furnish to the trial counsel a curriculum vitae.

(iii) Any tangible objects, including books, papers, documents, photographs, buildings, places or any other objects, which the defense intends to introduce as evidence at trial.

(b) If the defense intends to use character, reputation, or other act evidence not relating to the accused, the defense should notify the prosecution of that intention and of the substance of the evidence to be used.

(c) [Modified] If the defense intends to rely upon a defense of alibi, innocent ingestion or lack of mental responsibility, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense.

DISCUSSION

See R.C.M. 701 and its Discussion.

Standard 11-2.3. The Person of the Accused [Omitted]

SECTION III. Special Discovery Procedures

Standard 11-3.1. Obtaining Nontestimonial Information from Third Parties [Omitted]

Standard 11-3.2. Preservation of Evidence and Testing or Evaluation by Experts

(a) If either party intends to destroy or transfer out of its possession any objects or information otherwise discoverable under these standards, the party should give notice to the other party sufficiently in advance to afford that party an opportunity to object or take other appropriate action.

(b) Upon motion, either party should be permitted to conduct evaluations or tests of physical evidence in the possession or control of the other party which is subject to disclosure. The motion should specify the nature of the test or evaluation to be conducted, the names and qualifications of the experts designated to conduct evaluations or tests, and the material upon which such tests will be conducted. The court may make such orders as are necessary to make the material to be tested or examined available to the designated expert.

(i) The court should condition its order so as to preserve the integrity of the material to be tested or evaluated.

(ii) If the material is contraband material or a controlled substance, the entity having custody of the material may elect to have a representative present during the testing of the material.

SECTION IV. Timing and Manner of Disclosure

Standard 11-4.1. Timely Performance of Disclosure

(a) [Omitted]

(b) [Omitted]

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

Standard 11-4.2. Manner of Performing Disclosure

Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:

(a) notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and

(b) make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

Standard 11-4.3. Obligation to Obtain Discoverable Material

(a) The obligations of the trial counsel and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office.

(b) The trial counsel should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the trial counsel's office.

(c) If the trial counsel is aware that information which would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the trial counsel, the trial counsel should disclose the fact of the existence of such information to the defense.

(d) Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which is in the possession or control of the others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.

(e) Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court may order disclosure of the specified material or information.

SECTION V. Depositions

Standard 11-5.1. Depositions to Perpetuate Testimony [Omitted].]

Standard 11-5.2. Discovery Depositions [Omitted]

Section VI. General Provisions Governing Discovery

Standard 11-6.1. Restrictions on Disclosure

(a) Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the trial counsel or defense counsel, or members of the attorney's legal staff.

(b) Disclosure of an informant's identity should not be required where such identity is a government secret and where a failure to disclose will not infringe on the constitutional right of the accused. Disclosure should not be denied regarding witnesses or material to be produced at a hearing or trial.

(c) [Modified] The court may deny, delay, or otherwise condition discovery under this Section of the standards if it finds that there is a substantial risk of grave prejudice to national security resulting from such disclosure, and where a failure to disclose will not infringe on the constitutional rights of the accused.

(d) Disclosure should not be required from the defense of any communications of the defendant, or any other materials which are protected from disclosure by the Constitution, statutes or other law.

(e) The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds that there is a substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure which outweighs any usefulness of the disclosure.

Standard 11-6.2. Failure of a Party to Use Disclosed Material at Trial

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

Standard 11-6.3. Investigations Not to Be Impeded

Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the accused) who have relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

Standard 11-6.4. Custody of Materials

Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

Standard 11-6.5. Protective Orders

Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

Standard 11-6.6. Excision

When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscoverable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

DISCUSSION

Any issues relating to perceived abuses of discovery should be raised by a motion for appropriate relief, prior to the entry of pleas by the accused. Otherwise, the issue may be deemed to be waived on appeal.

Standard 11-6.7. In Camera Proceedings

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made *in camera*. A record should be made of both in court and *in camera* proceedings. Upon the entry of an order granting relief following a showing *in camera*, all confidential portions of the *in camera* portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

Section VII. Sanctions**Standard 11-7.1. Sanctions**

(a) If an applicable discovery rule or an order pursuant thereto is not promptly implemented, the court should do one or more of the following:

(i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;

(ii) grant a continuance;

(iii) prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the accused's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; and/or

(iv) enter such other order as it deems just under the circumstances.

(b) The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order.

Attachment 8**THE AIR FORCE UNIFORM CODE OF JUDICIAL CONDUCT****I. INTRODUCTION**

II. PREAMBLE

III. TERMINOLOGY

IV. CANONS:

CANON 1. A judge shall uphold the integrity and independence of the judiciary

CANON 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

CANON 3. A judge shall perform the duties of the judicial office impartially and diligently

CANON 4. A judge shall conduct the judge's extrajudicial activities so as to minimize the risk of conflict with judicial obligations

CANON 5. A judge or judicial candidate shall refrain from inappropriate political activity

V. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

PART I. INTRODUCTION

In 1924, the American Bar Association (ABA) formulated the original *Canons of Judicial Ethics*. In 1972, the ABA adopted the *Code of Judicial Conduct*, which was slightly amended in 1984. That code, with some modification, has been adopted by the Judicial Conference of the United States and most states. In late 1988, after a conference of appellate military judges, the service Courts of Military Review appointed a working group composed of a judge from each of the Courts of Military Review to study the ABA *Code of Judicial Conduct* and make recommendations to their respective Judge Advocate Generals (TJAG) about the advisability of adopting a uniform code of judicial conduct for trial and appellate military judges. During the time of the working group's study, the ABA issued a draft revision of its *Code of Judicial Conduct*. While that draft revision was not a final product sanctioned by the ABA, the working group considered the draft. Later in the project, the Chief Trial Judges of each service joined the group to consider developing regulations and procedures relating to judicial discipline.

The working group presented the results of their study first to their fellow judges for review and then worked with representatives of the respective TJAGs for their input and further considerations. This version of the draft *Code of Judicial Conduct* was accepted in principle by the Air Force TJAG but was not accepted by the TJAGs for the other services.

The American Bar Association revised and then adopted the *Model Code of Judicial Conduct* in August 1990. The Working Group's draft was then revised to conform with this ABA *Model Code of Judicial Conduct* (August 1990) and to accommodate the unique aspects of service as an Air Force trial or appellate military judge.

PART II. PREAMBLE

Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this code is the notion that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is at once an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The *Air Force Uniform Code of Judicial Conduct* (the *Code*) is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Part (Part III), an Application Part, (Part V), and Commentary and References throughout. The text of the Canons and its Sections, along with the Terminology and Application Parts, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. The References provide authority but are not all-inclusive. When the text uses "shall" or "shall not," it is intended to impose binding obligations, the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended to be advisory and a statement of what is or is not appropriate conduct but it is not intended to be a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to actions that are not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, departmental directives, Air Force instructions, other court rules, and decisional law, and in the context of all relevant circumstances. The *Code* is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. In addition, this *Code* and the Canons and Sections are not to be construed as a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice (UCMJ); nor are they designed or intended as a basis for civil liability or criminal actions under the UCMJ. Furthermore, the purpose of the *Code* would be subverted if the *Code* were invoked by lawyers for mere tactical advantage in a proceeding or by judges for their own personal benefit.

Accordingly, nothing in the *Code* should be deemed to augment any substantive legal duty of judges or add to the extra-disciplinary consequences of violating such a duty.

The *Code* is not intended as an exhaustive guide for the conduct of judges. Judges should also be governed in their judicial and personal conduct by general ethical standards. The *Code* is intended, however, to state basic standards which should govern the conduct of all

judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

The *Code* promulgated herein is designed to apply to both active duty and reserve trial and appellate military judges; but its application to reserve trial and appellate military judges is limited to those aspects of their service which relate only to their military duties.

PART III. TERMINOLOGY

“Appropriate authority” denotes the authority with responsibility for initiation of the disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

“Continuing part-time judge” denotes a judge who serves repeatedly on a part-time basis such as a reserve trial or appellate military judge. The definition also includes a retired judge subject to recall who is permitted to practice law. See Part V, Subpart C.

“Court personnel” does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

“De Minimis” denotes an insignificant interest that could not raise reasonable question as to the judge’s impartiality. See Section 3E(1)(c) and 3E(1)(d).

“Economic interest” denotes ownership of a more than *de minimis* legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund, or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, or civic organization, or service by a judge’s spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest; and

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

See Sections 3E(1)(c) and 3E(2).

“Fiduciary” includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 4E.

“Judge” includes military judge, and is intended to refer to Air Force military judges, both active duty and reserve, who are serving in a trial or appellate level position.

“Knowingly,” “knowledge,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances. See Sections 3D and 3E(1).

“Law” denotes court rules, as well as statutes, constitutional provisions, Air Force instructions, and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4B, 4C, 4D(5), 4F, and 4I.

“Member of the judge’s family” denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Sections 4D(3), 4E, and 4G.

“Member of the judge’s family residing in the judge’s household” denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge’s family, who resides in the judge’s household. See Section 3E(1) and 4D(5).

“Nonpublic information” denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded, or communicated *in camera*; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Section 3B(11).

“Periodic part-time judge” denotes a judge who serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter. A reserve trial or appellate military judge may come within this definition. See Part V, Subpart D.

“Pro tempore part-time judge” denotes a judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard. A reserve trial or appellate military judge may come within this definition. See Part V, Subpart E.

“Require.” The rules prescribing that a judge “require” certain conduct of others are, like all of the rules in this *Code*, rules of reason. The use of the term “require” in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge’s direction and control. See Sections 3B(3), 3B(4), 3B(5), 3B(6), 3B(9), and 3C(2).

“Third degree of relationship.” The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece. See Section 3E(1)(d).

PART IV. CANONS

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

1A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this *Code* are to be construed and applied to further that objective.

Commentary:

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this *Code*. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this *Code* diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Military judges must apply the principles of this *Code* in all their written and orally announced decisions and opinions. The judiciary enhances the perception of its independence and integrity by fully adhering to recognized court standards, Rules for Courts-Martial (R.C.M.), and the general principle that a court should explain the bases for its decisions regarding issues in a case submitted for its review.

Traditionally, some people have thought that military justice is concerned solely with providing the discipline for the preservation of morale and good order. Military justice is also properly focused on preserving rights of service members while meeting the needs of military discipline. Congress and the public expect the military to have a judicial system that is responsive to the unique needs of discipline in the armed services but safeguards rights of service members. To this end, Congress has created a military judiciary which is intended to be independent. Accordingly, judges must recognize and safeguard against any affront to the independence of a court, such as attempted unlawful influence by a commander or other superior, or invasion of the deliberative process.

Moreover, any perception of the foregoing similarly must be addressed. Military judges must ensure that their conduct comports, and is perceived to comport, with the principle of judicial independence and integrity. That principle includes maintaining the confidentiality of

the deliberative process and the invocation, when necessary, of qualified judicial privilege. The judiciary's independence and integrity ultimately depend upon the personal and professional conduct of the individual judge.

References:

N.M.C.M.R. v. Carlucci, 26 M.J. 328 (C.M.A. 1988).
Chandler v. Judicial Council of the Tenth Circuit, 382 U.S. 1003 (1966), 398 U.S. 74 (1970).
Hastings v. Judicial Conference of the United States, 593 F.Supp. 1371 (D.C. D.C. 1984).
In the Matter of Certain Complaints under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488 (11th Cir. 1986). Article 37, UCMJ. R.C.M. 908.
ABA Standards for Appellate Courts.
ABA Standards for Criminal Justice, The Function of the Trial Judge.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.

2A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on his or her conduct that might be viewed as burdensome by the ordinary citizen and do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful, although not specifically mentioned in the *Code*. Actual improprieties under this standard may include violations of law, court rules, or other specific provisions of this *Code*. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

2B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. This is even

more important, and difficult, in a judicial system such as the court-martial system because it is within the executive branch. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business affairs. Judges should comply with applicable regulations on the use of judicial staff and appurtenances of judicial office for personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. As to acceptance of awards, see Section 4D(5)(a) and accompanying Commentary. This area is further restricted by Department of Defense (DoD) regulation.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a corrections officer, but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify.

Reference:

DoD 5500.7-R, *Joint Ethics Regulation*

2C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

Commentary:

Membership of a judge in an organization that practices invidious discrimination may create the undesirable perception that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges must be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely

private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion, or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

References:

Article 37, UCMJ.

United States v. Tomchek, 2 M.J. 813 (A.C.M.R. 1976). *United States v. Berman*, 28 M.J. 615 (A.F.C.M.R. 1989).

New York State Club Ass'n Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987).

Roberts v. United States Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF THE JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

3A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

3B. Adjudicative Responsibilities.

3B(1) A judge shall hear and decide matters assigned to the judge, except those in which disqualification is required.

3B(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

3B(3) A judge shall require order and decorum in proceedings before the judge.

3B(4) A judge shall be patient, dignified, and courteous to the litigants, court members, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

3B(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expressions and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, court members, the media, and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

3B(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, and others. This Section does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceedings.

3B(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

3B(7)(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

3B(7)(a)(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

3B(7)(a)(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

3B(7)(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

3B(7)(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

3B(7)(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

3B(7)(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain *ex parte* communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met, subject to R.C.M. 802, as applicable. A judge must disclose to all parties all *ex parte* communications received regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented. This provision does not preclude appellate courts from taking judicial notice during consideration of a case. This provision does not prevent a military judge from calling for additional evidence to be presented during trial (see Article 46, UCMJ, and R.C.M. 913(c)(1)(F)); nor does it prevent the Court of Criminal Appeals from exercising the fact finding powers provided by statute (Article 66(c), UCMJ).

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including providing appropriate supervision, to ensure that Section 3B(7) is not violated through the actions of law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication must be provided to all parties.

3B(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

Commentary:

In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

3B(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of *mandamus* where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by *Air Force Rules of Professional Conduct* (AFRPC) Rule 3.6 and Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, paragraph 12.6.

3B(10) A judge shall not commend or criticize court members for their findings or sentence other than in a court order or opinion in a proceeding, but may express appreciation to the court members for their service to the judicial system and the community.

Commentary:

Commending or criticizing court members for their verdict may imply a judicial expectation in future cases and may impair a court member's ability to be fair and impartial in a subsequent case.

3B(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

3C. Administrative Responsibilities.

3C(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

3C(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

3C(3) A judge with supervisory responsibility for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

References:

United States v. Mabe, 28 M.J. 326 (C.M.A. 1989), 30 M.J. 1254 (N.M.C.M.R. 1990), 33 M.J. 200 (C.M.A. 1991).

United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

3C(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Although military judges ordinarily lack specific powers of appointment, this Canon prohibits military judges from using their position as judges to exercise undue or improper influence on the civil service or military personnel system.

Reference:

Article 37, UCMJ.

3D. Disciplinary Responsibilities.

3D(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this *Code* should take appropriate action. A judge having knowledge that another judge has committed a violation of this *Code* that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.

3D(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the AFRPC should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the AFRPC that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

3D(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Military judges have a responsibility to ensure that the highest standards of justice and ethical responsibility are observed throughout the military justice system. This responsibility includes taking appropriate action upon observing conduct that might reasonably raise adverse perceptions about military justice. "Appropriate action" in the context of this rule is intended to mean that the judge is required to report to a disciplinary authority misconduct of lawyers and other judges and to encourage judges to take other remedial steps as appropriate, such as referring the judge or lawyer whose conduct is in question to a substance abuse treatment program. The rule was designed to reflect the standards for reporting professional misconduct that appear in AFRPC Rule 8.3. A military judge may report misconduct by other trial or appellate military judges or by lawyers to their chief judge or to The Judge Advocate General.

3E. Disqualification.

3E(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified and should recuse himself or herself whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be the only judge available in a matter requiring immediate judicial

action, such as a hearing on witness production, speedy trial, or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Reference:

United States v. Berman, 28 M.J. 615 (A.F.C.M.R. 1989).

3E(1)(a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

3E(1)(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary:

A lawyer in a governmental agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

References:

R.C.M. 902.

United States v. Sherrod, 26 M.J. 30 (C.M.A. 1988).

3E(1)(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or is a party to the proceeding or has any other than *de minimis* interest that could be substantially affected by the proceeding; and

3E(1)(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

3E(1)(d)(i) is a party to the proceeding, or an officer, director, or trustee of a party;

3E(1)(d)(ii) is acting as a lawyer in the proceeding;

3E(1)(d)(iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; or

3E(1)(d)(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that

could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

References:

Article 26, UCMJ.

United States v. Hilow, 29 M.J. 641 (A.C.M.R. 1989).

Leslie W. Abramson, "Judicial Disqualification under Canon 3 of the Code of Judicial Conduct" (American Judicature Society, 2d ed., 1992).

3E(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

3F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E and R.C.M. 902(a) may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CANON 4

A JUDGE SHALL CONDUCT THE JUDGE'S EXTRAJUDICIAL ACTIVITIES SO AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

4A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extrajudicial activities so that they do not:

4A(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

4A(2) demean the judicial office; or

4A(3) interfere with the proper performance of judicial duties.

Commentary:

Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Military judges must follow carefully, and appear to follow carefully, the provisions of statutes, executive orders, and any applicable Air Force instructions prescribing rules to uphold the integrity and public confidence in military and federal public service.

Expressions of bias and prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. See Section 2C and accompanying Commentary.

4B. Avocational Activities. A judge may speak, write, lecture, teach, and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this *Code*.

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of the military justice system. To the extent that a judge's time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary, and the integrity of the legal profession, and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In this and other Sections of Canon 4, the phrase "subject to the requirements of this *Code*" is used, notably in connection with a judge's governmental, civic, or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the *Code* does not relieve a judge from the other requirements of the *Code* that apply to the specific conduct.

4C. Governmental, Civic, or Charitable Activities.

4C(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting *pro se* in a matter involving the judge or the judge's interests.

Commentary:

See Section 2B regarding the obligation to avoid improper influence.

This Section does not apply to military judges who are required to attend conferences, professional military education courses, and other military gatherings associated with the obligation as officers of the United States Air Force; nor does it affect their obligation to assist in

the continuing legal education and professional education of attorneys in or out of military or government service.

4C(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge may, however, represent a country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Commentary:

Section 4C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system, or administration of justice as authorized by Section 4C(3). Insofar as this provision might interfere with an appointment in the United States Air Force as a regular or reserve officer, this provision does not apply to trial or appellate military judges. The appropriateness of accepting extra-judicial assignments must be assessed, in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not accept appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 4C(2) does not govern a judge's service in a nongovernmental position. See Section 4C(3) permitting service by a judge with organizations devoted to the improvement of the law, the legal system, or the administration of justice and with educational, religious, charitable, fraternal, or civic organizations not conducted for profit.

4C(3) A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this *Code*.

Commentary:

Section 4C(3) does not pertain to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 4C(2).

See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this *Code*." As an example of the meaning of the phrase, a judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a judge is prohibited by Section 4G from serving as a legal advisor to a civic or charitable organization.

4C(3)(a) A judge shall not serve as an officer, director, trustee, or non- legal advisor if it is likely that the organization:

4C(3)(a)(i) will be engaged in proceedings that would ordinarily come before the judge, or

4C(3)(a)(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Commentary:

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation.

4C(3)(b) A judge as an officer, director, trustee, or non-legal advisor, or as a member of an organization:

4C(3)(b)(i) may assist the organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory authority;

4C(3)(b)(ii) may make recommendations to public and private fund-granting organization on projects and programs concerning the law, the legal system, or the administration of justice;

4C(3)(b)(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism; and

4C(3)(b)(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Commentary:

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system, or the administration of justice, or for a nonprofit educational, religious, charitable, fraternal, or civic organization so long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing, or by telephone, except in the following cases: (1) a judge may solicit, for funds or memberships, other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the

judge serves and; (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b), provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise. In evaluating the application of this guidance, the judge should consult the applicable DoD regulation.

A judge shall not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this *Code* and the applicable DoD regulation.

4D. Financial Activities.

4D(1) A judge shall not engage in financial and business dealings that:

4D(1)(a) may reasonably be perceived to exploit the judge's judicial position, or

4D(1)(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

Commentary:

The Time for Compliance provision of this *Code* postpones the time for compliance with certain provisions of this Section in some cases.

When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuous business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism, and to minimize the potential for disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety, the appearance of impropriety, and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct

in all activities, as set forth in Canon 1. See the Commentary for Section 4B regarding use of the phrase “subject to the requirements of this *Code*.”

4D(2) A judge may, subject to the requirements of this *Code*, hold and manage investments of the judge and members of the judge’s family, including real estate, and engage in other remunerative activity.

Commentary:

This Section provides that, subject to the requirements of this *Code*, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge’s family, and investments owned jointly by the judge and members of the judge’s family.

4D(3) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity, except that a judge may, subject to the requirements of this *Code*, manage and participate in:

4D(3)(a) a business closely held by the judge or members of the judge’s family, or

4D(3)(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.

Commentary:

Subject to the requirements of this *Code*, a judge may participate in a business that is closely held either by the judge alone, by members of the judge’s family, or by the judge and members of the judge’s family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 4D(3), a judge may be prohibited from participation by other provisions of this *Code* when, for example, the business entity frequently appears before the judge’s court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge’s participation would involve misuse of the prestige of judicial office.

See also the requirements contained in TJAG Policy Memorandum, TJS-7, *Off-Duty Employment of Judge Advocates and Civilian Attorneys*.

4D(4) A judge shall manage the judge’s investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

4D(5) A judge shall not accept or knowingly permit a member of the judge’s family residing in the judge’s household to accept a gift, bequest, favor, or loan from anyone except for:

Commentary:

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

4D(5)(a) a gift incident to a public testimonial, books, tapes, or other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system, or the administration of justice;

Commentary:

Acceptance of an invitation to a law-related function is governed by Section 4D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members frequently comprise or represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this *Code*. See Section 4A(1) and 2B.

4D(5)(b) a gift, award, or benefit incident to the business, profession, or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards, and benefits for the use of both the spouse and other family member and the judge (as spouse or family member), provided the gift, award, or benefit could not reasonably be perceived as intended to influence the judge in the performance of judiciary duties;

4D(5)(c) ordinary social hospitality;

4D(5)(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary, or birthday, if the gift is fairly commensurate with the occasion and the relationship;

Commentary:

A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(5)(e).

4D(5)(e) a gift, bequest, favor, or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

4D(5)(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

4D(5)(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

4D(5)(h) any other gift, bequest, favor, or loan, only if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge.

Commentary:

Section 4d(5) prohibits judges from accepting gifts, favors, bequests, or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests, or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Section 4D(5)(h) of the approved ABA *Uniform Code of Judicial Conduct* includes a requirement that gifts, bequests, favors, or loans may be accepted only if the judge reports any such gift, bequest, favor, or loan in excess of \$150.00. That provision was not adopted for trial and appellate military judges because their conduct is already extensively regulated by DoD Directive 5500.7-R, Joint Ethics Regulation, which in turn implements the Ethics in Government Act and provides for appropriate financial disclosure reporting.

4E. Fiduciary Activities.

4E(1) A judge shall not serve as executor, administrator, or other personal representative, trustee, guardian, attorney-in-fact, or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

4E(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

4E(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary:

The Time for Compliance provision of the *Code* postpones the time for compliance with certain provisions of this Section in some cases.

The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings, the retention of which would place the judge in violation of Section 4D(4).

Section 4E applies to trial and appellate military judges only when a party or parties for whom the judge serves as executor, administrator, or other personal representative or other fiduciary may appear in the judge's court.

4F. Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity, unless authorized by law.

Commentary:

Section 4F does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties.

4G. Practice of Law. A judge shall not practice law, except in the performance of his or her judicial responsibilities. 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.

Commentary:

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 the judge's family. See Section 2B.

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.

4H. Standards of Conduct. A judge is bound by the Ethics in Government Act and all DoD regulations governing standards of conduct of military personnel.

Commentary:

This provision has been modified from the approved draft of the *ABA Uniform Code of Judicial Conduct*. Trial and appellate military judges are bound by federal statutes, DoD regulations, and Air Force instructions governing their financial activities, to include the acceptance of gifts, bequests, honoraria, etc. Where this *Code* conflicts with federal, DoD, or Air Force law or directive, the law or directive governs. This *Code* provides general guidelines that should assist the military judge in determining the propriety of his or her activities under federal, DoD, or Air Force law or directive when those provisions may not be clear on a particular issue.

The *Code* does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

4I. Disclosure of a judge’s income, debts, investments, or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise provided by law or directive.

Commentary:

Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See “economic interest” as defined in the Terminology Part (Part III). Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties. A judge has the rights of any other citizen, including the right to privacy of the judge’s financial affairs, except to the extent that limitations established by law and regulation are required to safeguard the proper performance of the judge’s duties and insure public confidence in the judiciary.

The trial and appellate military judge should be aware that not all private investments are free of ethical considerations. A pertinent example is the purchase of shares in a firm which has a contract with the Air Force or the DoD to perform drug testing.

CANON 5

A JUDGE OR JUDICIAL CANDIDATE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

Commentary:

Canon 5 is not adopted for trial and appellate military judges because the judge’s duties, rights, and responsibilities in this area are already clearly defined by Air Force instructions and customs of the service.

PART V. APPLICATION OF THE CODE OF JUDICIAL CONDUCT

A. Anyone, whether or not a lawyer, who is an officer of a judicial system and who performs judicial functions, including an officer such as a magistrate, court commissioner, special master, or referee, is a judge within the meaning of this *Code*. All judges shall comply with this *Code* except as provided below.

Commentary:

The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this Section, as long as a retired judge is subject to recall the judge is considered to “perform judicial functions.” The determination of which category and, accordingly, which specific *Code* provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

B. Retired Judge Subject to Recall. A retired judge subject to recall who by law is not permitted to practice law is not required to comply:

- (1) **except while serving as a judge, with Section 4F; and**
- (2) **at any time with Section 4E.**

Commentary:

This provision is meant to apply only to retired reserve military judges who may be prohibited by the laws of their state from practicing law.

C. Continuing Part-Time Judge. A continuing part-time judge:

- (1) **is not required to comply**
 - (a) **except while serving as a judge, with Section 3B(9), and**
 - (b) **at any time with Sections 4C(2), 4D(3), 4E(1), 4F, 4G, and 4H; and**
- (2) **shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.**

Commentary:

When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to AFRPC Rule 1.12(a).

D. Periodic Part-Time Judge. A periodic part-time judge:

- (1) **is not required to comply**
 - (a) **except while serving as a judge, with Section 3B(9),**
 - (b) **at any time, with Sections 4C(2), 4C(3)(a), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, and 4H; and**
- (2) **shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.**

Commentary:

When a person who has been a periodic part-time judge is no longer a periodic part-time judge (no longer accepts appointments), that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the express consent of all parties pursuant to AFRPC Rule 1.12(a).

E. Pro Tempore Part-Time Judge. A pro tempore part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Sections 2A, 2B, 3B(9), and 4C(1),

(b) at any time with Sections 2C, 4C(2), 4C(3)(a), 4C(3)(b), 4D(1)(b), 4D(3), 4D(4), 4D(5), 4E, 4F, 4G, and 4H;

(2) a person who has been a *pro tempore* part-time judge shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto, except as otherwise permitted by AFRPC Rule 1.12(a).

F. Time for Compliance. A person to whom this *Code* becomes applicable shall comply immediately with all provisions of this *Code* except Section 4D(2), 4D(3), and 4E, and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary:

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 4E, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 4D(3), continue in that activity for a reasonable period, but in no event longer than one year.

Attachment 9

REGULATIONS AND PROCEDURES RELATING TO JUDICIAL DISCIPLINE

I. INTRODUCTION

II. POLICY

III. PURPOSE

IV. TERMINOLOGY

V. INVESTIGATION

A. Confidentiality

B. Judicial Privilege

- C. Judicial Ethics Advisory Council
- D. Judicial Privilege Review Commission
- E. Temporary Suspension Authority
- F. Complaint Procedure
- G. Judicial Inquiry Commission

VI. ACTION ON REPORT OF JUDICIAL INQUIRY COMMISSION

VII. IMPLEMENTATION OF ACTION BY THE CHIEF TRIAL JUDGE OR THE JUDGE ADVOCATE GENERAL

VIII. FINALITY

I. INTRODUCTION

These regulations and procedures are based on the federal statute dealing with the discipline of federal judges, 28 U.S.C. Section 372(c), the *ABA Model Standards of Judicial Discipline*, and the most recent judicial precedent addressing the initiation, screening, investigation, review, and appeal of judicial disciplinary proceedings. Information obtained from the Administrative Office of United States Courts, the Judicial Conference of the United States, the National Center for State Courts, the National Judicial College, and the American Bar Association has also been consulted. In addition, numerous law review articles addressing the issue of judicial disciplinary procedures, including analyses of specific rules and procedures adopted by state and federal courts, have been reviewed. The basic premise of these authorities is that to preserve the independence and integrity of the judiciary—judges should judge judges. That premise is the benchmark of these regulations and procedures.

II. POLICY

These regulations and procedures relating to judicial discipline are established to ensure that allegations of unprofessional conduct by trial and appellate military judges are examined by the military judiciary and that proper determination and action is taken regarding that conduct to preserve and promote the integrity, independence, and impartiality of the military judiciary. This purpose and these regulations and procedures are independent of any other investigation or actions regarding alleged misconduct of trial and appellate military judges. The deliberative processes of the military judiciary, however, shall be preserved from public disclosure in all instances to the extent possible under recognized qualified judicial privilege precedent. In the absence of an allegation of fraud or a corrupt motive on the part of a judge, these regulations and procedures for judicial discipline must not be used as a means for taking action against a judge for reaching an erroneous factual or legal conclusion or misapplying the law in any particular case. An erroneous decision by a judge must be left to the regular appellate process. See *Chandler v. Judicial Council*, 382 U.S. 1003 (1966), 398 U.S. 74 (1970).

III. PURPOSE

The purpose of the complaint procedure is to ensure application of the highest standards of judicial conduct and competence in the court-martial process. The maintenance of such standards is the responsibility of The Judge Advocate General (TJAG), as set forth in Rules for Courts-Martial (R.C.M.) Rule 109. These regulations and procedures include taking action when judges have engaged in conduct that does not meet the standards expected of military judicial officers. All military judges, trial and appellate, former and currently assigned, are subject to the application of these rules and regulations for any unprofessional conduct which is alleged to have occurred during their assignment as judges. These procedures will contribute to the integrity of court-martial proceedings and thereby preserve and enhance public confidence in the fairness and correctness of military justice.

IV. TERMINOLOGY

Air Force Uniform Code of Judicial Conduct (the Code) refers to the code which is Attachment 1 to this policy memorandum.

Air Force Judicial Ethics Advisory Council (JEAC) refers to the council established by Attachment 4 to this policy memorandum.

Chief Trial Judge. The Chief Trial Judge of the USAF Trial Judiciary.

Complaint refers to an allegation of unprofessional conduct. See definition *infra*.

Complained-against-judge is the person holding a military judicial assignment with either the trial or appellate military court, who has had a complaint of misconduct filed against him or her.

Deliberative process is defined by the law related to Military Rules of Evidence Rule 509 as follows: "Except as provided in Mil.R.Evid. 606, the deliberations of courts and grand and petit juries are privileged to the extent that such matters are privileged in trial of criminal cases in the United States district courts, but the results of the deliberations are not privileged."

Discipline means action taken pursuant to these rules and procedures as a result of the filing of a complaint of unprofessional conduct on the part of a trial or appellate military judge.

Judge refers to a trial military judge who has been certified in accordance with Article 26, Uniform Code of Military Justice (UCMJ), or an appellate military judge assigned to the Air Force Court of Criminal Appeals in accordance with Article 66, UCMJ, and who is assigned to judicial duties on a full-time basis, or part-time basis (detailed to at least one case), at the time of the alleged unprofessional conduct.

The Judge Advocate General (TJAG) refers to The Judge Advocate General of the United States Air Force.

Judicial Inquiry Commission (JIC) is a one-judge or multi-judge body appointed by the Chief Trial Judge or TJAG, as appropriate, to conduct an investigation into alleged unprofessional conduct subsequent to a finding of sufficient cause.

Judicial privilege is a privilege in law applying to the judicial process, which protects the confidentiality of communications among judges and their staff relating to official judicial business, most particularly the deliberative processes, such as voting, the basis for a decision, and the framing and researching of opinions, orders, and rulings.

Judicial Privilege Review Commission (JPRC) is an *ad hoc* body composed of judges appointed by TJAG to resolve issues involving a claim of judicial privilege by trial or appellate military judges.

Sufficient cause is the screening standard that must be met before a JIC is appointed to investigate a complaint alleging unprofessional conduct. Sufficient cause to proceed means that the complaint against the judge alleges unprofessional conduct.

Unprofessional conduct is any conduct that violates a provision of the *Code*. It does not require a finding of a violation of the UCMJ. Examples of unprofessional conduct include, but are not limited to:

1. conviction of a serious offense (felony or equivalent conviction);
2. willful misconduct in office (acting in bad faith while acting in a judicial capacity, including the interference or attempted interference with the independence, integrity, or impartiality of the judge);
3. willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute (minor criminal offenses);
4. conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, whether conduct in office or outside of judicial duties, that brings the conduct that gives the appearance of impropriety; and
5. any conduct that constitutes a violation of the rules of professional conduct for lawyers.

V. INVESTIGATION

A. Confidentiality. Confidentiality is required during the initial investigatory procedures undertaken pursuant to this regulation so that a judge is protected from frivolous complaints. If all complaints were publicly announced, meritless complaints could have irreversible ramifications not only for the complained-against-judge but for the military justice system as a whole. Furthermore, confidentiality encourages litigants and attorneys to report their complaints without fear of reprisal from the judge or other authority.

B. Judicial Privilege. The judicial privilege is a qualified privilege. A judge invoking a claim of judicial privilege before a JIC has the burden of demonstrating that the matters under inquiry fall within the confines of the privilege. Once the judge has met the burden, those matters are presumptively privileged and need not be disclosed unless the JIC determines that its need for the materials is sufficiently great to overcome the privilege.

The privilege is qualified in that it must sometimes yield to other considerations. In making that determination, the JIC will consider such factors as the importance of the inquiry for which the privileged information is sought, the relevance of that information to its inquiry, and the difficulty of obtaining the desired information through alternative means.

The JIC must then weigh the demonstrated need for the information against the degree of intrusion upon the confidentiality of privileged communications necessary to satisfy that need. If the JIC determines that the qualified judicial privilege must yield, the JIC shall record its reasons by making written essential findings.

The complained-against-judge can appeal to the appointing authority the findings and ruling of the JIC that the qualified judicial privilege must yield. The appointing authority must consult on this issue with the JPRC. The appointing authority shall conduct a *de novo* review in assessing the appeal of the JIC's findings and ruling on judicial privilege. The appointing authority shall advise the judge claiming the privilege of the appointing authority's decision in writing.

References:

Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 337-341 (C.M.A. 1988).

In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit v. Mercer, 783 F.2d 1438, 1520-1525 (11th Cir. 1986).

C. Judicial Ethics Advisory Council. During any stage of the investigation, the Judicial Ethics Advisory Council may be consulted. The Judicial Ethics Advisory Council is composed of three persons appointed by TJAG pursuant to Part III of this policy memorandum. The opinions of the Judicial Ethics Advisory Council are not binding.

D. Judicial Privilege Review Commission. Before the appointing authority determines that any claim of judicial privilege must yield, he or she shall obtain an opinion from the JPRC. TJAG shall appoint three Air Force Court of Criminal Appeals judges who should ordinarily be of the same or higher grade as the complained-against-judge, to resolve a claim of judicial privilege as a whole claims judicial privilege, a Commission composed of at least three judges sitting on other service Courts of Criminal Appeals shall be appointed by TJAG with the approval of the other service Judge Advocate Generals from whose service Courts of Criminal Appeals the members are drawn.

E. Temporary Suspension Authority. The Chief Trial Judge, with respect to trial judges, or TJAG, with respect to any judge, may temporarily suspend, without prejudice, a judge from the

performance of the judge's judicial duties at any stage of an investigation into alleged judicial misconduct.

F. Complaint Procedure.

1. Submission of Complaint.

- a. Any person may submit a complaint, orally or in writing, giving a brief statement of the facts constituting such conduct. Any complaint shall be forwarded to any judge advocate or law specialist, preferably a staff judge advocate, legal officer, or military judge.
- b. Any judge who believes that his or her judicial independence or integrity has been or is being threatened, in addition to any other remedies available to him or her pursuant to Air Force instructions, may submit a complaint to the Chief Trial Judge, if the complainant is a trial judge, or to TJAG, if the complainant is the Chief Trial Judge or an appellate judge.
- c. If the complaint received involves a judge's concern that his or her judicial independence or integrity has been or is being threatened by someone who is not a judge, such complaint shall be processed in accordance with Articles 98 or 138, UCMJ, the Manual for Courts-Martial, or other applicable Air Force instructions.

2. Referral of Complaint.

- a. If the complained-against-judge is a trial judge, the officer receiving such complaint shall forward it promptly to the Chief Trial Judge.
- b. If the complained-against-judge is an appellate judge or the Chief Trial Judge, the officer receiving such complaint shall forward it promptly to TJAG.
- c. The Chief Trial Judge (unless he or she is the complained-against-judge) with respect to trial judges, or TJAG with respect to any judge, may find, *sua sponte*, sufficient cause to appoint a JIC.

3. Screening of Complaint.

- a. Trial judges.** Upon receipt of a complaint against a trial judge filed under paragraph 1a of this subsection, the Chief Trial Judge, or his or her appointee (who must be a currently assigned trial military judge or appointed appellate military judge, who should ordinarily be of the same or higher grade as the complained-against-judge, and who must not be subordinate in the performance rating chain to the complained-against-judge) shall promptly record the receipt of the complaint and screen the complaint for sufficient cause.
- b. Appellate judges or Chief Trial Judge.** Upon receipt of a complaint against an appellate military judge or the Chief Trial Judge filed under paragraph 1b of this subsection, TJAG or his or her appointee (who must be a currently assigned trial military judge or appointed appellate military judge, who should ordinarily be of the same or higher grade as the complained-against-

judge, and who must not be subordinate in the performance rating chain to the complained-against-judge) shall promptly record the receipt of the complaint and screen the complaint for sufficient cause.

4. Results of Screening. After the complaint has been expeditiously screened and a sufficient cause determination made, the Chief Trial Judge, or TJAG, as appropriate, by written order stating the reasons, may:

a. if there is not sufficient cause to proceed, dismiss the complaint and transmit copies of any written order to the complainant, if known, and the complained-against-judge; or

b. if sufficient cause is found, refer the complaint to a JIC. Under R.C.M. 109(c)(4), prior to the commencement of an initial inquiry, the complained- against-judge shall be notified that a complaint has been filed and that an initial inquiry will be conducted.

G. Judicial Inquiry Commission.

1. Appointment. Where sufficient cause is found, the Chief Trial Judge, or TJAG, as appropriate, shall appoint a JIC. The Chief Trial Judge may appoint himself or herself as the JIC. If the Chief Trial Judge designates another judge as the JIC, or when TJAG appoints a judge to a JIC, that judge must be a currently assigned military trial or appellate judge, who should ordinarily be of the same or higher grade as the complained- against-judge, and who must not be subordinate in the performance rating chain to the complained-against-judge. The JIC shall investigate the complaint, and after giving the complained-against-judge the opportunity to respond to the allegations, make findings of fact, including whether unprofessional conduct occurred.

2. Conduct of investigation. The JIC appointed hereunder shall conduct an investigation which is as extensive and as formal as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the Chief Trial Judge or TJAG, as appropriate. The purpose of the JIC in conducting an investigation is solely to gather information, make findings of fact based upon its evaluation of the evidence and information received, and submit a written report of its investigation, including its findings of fact, to the authority who appointed it.

Findings of fact must be as specific as possible, with each fact made a separate finding, if possible. See R.C.M. 905(d). Findings of fact include finding that the allegation of unprofessional conduct is or is not substantiated. The JIC shall not report opinions or recommendations. It has the authority to administer oaths (see Article 136, UCMJ; AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*). The Military Rules of Evidence are not binding but may be used as a guide. The complained-against-judge has no right to a personal appearance before the JIC, nor a right of confrontation or cross-examination, but does have the right to review all evidence against him or her and to present any matters to the JIC before findings of fact are made.

VI. ACTION ON THE REPORT OF THE JUDICIAL INQUIRY COMMISSION

Upon receipt of a report filed from a JIC, the Chief Trial Judge or TJAG, as appropriate, shall:

1. conduct or direct any additional investigation considered necessary;
2. approve or disapprove the findings or make findings of his or her own;
3. close the case and inform the complained-against-judge if he or she finds the alleged unprofessional conduct is not substantiated;
4. take appropriate action if he or she finds the alleged unprofessional conduct is substantiated;
5. refer the matter to other authorities for appropriate disposition whether or not the allegation of unprofessional conduct is or is not substantiated;
6. immediately provide written notice to the complainant, if known, that the matter has been concluded; and
7. immediately notify the complained-against-judge of any action taken under this paragraph or contemplated under Part VII.

VII. IMPLEMENTATION OF THE ACTION BY THE CHIEF TRIAL JUDGE OR THE JUDGE ADVOCATE GENERAL

A. Non-Adverse Action. Where the Chief Trial Judge or TJAG makes a final decision that the allegation of unprofessional conduct is not substantiated, the case is closed.

B. Due Process Rights before Certain Adverse Actions are Taken. Where TJAG determines that an allegation of unprofessional conduct has been substantiated and that he or she may take adverse action that includes removal of the judge from his or her assignment as a trial or appellate military judge, decertification from judicial duties, or referral to the complained-against-judge's state bar, then the complained-against-judge is entitled to written notice of the contemplated adverse action, the assistance of counsel, the opportunity to submit a written response, and the opportunity for a personal appearance before TJAG. The complained-against-judge has 15 days after receipt of notification to inform TJAG of his or her decision to exercise any and all of these due process rights.

VIII. FINALITY

TJAG's decision to authorize further investigation is within his or her discretion and is final. TJAG's decision on the resolution of judicial privilege issues is final. TJAG's decision as to any adverse action taken pursuant to these rules and procedures relating to judicial discipline is also final.

Attachment 10

THE AIR FORCE JUDICIAL ETHICS ADVISORY COUNCIL

I. ESTABLISHMENT

A Judicial Ethics Advisory Council (Council) shall be established pursuant to Rule for Courts-Martial 109(d) for the purpose of issuing advisory opinions on questions relating to the propriety of judicial conduct under the Uniform Code of Judicial Conduct (the *Code*). Opinions of the Council shall be provided to military judges at their request, Judicial Inquiry Commissions, Judicial Privilege Review Commissions, or to persons or agencies designated by The Judge Advocate General (TJAG) or his designee.

II. PURPOSE

The Council shall provide advisory opinions on the scope and meaning of the *Code* and its practical application.

III. COMPOSITION

The Judicial Ethics Advisory Council shall be appointed by TJAG for a minimum of one year. The Council shall be composed of at least three active duty or reserve judge advocates: one will be a currently-certified military trial judge, one will be a currently-certified military appellate judge, and one will be a judge advocate serving in another capacity. No member of the Council may serve concurrently on a Judicial Inquiry Commission or a Judicial Privilege Review Commission.

IV. DUTIES AND RESPONSIBILITIES OF THE COUNCIL

The Judicial Ethics Advisory Council shall:

- (1) by the concurrence of a majority of its members, express, in writing, its opinion on the propriety of judicial conduct with respect to the provisions of the *Code*;
- (2) make periodic recommendations to TJAG for amendment of the *Code*; and
- (3) adopt rules relating to the procedures to be used in expressing opinions, including rules to assure a timely response to inquiries.

V. ACTION PENDING OPINION

When the Council has been requested to provide an opinion concerning a question of judicial ethics and there is an urgent need for resolution of the question such that the administration of military justice may otherwise be impeded, the requesting judge should notify the Council of the urgency for resolution of the question before it. The Council should then provide an opinion expeditiously. An oral opinion followed by written confirmation is acceptable. Pending an opinion of the Council, a judge should normally refrain from participating in the conduct to which the question before the council relates. If some immediate action is required, the judge should consider other procedures for resolution of the matter (e.g., notification of the parties, voir dire, or recusal).

VI. RELIANCE ON OPINIONS

Opinions of the Council are not binding; however, TJAG and any Judicial Inquiry Commission will consider any good faith reliance on a Council's opinion in determining the propriety of questioned judicial conduct that is the subject of a disciplinary proceeding. A judge who has requested and complied with an opinion should not normally be disciplined for conduct consistent with that opinion. A Council opinion may always be used as mitigation or, when appropriate, as a defense.

VII. PUBLICATION

Opinions issued pursuant to this rule shall be filed with the Office of TJAG. Such opinions are confidential and not public information unless TJAG so directs. TJAG, however, shall cause an edited version of each opinion to be prepared, in which the identity and geographic location of the person who has requested the opinion, the specific court involved, and the identity of other individuals, organizations or groups mentioned in the opinion are not disclosed. Opinions so edited shall be published and circulated in a timely manner to all sitting trial and appellate military judges. The Chief Trial Judge will number such opinions consecutively and retain the record copy.

In order to make these opinions available to other jurisdictions, each opinion should also be reviewed and a determination made whether to send a copy to the Center for Judicial Conduct Organizations. The Center for Judicial Conduct Organizations is an informational source and study center for judicial discipline operated by the American Judicature Society (Web site: <http://www.ajs.org>).

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**

AIR FORCE INSTRUCTION 51-110

5 AUGUST 2014



Law

**PROFESSIONAL RESPONSIBILITY
PROGRAM**

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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This is a new publication implementing Air Force Policy Directive (AFPD) 51-1, *The Judge Advocate General's Department*, and Rule for Court Martial (RCM) 109. It provides guidance for the maintenance of professional responsibility and ethical standards within the Air Force Judge Advocate General's Corps (AFJAGC). This publication applies to AFJAGC members, including Air Reserve Component members.

Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the AF Form 847, *Recommendation for Change of Publication*; route AF Forms 847 from the field through appropriate functional's chain of command.

The authorities to waive wing/unit level requirements in this publication are identified with a Tier ("T-0, T-1, T-2, T-3") number following the compliance statement. See AFI 33-360, *Publications and Forms Management*, Table 1.1 for a description of the authorities associated with the Tier numbers. Submit requests for waivers through the chain of command to the appropriate Tier waiver approval authority, or alternately, to the Publication OPR for non-tiered compliance items. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with Air Force Manual (AFMAN) 33-363, *Management of Records*, and disposed of in accordance with the Air Force Records Disposition Schedule located in the Air Force Records Information Management System (AFRIMS). This publication may be supplemented at any level, but all supplements must be routed to OPR for coordination prior to certification and approval.

This publication requires the collection and/or maintenance of information protected by the Privacy Act (PA) of 1974. The authorities to collect and/or maintain the records prescribed in this publication are *Title 10 United States Code*, Section 8037 and RCM 109, Manual for Courts-

Martial (MCM). The applicable Privacy Act System Notice, F051 AFJA E, *Judge Advocate General's Professional Conduct Files*, is available online at: [http://dpclo.defense.gov/Privacy/DODComponentArticleList/tabid/6799/Category](http://dpclo.defense.gov/Privacy/DODComponentArticleList/tabid/6799/Category/2777/departement-of-the-air-force.aspx)

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1. Overview. This instruction provides guidance governing the ethical conduct of AFJAGC members. It sets forth the Air Force Rules of Professional Conduct (AFRPC) (Attachment 2), the Air Force Standards for Civility in Professional Conduct (Attachment 3), Supplemental Rules of Professional Conduct for Air Force Reserve Judge Advocates (Attachment 4), and Supplemental Rules of Professional Conduct for Air National Guard Judge Advocates (Attachment 5) (hereinafter rules and standards). References to rules and standards also encompass the Air Force Standards for Criminal Justice, which is found in AFI 51-201, *Administration of Military Justice*, Attachment 3. Additionally, this instruction establishes the procedures for receiving, processing, and taking action on complaints of professional misconduct made against lawyers practicing under the supervision of TJAG. It also provides limitations on

and procedures for processing requests to engage in the outside practice of law by AFJAGC lawyers and for the use of legal services volunteers.

2. Applicability. This instruction applies to all military and civilian lawyers, paralegals, and nonlawyer assistants in the AFJAGC. This includes all active duty, Air Force Reserve, Air National Guard (ANG), and civilian personnel employed by the AFJAGC, civilian counsel who represent an accused or are likely to represent an accused at court-martial or other proceedings governed by the Uniform Code of Military Justice (UCMJ) and/or MCM, and other personnel under the functional supervision of TJAG. The term “lawyer” in each rule should be read as “all military and civilian members of the JAGC.”

2.1. Acts or omissions may constitute professional misconduct, criminal misconduct, poor duty performance, or a combination of all three. Care must be taken to appropriately characterize the nature of the conduct to determine who should take official action.

2.1.1. Questions of legal ethics and professional misconduct by attorneys are within the exclusive province of TJAG. Nothing in this instruction limits the authority of TJAG to 1) issue or withdraw any certification or qualification to act as a military judge, any certification of competency to act as counsel before courts-martial, or any designation as a judge advocate; or 2) suspend any attorney from performing duties pending resolution of an allegation of unprofessional or unethical conduct.

2.1.2. Criminal misconduct is properly addressed by the attorney’s chain of command through the disciplinary process provided under the UCMJ and implementing instructions or through referral to appropriate civil authority. Poor performance of duty is properly addressed by the attorney’s chain of command through various administrative actions, including documentation in performance reports or appraisals. Nothing in this instruction limits the authority of commanders or other supervisors from taking appropriate disciplinary or administrative action when warranted.

3. Responsibilities.

3.1. **TJAG.** TJAG is responsible for making reasonable efforts to ensure all members of the AFJAGC receive training on and act in conformity with the rules and standards contained herein. Consistent with TJAG’s responsibilities to maintain ethical standards in the AFJAGC, TJAG is authorized to conduct inquiries into professional misconduct by AFJAGC attorneys or other attorneys subject to TJAG’s functional supervisory authority pursuant to RCM 109.

3.2. **Deputy Judge Advocate General (DJAG).** DJAG is delegated the authority to conduct initial reviews and appoint inquiry officers on cases in which the subject is a senior supervising attorney (SSA) as defined in paragraph 3.5 and in cases in which the subject attorney does not fall under the supervision of a SSA, including civilian attorneys who are not part of the AFJAGC.

3.3. **TJAG’s Professional Responsibility Administrator (TPRA).** TPRA is assigned to the Administrative Law Directorate (HQ USAF/JAA-PR). TPRA will carry out overall administration and management of TJAG’s Professional Responsibility Program. TPRA reports to TJAG through the Director, Administrative Law, on all professional responsibility matters. TPRA will provide general guidance on professional responsibility matters to AFJAGC members and will refer matters and provide assistance to TJAG’s Advisory

Committee on Professional Responsibility and Standards as appropriate. TPRA will provide monthly case reports to the Director, Administrative Law and Advisory Committee. TPRA will also provide such reports concerning active duty cases to the Professional Development Directorate (HQ USAF/JAX).

3.4. TJAG's Advisory Committee on Professional Responsibility and Standards (Advisory Committee). The Advisory Committee will advise TJAG on matters related to the maintenance of professional responsibility rules and standards.

3.4.1. The Advisory Committee may be convened to take actions required in accordance with this instruction. It will advise TJAG on alleged violations of the rules and standards. Neither the Advisory Committee nor its individual members has investigative powers while performing this function, and neither will communicate directly with the subject, counsel, or witnesses on matters under consideration.

3.4.2. The Advisory Committee may issue advisory opinions on professional responsibility matters consistent with the procedures set forth in paragraph 9.

3.4.3. The permanent members of the Advisory Committee are the Director, USAF Judiciary (AFLOA/JAJ), Director, Civil Law and Litigation (AFLOA/JAC), Director, Civilian Career Development, Plans, and Programs (HQ USAF/JAZ), and the Reserve Advisor to TJAG (HQ USAF/JAR), who will serve only on matters affecting Reserve and ANG judge advocates. TPRA will serve as a non-voting recorder to the Advisory Committee. TJAG may appoint ad hoc members to the Advisory Committee when necessary to provide expertise in a particular area or to replace a member who is unable to serve on a particular case. The senior active duty member on the Advisory Committee will be the chairperson.

3.5. Senior Supervisory Attorney (SSA). SSAs are responsible for making reasonable efforts to ensure attorneys under their supervision receive training and conform to the rules and standards. When SSAs receive information that AFJAGC members under their jurisdiction are alleged to have violated TJAG's rules and standards, SSAs must review and process the alleged violations. SSAs are delegated the authority to appoint inquiry officers to investigate alleged violations of the rules and standards by attorneys under their supervisory authority. For the purposes of this instruction, the term senior supervisory attorney includes the Air Force Legal Operations Agency commander (AFLOA/CC), major command staff judge advocates (SJA) (Air Combat Command SJA, Air Education and Training Command SJA, Air Force Global Strike Command SJA, Air Force Materiel Command SJA, Air Force Special Operations Command SJA, Air Force Space Command SJA, Air Mobility Command SJA, Air Force Reserve Command SJA, Pacific Air Forces SJA, United States Air Forces Europe SJA), and the ANG Assistant to TJAG (for ANG judge advocates).

3.6. Supervisory Attorneys. Supervisory attorneys are responsible for making reasonable efforts to ensure attorneys under their supervision receive training and conform to the rules and standards.

3.6.1. Organizational Training. Supervisory attorneys are responsible for ensuring AFJAGC attorneys, paralegals, and non-lawyer assistants under their supervision receive training on the rules and standards as an organization on an annual basis.

3.6.2. Annual Rules Review and Certification. In addition to the organizational training, supervisory attorneys must also ensure AFJAGC members under their supervision individually certify their annual review of the applicable rules and standards.

3.6.3. Additional Certifications. Consistent with AFI 51-103, *Designation and Certification of Judge Advocates*, and AFI 51-107, *Employment of Civilian Attorneys*, supervisory attorneys must also ensure subordinate attorneys annually certify they are an active (or equivalent) member of the bar of the highest court of a state, U.S. commonwealth, U.S. territory, or the District of Columbia and certify the absence of any pending or completed disciplinary proceedings by any licensing authority.

3.6.4. Certifications will be done through the PR CERT online certification program in the Federal Legal Information Through Electronics (FLITE) database.

3.7. All Attorneys. All AFJAGC attorneys are responsible for knowing and complying with the applicable rules and standards and the rules of their respective licensing jurisdictions. AFJAGC attorneys are responsible for completing annual professional responsibility certifications through the PR CERT program as discussed in paragraphs 3.6.2. through 3.6.4. AFJAGC attorneys must also meet ethics training and other professional responsibility requirements imposed by their licensing authorities in order to maintain an active (or equivalent) status.

3.7.1. Reporting Alleged Violations. Allegations of violations of the rules and standards will be reported in accordance with Rule 8.3, Air Force Rules of Professional Conduct (Attachment 2), and this instruction.

3.7.2. Required Notifications.

3.7.2.1. AFJAGC attorneys must notify TPRA prior to contacting the licensing authorities of another AFJAGC attorney regarding an alleged professional responsibility violation by any attorney subject to this instruction. This notification will assist TPRA in carrying out TJAG's supervisory responsibilities and will ensure TJAG is aware of all professional responsibility matters involving attorneys within the AFJAGC.

3.7.2.2. In accordance with AFI 51-103, judge advocates will provide notice through their SJA (or equivalent) and SSA to HQ USAF/JAX of the commencement of any action (including an investigation) by licensing authorities that may affect their license to practice law. ARC judge advocates must report similar actions through their SJA and SSA to the Mobilization Assistant to TJAG or the ANG Assistant to TJAG, as applicable. In accordance with AFI 51-107, civilian attorneys will make such notifications through their SJA (or equivalent) and SSA to the Civilian Career Development, Plans and Programs, Directorate (HQ USAF/JAZ). JAX and JAZ will advise TPRA of all actions by licensing authorities.

3.8. Paralegals and Nonlawyer Assistants. Although paralegals and nonlawyer assistants are not licensed attorneys subject to state licensing authorities, all Air Force legal professionals are responsible for knowing and conducting themselves in a manner consistent with the applicable rules and standards that govern the Air Force practice of the attorneys they assist. The terms paralegal and nonlawyer assistants includes other Air Force personnel, military and civilian, who perform duty in an Air Force legal office in support of Air Force

attorneys. Paralegals and nonlawyer assistants are responsible for completing annual professional responsibility certifications through the PR CERT program as discussed in paragraph 3.6.2. See paragraph 11.2 concerning volunteers.

3.9. Civilian Attorneys. Civilian attorneys who are not AFJAGC attorneys but who represent an accused in courts-martial, other proceedings governed by the UCMJ and/or MCM, or administrative proceedings are responsible for knowing and complying with the applicable rules and standards and the rules of their respective licensing authorities. Military defense counsel must provide associate civilian counsel with a copy of the applicable rules and standards for their review.

3.10. Host Nation Attorneys. The professional responsibility program responsibilities also apply to host nation attorneys who perform duty in an Air Force legal office. Host nation attorneys employed overseas by the Department of the Air Force must follow the rules and standards promulgated in this instruction to the extent the rules and standards are not inconsistent with their domestic law and professional standards.

4. Reporting Alleged Violations of the Rules and Standards.

4.1. Alleged Violations of the Rules and Standards by Judges. All allegations involving professional misconduct by Air Force judges will be reported and handled under the procedures outlined in AFI 51-201, Attachment 6.

4.2. Alleged Violations of the Rules and Standards by Attorneys Who are Not Judges. A complaint should ordinarily be in writing and detail the attorney's actions or omissions that constituted a violation of the rules and standards. A complaint may be initiated by any person.

4.2.1. Complaints of alleged violations of the rules and standards will be reported to:

4.2.1.1. DJAG (through TPRA) when the subject of the professional misconduct allegation is an SSA or an attorney not assigned to an SSA.

4.2.1.2. The subject attorney's SSA as outlined in paragraph 3.5. If an allegation is reported to someone other than the subject's SSA, the allegation will be forwarded to the appropriate SSA. Upon receiving information of a potential violation of the rules and standards, the SSA will notify TPRA. TPRA will monitor the processing of the matter.

4.2.1.2.1. The ANG Assistant to TJAG for complaints concerning ANG judge advocates. Complaints involving ANG judge advocates shall be forwarded to the ANG State Headquarters SJA of the state of the unit to which the subject judge advocate is assigned. The State Headquarters SJA shall notify the appropriate command authorities thereof, and send it, together with such comment as deemed appropriate, to the ANG Assistant to TJAG. If, however, the subject is a State Headquarters judge advocate or an ANG judge advocate in the grade of colonel, the information shall be forwarded directly to the ANG Assistant to TJAG, who will notify the appropriate state command authorities. If the ANG judge advocate is performing duty under Title 10, the complaint may be received and processed by the appropriate active duty SSA.

5. Processing Allegations of a Violation of the Rules and Standards. All allegations of a violation of the rules and standards will be investigated expeditiously and fairly.

5.1. Deferring the Processing of a Complaint. When the alleged violation of the rules and standards involves allegations of criminal misconduct, TJAG, DJAG, or the SSA as appropriate may defer an inquiry or action on the alleged rules and standards violation until criminal allegations are resolved. TJAG, DJAG, or the SSA may also defer inquiries and actions when otherwise warranted (e.g., to prevent interference with an ongoing litigation, post-trial actions, or the appellate process). The TPRA should be informed of any decision to defer the processing of a complaint.

5.2. Processing Cases of Civilian Counsel. The procedures and actions set forth in this instruction regarding allegations of violations of the rules and standards will apply, insofar as practicable, against civilian counsel who are not AFJAGC attorneys, but who represent a military accused. Complaints against civilian counsel who are not AFJAGC attorneys will be forwarded to DJAG.

5.3. Initial Review and Credibility Determination: Senior Attorney Cases. When the subject of an allegation of professional misconduct is a general officer or colonel or holds a civilian grade of GS-15 or higher, the following procedures shall apply.

5.3.1. Initial Review. DJAG or the SSA may forward the complaint to the subject of the complaint and provide the subject an opportunity to provide an initial statement, if the subject desires to do so. After reviewing the complaint and any information from the subject, if provided, DJAG or the SSA will make comments and recommendations and forward the case to TPRA. TPRA will review the case and forward it to the Advisory Committee.

5.3.2. Credibility Determination. The Advisory Committee will review the allegation in light of the evidence gathered to determine whether it appears credible. An allegation is credible if the information received provides a reasonable belief that a rules and standards violation occurred.

5.3.2.1. If upon initial review the Advisory Committee determines that the allegation is not credible and further action is unwarranted, the case will be sent to TJAG with a recommendation that it be closed.

5.3.2.2. If upon initial review the Advisory Committee determines that the allegation appears credible, it will either 1) direct TPRA to return the case to DJAG or the SSA for the appointment of an inquiry officer; or 2) recommend TJAG find that the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.3.2.3. Upon receipt of the Advisory Committee's recommendation following initial review, TJAG may 1) close the case; 2) refer the matter back to DJAG or the SSA for appointment of an inquiry officer; 3) refer the matter back to the Advisory Committee to answer additional questions; or 4) determine the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.4. Initial Review and Credibility Determination: Other Attorney Cases. In cases where the subject of an allegation is a lieutenant colonel or below, a civilian in the grade of

GS-14 or below, or a civilian counsel who represents an accused at a court-martial or other proceeding governed by the UCMJ and/or MCM, the following procedures shall apply.

5.4.1. Initial Review. DJAG or the SSA may forward the complaint to the subject of the complaint and provide the subject an opportunity to provide an initial statement, if the subject desires to do so.

5.4.2. Credibility Determination. After reviewing the complaint and any information from the subject, if provided, DJAG or the SSA will assess the credibility of the complaint. DJAG or the SSA will review the allegation in light of the evidence gathered to determine whether it appears credible. An allegation is credible if the information received provides a reasonable belief that a rules and standards violation occurred.

5.4.2.1. Allegation is Not Credible. If, upon initial review, DJAG or the SSA determines the allegation is not credible, DJAG or the SSA will forward the case to TPRA with a recommendation to close the case. TPRA will review the case and either 1) refers the matter to TJAG with a recommendation to close the case; or 2) refers the matter to the Advisory Committee for review.

5.4.2.1.1. The Advisory Committee may 1) recommend closure of the case to TJAG; or 2) direct TPRA to return the case to DJAG/SSA for appointment of an inquiry officer.

5.4.2.1.2. TJAG may delegate the authority to close a non-credible complaint to SSA's after consultation with TPRA.

5.4.2.2. Allegation is Credible. If upon initial review, DJAG or the SSA determines the allegation is credible, DJAG or the SSA will 1) appoint an inquiry officer; or 2) recommend TJAG find that the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.4.2.2.1. If DJAG or the SSA recommends TJAG find a minor or technical violation, the matter will be forwarded to the TPRA for submission to the Advisory Committee for review and recommendation to TJAG.

5.4.2.3. Upon receipt of a recommendation following initial review, TJAG may 1) close the case; 2) refer the matter back to DJAG or the SSA for appointment of an inquiry officer; 3) refer the matter back to the Advisory Committee to answer additional questions; or 4) determine the violation is of a minor or technical nature appropriately addressed through corrective counseling.

5.5. Conducting a Formal Inquiry.

5.5.1. The purpose of conducting a formal inquiry is to develop the facts and circumstances surrounding allegations of violations of the rules and standards so that TJAG can determine whether a violation occurred and take appropriate action.

5.5.2. The initiation of a formal inquiry is not intended to constitute the type of "ethics investigation" that most licensing authorities normally require attorneys to report. However, it is the responsibility of the subject of the inquiry to know and comply with his or her licensing authority's reporting requirements.

5.5.3. Inquiry Officer Requirements. An inquiry officer will be senior in grade to the subject of the inquiry. Exceptions to this requirement must be approved by TJAG or TJAG's designee. If the allegation involves a defense counsel and the performance of defense duties, the inquiry officer will be a defense counsel or former defense counsel to the extent possible. If the inquiry officer is to be a sitting defense counsel, the appointing official will coordinate with AFLOA/JAJD for that appointment. The inquiry officer will not come from the same office as the subject of the inquiry. The same inquiry officer may be appointed to investigate multiple subjects from the same complaint.

5.5.3.1. In cases involving conduct by ANG judge advocates not on Title 10 orders, the ANG Assistant to TJAG will appoint a senior ANG judge advocate to conduct the inquiry.

5.5.4. Inquiry Officer Responsibilities. The inquiry officer will determine the facts and circumstances surrounding the allegations by interviewing all relevant witnesses and collecting all relevant documents. The inquiry officer will take sworn statements from witnesses who provide relevant information. The inquiry officer should use the Secretary of the Air Force Office of the Inspector General Complaints Resolution Directorate's *Commander-Directed Investigation Guide*, or similar resource to assist in conducting the investigation and completing the inquiry report.

5.5.4.1. **Due Process.** The inquiry officer will notify the subject of the inquiry of the allegation(s) and the purpose of the inquiry, question the subject about the allegation(s) and provide the subject an opportunity to submit a sworn statement and other documentary evidence. The provisions of Article 31, UCMJ, apply when the subject is a military member and the inquiry officer has reason to suspect the subject has committed a criminal offense. Judge advocates that are the subject of a professional responsibility inquiry are entitled to the assistance of a military defense counsel or can retain civilian counsel at their own expense. Civilian attorneys must retain counsel at their own expense.

5.5.4.2. **Preparing and Submitting a Report.** The inquiry officer will prepare a report setting forth the facts of the case and conclusions as to whether or not any of the rules and standards may have been violated. The inquiry officer will attach to the report all statements and documents obtained during the inquiry. The inquiry officer will submit the report to the subject's SSA or DJAG as appropriate.

5.5.5. Standard of Proof. A "clear and convincing evidence" standard of proof will be used in reaching conclusions from the evidence developed.

5.5.6. DJAG/SSA Recommendation. Upon receipt and review of the report of inquiry, the SSA or DJAG, as appropriate, will provide a written recommendation to TJAG via TPRA regarding the disposition of the case. At a minimum, the recommendation should include reasons for approving or disapproving the findings of the inquiry officer and any recommended TJAG action.

5.6. Disposition of Allegations Following an Inquiry.

5.6.1. **TPRA.** Upon receipt of the case file following an inquiry, TPRA will review the file and may 1) concur with DJAG/SSA recommendation to close the case after a finding

of no violation and forward it directly to TJAG with a recommendation to close the case; or 2) refer the case to the Advisory Committee.

5.6.2. Advisory Committee. Upon receipt of the case following an inquiry, the Advisory Committee may do one of the following.

5.6.2.1. The Committee may return the case to TPRA for distribution back to DJAG or the SSA for further investigation.

5.6.2.2. The Committee may concur with DJAG/SSA recommendation to close the case after a finding of no violation and forward to TPRA for distribution to TJAG. In its discretion, the Committee may prepare a report supporting its concurrence to close the case.

5.6.2.3. When the Committee determines a violation has occurred, the Committee shall prepare a report including its findings, recommendations, and rationale for submission to TJAG. The report will clearly state what violations of the rules and standards the Committee found by clear and convincing evidence. The findings should be limited to the specific provisions allegedly violated. The report will include a copy of the case file. Minority reports are permitted. The Advisory Committee may make other observations about the case in a separate letter.

6. TJAG Action on Report of Inquiry. TJAG is not bound by the recommendations received from DJAG, the SSA, the Advisory Committee, or TPRA. TJAG will determine appropriate action in a case in TJAG's sole discretion. TJAG may take any of the following actions after receiving a report of inquiry.

6.1. Find no violation and close the case.

6.2. Direct further investigation.

6.3. Seek an opinion from the Advisory Committee.

6.4. Find a violation. If TJAG determines a violation has occurred, TJAG may take any of the following actions individually or in combination.

6.4.1. Characterize the violation as minor or technical and provide corrective counseling.

6.4.2. Admonish or reprimand the subject attorney.

6.4.3. Direct TPRA to forward the matter to the subject's commander or supervisory attorney for appropriate action.

6.4.4. Suspend the subject attorney's ability to practice before Air Force Courts pursuant to RCM 109.

6.4.5. Suspend a civilian attorney's authority to practice law in the AFJAGC pursuant to AFI 51-107.

6.4.6. Suspend or withdraw a judge advocate's designation and/or certification pursuant to AFI 51-103. The notice of reasons of such a withdrawal required by AFI 51-103 may be given simultaneously with the notice of other contemplated action. TJAG may combine all actions in a single communication.

6.5. If TJAG determines the subject violated any of the rules and standards and determines corrective action within TJAG's authority under paragraphs 6.4.4, 6.4.5 or 6.4.6 is warranted, TJAG will do the following.

6.5.1. Advise the subject of the proposed action.

6.5.2. Direct TPRA to send a copy of the relevant portions of the inquiry to the subject.

6.5.3. Give the subject 10 calendar days to submit written matters why TJAG should not take such action. The subject of the proposed action does not have a right to a personal appearance with TJAG.

6.5.3.1. Extensions and Waiver. TJAG may grant extensions to the period allowed to respond for good cause. A subject's failure to provide written comments in the time provided, including any extensions, constitutes a waiver of the opportunity to comment.

7. Post Decision Processing.

7.1. **Notification of Parties.** TPRA will notify the subject and the subject's SSA of the findings reached in the case. Notification to the complainant will be made in accordance with the Privacy Act. TJAG's action is final and not subject to appeal.

7.1.1. For ANG judge advocates, TPRA will notify the ANG Assistant to TJAG and the Adjutant General of the subject ANG judge advocate's state of any final action before notifying the ANG judge advocate of the ultimate disposition of the matter.

7.2. **Other Notification.** Investigations and results regarding senior officials and field grade officers will be reported to SAF/IGQ consistent with the guidance in AFI 90-301, *Inspector General Complaints Resolution*.

7.3. Reporting Cases to Licensing Officials.

7.3.1. Inquiries and actions taken under this instruction are not necessarily equivalent to the types of proceedings that require subjects to make a report to their state licensing official. However, findings or actions taken may trigger a requirement that the subject report the action to his or her licensing authorities. Ultimately, it is the responsibility of the subject attorneys to know and comply with the reporting requirements of their licensing authorities.

7.3.2. If TJAG determines any of the rules and standards have been violated and the seriousness of the violation warrants, TJAG may direct TPRA to report the matter to the appropriate licensing authorities of the subject attorney after notifying the subject that such a report will be made. Complaint information may be released to assist appropriate licensing and disciplinary authorities to meet their investigative and disciplinary proceeding responsibilities.

7.4. **Time Standards.** As a general rule, all efforts should be made to expedite an inquiry while safeguarding the appropriate due process requirements. The goal should be to complete inquiries within 120 calendar days from complaint to final action.

8. Effect of Separate Proceeding and Reciprocal Action. For purposes of this paragraph, the term "separate proceeding" includes, but is not limited to, court-martial, nonjudicial punishment,

administrative board, attorney disciplinary procedure, Inspector General investigation or similar civilian or military proceeding.

8.1. In those cases in which an attorney is determined to have committed misconduct at a separate proceeding which afforded procedural protection equal to that provided by an ethics inquiry under this instruction, the previous determination regarding the underlying misconduct may be considered *res judicata* with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the attorney an opportunity to respond with respect to whether the underlying misconduct constitutes a violation of the rules and standards and what sanctions, if any, are appropriate.

8.2. Notwithstanding paragraph 8.1, TJAG may dispense with an initial review and formal inquiry and, after affording the attorney written notice and an opportunity to respond in writing, take action in a case when the attorney has been:

8.2.1. Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Judge Advocate General or General Counsel of another Military Department;

8.2.2. Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals of the Armed Forces or by any Federal, State, or local bar; or

8.2.3. Convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court that, in TJAG's judgment, renders the attorney unqualified or incapable of properly or ethically representing the Department of the Air Force or a client when the attorney has been afforded procedural protection equal to that provided by an ethics investigation under this instruction.

9. Advisory Opinions.

9.1. **Written Requests.** The Advisory Committee may provide advisory opinions when requested. To the extent practicable, attorneys will request formal advisory opinions in writing. Requests will be sent to TPRA. While not required, attorneys are encouraged to send requests for advisory opinions through supervisory channels to TPRA. Prior to forwarding requests, supervisory SJAs should include their observations and recommendations. TJAG will review all written advisory opinions before they are issued and will decide whether and how the formal opinions will be published.

9.2. **Written Opinions.** When a request for a written advisory opinion is not practicable, attorneys may request an advisory opinion by calling TPRA. The Advisory Committee may, in very limited situations, issue an oral opinion, but only with the approval of TJAG. If an oral opinion is rendered, a written opinion restating the oral opinion will be prepared as soon as possible.

9.3. **Limitation.** Normally, the Advisory Committee will not provide advisory opinions concerning professional responsibility matters that are, at the time, the subject of litigation.

10. Off-Duty Legal Employment. 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.

10.1. **Applicability.** This guidance on off-duty legal employment applies to active duty judge advocates and civilian attorneys in the AFJAGC. Trial and appellate military judges must also observe additional restrictions contained in the Air Force Uniform Code of Judicial Conduct, Part IV, Canon 4 in AFI 51-201, Attachment 5. Air Force Reserve and Air National Guard judge advocates must adhere to the standards pertaining to off-duty representation contained in Attachments 4 and 5 of this instruction.

10.2. **Definition.** Off-duty legal employment is defined as any provision of legal advice, counsel, assistance, or representation, with or without compensation, that is not performed pursuant or incident to duties as an Air Force attorney (including employment while on terminal leave). Unless otherwise prohibited by statute or regulation, the following are excluded from this definition: 1) occasional uncompensated assistance rendered to relatives or friends; 2) the practice of law on the member's own behalf, or on behalf of parents, spouse, or children; and 3) teaching law as part of a program of education or training, or legal writing for educational purposes or for publication. The definition does include the provision of pro bono legal services.

10.3. Approval Required.

10.3.1. **Staff Judge Advocates and Military Judges.** SJAs and military judges seeking permission to engage in off-duty legal employment must first obtain written approval of their immediate commanders or supervisors and comply with relevant command policies. (T-3) Additionally, they must forward such requests through command judge advocate channels to TJAG or his designee for approval. (T-1) The request must identify the nature of the off-duty legal employment and include the approval of the immediate commander or supervisor.

10.3.2. **Other Attorneys.** Other attorneys desiring approval to engage in off-duty legal employment must receive written approval of their SJAs or equivalent and comply with relevant command policies.

10.3.3. **No Endorsement.** The approval to engage in off-duty legal employment does not in any way certify the qualifications or competencies of the Air Force lawyer to engage in that practice. Furthermore, because outside law practice is necessarily beyond the scope of the Air Force attorney's official duties, consideration should be given to obtaining personal malpractice insurance coverage.

10.4. **Compliance with Professional Responsibility and Standards of Conduct Rules.** Attorneys engaging in off-duty legal employment must ensure they adhere to applicable professional responsibility and standards of conduct rules.

10.4.1. **Professional Responsibility Rules.** Attorneys engaging in off-duty legal employment must comply with professional responsibility rules, including practice-related rules and licensing requirements of the jurisdiction in which they engage in such employment. This includes ensuring out-of-state attorneys may provide pro bono services without violating rules on the unauthorized practice of law or other local rules and regulations regarding professional fees or practice restrictions. It also includes

adhering to rules pertaining to terminating representation of a client if termination is necessary due to reassignment, deployment, or other reasons.

10.4.2. Standards of Conduct Rules. Attorneys engaging in off-duty legal employment must ensure that such activities are consistent with ethical standards of conduct. Accordingly, such attorneys must not engage in employment that would do any of the following.

10.4.2.1. Violate any Federal statute, rule or regulation, for example: 18 U.S.C. 202, et seq. (Federal Conflict of Interest Laws); 5 C.F.R. Part 2635 (Standards of Conduct for Employees of the Executive Branch); or the Joint Ethics Regulation, DoD 5500.07-R. Examples of criminal conflict of interest statutes include the following:

10.4.2.1.1. 18 U.S.C. 203. Federal officers and employees may not receive compensation for any representational services as agent or attorney in relation to a “particular matter” in which the United States is a party or has a direct and substantial interest.

10.4.2.1.2. 18 U.S.C. 205. Federal officers and employees may not act as agent or attorney to prosecute any claim against the United States, and may not act as agent or attorney before any Federal department concerning a “covered matter” in which the United States is a party or has a direct and substantial interest.

10.4.2.1.3. 18 U.S.C. 209. Federal officers and employees may not receive any salary or supplementation of salary as compensation for services as an officer or employee of the United States, from any source other than the Government of the United States.

10.4.2.2. Interfere with the proper and effective performance of the employee’s official duties, including time and availability requirements of his or her position. (See 5 C.F.R. 2635.705).

10.4.2.3. Provide legal services for compensation in an off-duty employment status to any person authorized legal assistance under AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*.

10.4.2.4. Otherwise cause a reasonable person to question the integrity of AFJAGC programs or operations. Accordingly, judge advocates must not wear their uniforms, use their official titles, or use official letterhead, official business cards, or other media while engaged in off-duty legal employment as doing so may create the appearance of impropriety or imply the Air Force endorses or has an interest in the matter.

10.5. Authority to Appear in Accordance with AFI 51-301, *Civil Litigation*.

10.5.1. Consistent with the above guidance, any judge advocate or civilian attorney who receives approval to engage in off-duty legal employment is authorized, pursuant to AFI 51-301, para 1.1.5, to appear in a civil judicial or administrative action.

10.5.1.1. Air Force lawyers shall not wear uniforms when representing clients off-base. This applies when representing a client through off-duty legal employment, the expanded legal assistance program, or other pro bono legal services.

11. Use of Legal Services Volunteers. Volunteers are an invaluable resource and perform many tasks worldwide, increasing the level of service AFJAGC is able to provide to its clients. Air Force legal professionals should use volunteers to the maximum extent practicable, subject to the limitations on the functions they can perform as outlined below. All volunteers shall read and sign the appropriate part of the DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities or Nonappropriated Fund Instrumentalities*.

11.1. Limitations.

11.1.1. 31 U.S.C. 1342, *Limitation on Voluntary Services*, prohibits federal government officials from accepting voluntary services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. Examples of voluntary services authorized by law that are regularly applicable to AFJAGC practice include 10 U.S.C. 1588, *Authority to Accept Certain Voluntary Services*, and 5 U.S.C. 3111, *Acceptance of Volunteer Service*.

11.1.1.1. 10 U.S.C. 1588 allows the Department of Defense to accept certain voluntary services, and DODI 1100.21, *Voluntary Services in the Department of Defense*, paragraph E3.2.3.9, includes legal assistance as an accepted volunteer program under 10 U.S.C. 1044, *Legal Assistance*.

11.1.1.2. 5 U.S.C. 3111 permits the acceptance of volunteer services pursuant to student intern programs.

11.1.2. **Judge Advocate Functions.** By statute, only attorneys qualified and designated by TJAG as judge advocates may perform judge advocate functions. (See 10 U.S.C. 8067(g)). As a result, legal services volunteers, even if licensed attorneys, may not perform the functions of a judge advocate. These include any functions that the UCMJ or Air Force instructions require to be performed by a judge advocate. Examples of such functions include acting as trial counsel, military defense counsel, legal advisor, or military judge in an Article 32 hearing or court-martial and serving as a recorder, legal advisor, or respondent's military counsel in an adverse administrative proceeding. For purposes of this restriction, "judge advocates" are those officers designated as judge advocates in accordance with AFI 51-103.

11.1.3. **Military Defense Counsel.** Military defense counsel responsibilities are, by their very nature, a judge advocate function. Therefore, volunteers serving in an area defense counsel (ADC) office or other office providing military defense services may not represent clients. They may perform paralegal-type functions under the supervision of a judge advocate. Care must be taken in such cases to maintain confidentiality of client matters. Military clients seeking representation should be advised of the status of any volunteer assisting a military defense counsel on the case. The degree of supervision required will vary depending on the nature of the task being performed and the skill level of the individual volunteer performing the task. This restriction does not prohibit a licensed attorney from entering into an attorney-client relationship with Air Force members.

11.1.4. **Inherently Governmental Legal Functions.** Legal services volunteers, even if licensed attorneys, may not perform "inherently governmental functions" within the meaning of Office of Management and Budget Circular No. A-76. Examples of legal

actions which fall into this category include decisions to settle claims against the government; decisions to assert, settle, or drop pro-government claims; and decisions establishing the government position or strategy with respect to civil litigation issues.

11.1.5. Other Legal Services Functions. As a matter of policy, legal services volunteers, even if licensed attorneys, may not be permitted to provide direct, unsupervised advice to legal assistance clients or to commanders or other agency clients on matters affecting Air Force interests. They may, however, perform paralegal-type functions or provide other legal services if acting under the direction, supervision, and control of an Air Force military or civilian attorney. Examples of permissible uses include researching, drafting legal opinions for review and signature by an Air Force attorney, and assisting with legal assistance matters (such as drafting wills and providing tax return preparation) under the supervision of an Air Force attorney. The degree of supervision required will vary depending on the nature of the task being performed and the skill level of the individual volunteer performing the task.

11.2. Confidentiality and Standards of Professional Conduct. All legal service volunteers must be briefed on, understand, and comply with the same confidentiality requirements applicable to all members of the legal staff. All legal services volunteers must read and sign a confidentiality agreement. A sample agreement is provided at Attachment 6. In addition, volunteers performing paralegal functions or providing other legal services under the supervision of an attorney must be briefed on, understand, and comply with the rules and standards in Attachments 2 and 3.

ROBERT G. KENNY
Major General, USAFR
Performing Duties of The Judge Advocate General

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

AFI 51-103, *Designation and Certification of Judge Advocates*

AFI 51-107, *Employment of Civilian Attorneys*

AFI 51-201, *Administration of Military Justice*

AFI 51-301, *Civil Litigation*

AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*

AFI 90-301, *Inspector General Complaints Resolution*

DODI 1100.21, *Voluntary Services in the Department of Defense*

DoD 5500.07-R, Joint Ethics Regulation

Manual For Courts-Martial, United States

5 Code of Federal Regulations Part 2635

OMB Circular No. A-76

Title 5 United States Code, Section 3111

Title 10 United States Code, Section 1044

Title 10 United States Code, Section 1588

Title 10 United States Code, Section 8037

Title 10 United States Code, Section 8067

Title 18 United States Code, Section 202

Title 18 United States Code, Section 203

Title 18 United States Code, Section 205

Title 18 United States Code, Section 209

Title 31 United States Code, Section 1342

Adopted Forms

AF Form 847, *Recommendation for Change of Publication*

Abbreviations and Acronyms

AFI—Air Force Instruction

ACC—Air Combat Command

AETC—Air Education and Training Command

AFDW—Air Force District of Washington

AFGSC—Air Force Global Strike Command

AFMC—Air Force Materiel Command
AFSOC—Air Force Special Operations Command
AFSPC—Air Force Space Command
AMC—Air Mobility Command
AFRC—Air Force Reserve Command
AFLOA—Air Force Legal Operations Agency
AFMAN—Air Force Manual
ANG—Air National Guard
AFRIMS—Air Force Records Information Management System
AFRPC—Air Force Rules of Professional Conduct
CLE—Continuing Legal Education
CFR—Code of Federal Regulations
DJAG—Deputy Judge Advocate General
FLITE—Federal Legal Information Through Electronics
JER—Joint Ethics Regulation
MCM—Manual for Courts-Martial
PACAF—Pacific Air Forces
RCM—Rule for Court Martial
SSA—Senior Supervising Attorney
TJAG—The Judge Advocate General
AFJAGC—Air Force Judge Advocate General’s Corps
TPRA—The Professional Responsibility Administrator
UCMJ—Uniform Code of Military Justice
USAFE—United States Air Forces Europe
USC—United States Code

Attachment 2**AIR FORCE RULES OF PROFESSIONAL CONDUCT****INTRODUCTION TO THE AIR FORCE RULES OF PROFESSIONAL CONDUCT****CHAPTER 1 LAWYER-CLIENT RELATIONSHIP**

Rule 1.0	Terminology
Rule 1.1	Competence
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INTRODUCTION TO THE AIR FORCE RULES OF PROFESSIONAL CONDUCT

The *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*) apply to all military and civilian lawyers in the Air Force Judge Advocate General's Corps. This includes host nation lawyers employed overseas by the Department of the Air Force, to the extent the *Rules* are not inconsistent with their domestic law and professional standards (see Rule 8.5). The *Rules* apply to ANG judge advocates performing duty in Title 10 or Title 32 status. The *Rules* also apply to all lawyers who practice in Air Force courts and other proceedings under the UCMJ/MCM, including, but not limited to, civilian defense counsel with no connection to the Air Force. Although the AFRPC are not punitive in nature, they establish the minimum standards of ethical conduct demanded of covered individuals. Violations may be addressed administratively, or through actions to suspend practice or withdraw certification or designation.

Beyond establishing minimum standards, the *Rules* are designed to meet three important objectives. They provide workable guidance to Air Force lawyers, they are specific to the problems and needs of our practice, and they are accessible to Air Force lawyers assigned throughout the world. The AFRPC are directly adapted from the *American Bar Association (ABA) Model Rules of Professional Conduct*, with important contributions from *Army Rules of Professional Conduct for Lawyers* and the Navy instruction: *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*. The ABA made comprehensive amendments to its Model Rules of Professional Conduct in 2002, 2003, and 2009 and the Air Force adopted a number of these changes.

Where an ABA rule has been altered, the Air Force rule indicates that it was modified. Where material has been added, the new material is so labeled, and the term "substituted" indicates that a rule has been entirely replaced. Simple terminology changes made to conform a rule to Air Force practice, without substantive changes, are not annotated as being modified. Some of the *Rules* contain discussion sections, designed to explain or amplify the rule, place it in context, or provide additional guidance. Discussions are interpretive tools, not binding upon counsel, but helpful in understanding and using the *Rules*. Although the comments to the *ABA Model Rules* have not been incorporated, counsel are encouraged to consult them for guidance and assistance in placing the *Rules* in context. In doing so, counsel must be aware that the AFRPC were specifically adapted to the unique needs and demands of Air Force practice, and not all of the ABA comments will be helpful.

One of the more difficult issues Air Force lawyers may confront is identifying the client and where the counsel's loyalties belong. Rule 1.13 addresses this question at length and cautions that, under some circumstances, a lawyer may encounter a conflict between his or her obligation to the Air Force as the client, and the needs and interests of individual officials, employees, and agents of the Air Force. Another difficult area is the question of client confidentiality (Rule 1.6). Although language was added to recognize Air Force security and mission needs, the Air Force rule very closely follows the ABA rule with respect to confidentiality.

In adapting the *Rules*, a conscious attempt was made to balance Air Force needs with the position of Air Force lawyers as members and leaders in the mainstream of the legal profession in the United States. It is an appropriate balance, but one that carries heavy obligations to the service

and the profession. The quality and professionalism of the lawyers in this Corps provide ample assurance that those obligations will be met.

CHAPTER 1

LAWYER-CLIENT RELATIONSHIP

Rule 1.0. Terminology

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, a court-martial, an administrative discharge board, a board of inquiry, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.1. COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.

Rule 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) [Modified] Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive trial by court members, the composition of the court, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage in, or assist a client in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) An Air Force attorney's authority and control over decisions concerning representation may, by law, be expanded beyond the limits imposed by paragraphs (a) and (c).

DISCUSSION

Subsection (a) recognizes the balance between a client's ultimate authority within the limits imposed by law and the lawyer's professional responsibilities to determine the purposes to be served by the representation and the lawyer's responsibility for tactical and technical issues and considerations. Some decisions, such as whether to stipulate or proffer a pretrial agreement, must be made jointly by the lawyer and client within the context of applicable regulations, the UCMJ, and MCM. The subsection was modified slightly to include the client's sole authority, within the limits prescribed by RCM 903 and in AFI 51-201, to elect the composition of his or her court-martial. See also, *Air Force Standards for Criminal Justice* (AFSCJ or the *Standards*), Standard 4-5.2 and Standard 4-8.2.

The objectives and scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-client relationships and representation of clients by Air Force lawyers is permissible only when authorized by competent authority. Thus, notwithstanding Rule 1.2(a) and(c), Air Force lawyers are subject to directions of officials at higher levels within the Department. When acting pursuant to properly delegated authority, these officials may authorize or require some variance in the scope of representation otherwise agreed upon between the lawyer and a lower level official. For example, the Secretary of the Air Force may: prescribe who is entitled to legal assistance; limit the scope of consultation when an individual is deciding whether to accept nonjudicial punishment; or limit the scope of representation at a hearing to review pretrial confinement. When the objectives or scope of services provided by the lawyer are limited by law, the lawyer should ensure at the earliest opportunity that the client is aware of such limitations. Subsection (e) was added to reflect this aspect of Air Force practice.

Rule 1.3. DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. COMMUNICATION

(a) A lawyer shall

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. FEES

A lawyer shall not receive outside compensation for work performed as part of official government duties.

DISCUSSION

Air Force lawyers do not charge or collect fees. Civilian lawyers who do are regulated and may be sanctioned by state or federal bar authorities.

Rule 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) [Modified] to prevent reasonably certain death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or

(4) to comply with other law or court order.

DISCUSSION

Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the United States Air Force. A lawyer's duty to a client is a strong one. If it is possible for the lawyer to act to prevent ongoing or potential criminal misconduct without violating a client confidence, those actions should always be considered first. In the circumstances described in the rule, a lawyer is excused from his fundamental obligation to preserve client confidences. See also Rule 1.13, Rule 5.4, and Standard 4-3.7.

Rule 1.6 contemplates disclosure based on client consent. In the organizational context, the proper Air Force authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or Air Force official with decision making authority regarding the subject matter of the representation or superior authority.

Rule 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

DISCUSSION

Some limitations may be inherent in representation by an Air Force lawyer. Counsel should always ensure that each client is aware of such limitations and how they may specifically affect the representation. See Rule 1.2, Rule 1.4, Rule 1.13, and Standard 4-3.5.

Rule 1.7(b) contemplates waiver of a conflict based on client consent in certain cases. In the organizational context, the proper Air Force authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or Air Force official with decision making authority regarding the subject matter of the representation, that official's staff judge advocate or superior authority.

Rule 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) [Modified] A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation.

[(f) Omitted]

(g) [Modified] A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) [Omitted]

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) [Omitted]

DISCUSSION

Conflicts of interest in the nature of prohibited transactions are specifically prohibited by the *Joint Ethics Regulation* (JER), DoD 5500.7-R. That regulation, the underlying Department of Defense Directive 5500.7, *Standards of Conduct*, and applicable Federal statutes (see generally 5 U.S.C. Section 7301 and 18 U.S.C. Sections 202 to 209) are an Air Force lawyer's primary authority concerning conflicts of this nature.

Language concerning aggregated pretrial agreements in criminal cases was deleted from subsection (g) as inapplicable to military practice (see RCM. 705 and AFI 51-201, Chapter 6).

By adopting the ABA rule, the Air Force rule establishes only ethical parameters. It is doubtful that Air Force lawyers will find it necessary to obtain releases such as the ones described in 1.8(h). See 10 U.S.C. Section 1054 and 28 U.S.C. Sections 1346 (b) and 2672 limiting remedies for malpractice by Air Force lawyers to actions against the United States.

Subsections (f), (i) and (k) were omitted as being inapplicable to Air Force practice. Subsection (j) addresses sexual relations with clients. Additional regulatory guidance may further prohibit sexual relations between clients and attorneys, including rules on fraternization, unprofessional relationships, adultery, conduct unbecoming an officer, and misuse of position and may constitute separate grounds for disciplinary or administrative action.

Rule 1.9. DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10. IMPUTED DISQUALIFICATION [Substituted]

Air Force lawyers who work in the same military law office are not automatically disqualified from representing a client even if other Air Force lawyers in that office would be prohibited from doing so by Rule 1.7, Rule 1.8(c), or Rule 1.9.

DISCUSSION

Lawyer associations such as law firms are not directly analogous to military legal offices. The appropriate test is whether an actual conflict exists that directly prejudices the interests of a client. See *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987); *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987) and *United States v. Payton*, 23 M.J. 379 (C.M.A. 1987), all dealing generally with conflicts in criminal cases.

Rule 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

[Subsections (a), (b) and (c) are omitted. See the JER and applicable law. See also Discussion, Rule 1.8 supra.]

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment; unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) [Modified] negotiate for private employment with any person or organization who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) As used in this rule, the term "matter" includes:

(1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12. FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person, or as an arbitrator, mediator or other third party neutral unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third party-neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

[(c) Omitted]

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

DISCUSSION

Paragraph (b) indicates a lawyer serving as law clerk may negotiate for employment with a party or lawyer involved in a matter after notifying the judge. Such negotiation must comply with other rules regarding post-government employment, as applicable.

Rule 1.13. THE AIR FORCE AS CLIENT

(a) [Modified] Except when authorized to represent an individual client, the government of the United States, or another government agency, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

(b) [Modified] If an Air Force lawyer knows that an official, member, employee, or other person associated with the Air Force is acting, intends to act, or refuses to act in an official matter in a way that is either a violation of the person's legal obligations to the Air Force or a violation of law which reasonably might be imputed to the Air Force, the lawyer shall proceed as is reasonably necessary in the best interest of the Air Force. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the apparent motivation of the person involved, the policies of the Air Force concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) advising the person that, in the lawyer's opinion, the action, planned action, or refusal to act is contrary to law or regulation; advising the person of Air Force policy on the matter concerned; advising the person that his or her personal legal and professional interests are at risk; and asking the person to reconsider the matter;

(2) suggesting that a separate legal opinion on the matter be sought for presentation to the person or other appropriate Air Force authority;

(3) advising that person that the lawyer is ethically obligated to preserve the interests of the Air Force and, as a result, must consider discussing the matter with senior Air Force lawyers in the lawyer's office or at the next level of command and, again, asking the person to reconsider the matter;

(4) consulting with senior Air Force lawyers including, if warranted by the seriousness of the matter, referring the matter to the Air Force lawyer who serves as counsel to the person's superior in the chain of command.

(c) [Modified] If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the Air Force insists upon action or refusal to act that is clearly a violation of law, the lawyer may consult with senior Air Force lawyers at the same level of command or at higher levels of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid violation of the law by the Air Force and to prevent the lawyer from participating or assisting in a violation of the law. In no event shall the lawyer participate or assist in the illegal activity.

(d) [Modified] In dealing with Air Force officials, members, employees, or other persons associated with the Air Force, a lawyer shall explain that the Air Force is the lawyer's client when the lawyer knows or reasonably should know that the Air Force's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.

(e) [Modified] A lawyer representing the Air Force may also represent any of its officials, members, or employees subject to the provisions of Rule 1.7 and other applicable authority. If the Air Force's consent to representation of such individuals is required by Rule 1.7, the consent shall be given by the MAJCOM SJA or equivalent. If the MAJCOM SJA or equivalent is requesting consent, then consent shall be given by DJAG.

(f) [Added] A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual (including Special Victims' Counsel), has, for those purposes, a lawyer-client relationship with that individual.

DISCUSSION

With limited exceptions, an Air Force lawyer represents the Department of the Air Force as it acts through its authorized representatives. Exceptions include, but are not limited to, lawyers assigned to represent individuals under subsection (f), trial counsel who represent the government of the United States, counsel assigned to perform special duties such as assignment to the Department of Defense, a Department of Defense component, Department of the Air Force Office of the General Counsel, as an Assistant United States Attorney or other federal agency. In representing the Air Force, counsel serves his or her client by interacting with Air Force officials, members, and employees. When an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is protected from disclosure to anyone outside the Air Force under Rule 1.6. However, this does not mean that the official, employee, or member is a client of the Air Force attorney. It is the Air Force, not the official, employee, or member, that benefits from Rule 1.6 confidentiality. The Air Force's entitlement to confidentiality may not be asserted by an official, employee, or member to conceal personal misconduct from Air Force authorities.

If a lawyer knows that the Air Force may be substantially injured by an action of an official, member, or employee and the action is in violation of law, it may be necessary for the lawyer to take steps to have the matter reviewed by higher Air Force authority.

Air Force lawyers are required to act in a manner consistent with these rules. As discussed in the *Rules*, loyalty and confidentiality are ethical obligations owed to the Air Force and cannot be compromised. As professional military officers and trusted counsel, it is also essential for Air Force lawyers to be personally loyal to the commanders, officials, and other individuals whom the lawyers advise. Loyalty and confidentiality are professional traits that are virtues only when they are consistent with a lawyer's ethical obligations to the client: the Air Force.

Determining whether to reveal communications with a commander to higher Air Force authority requires mature judgment and common sense. If a lawyer perceives a conflict between his or her professional commitments to the commander and his or her ethical obligations to the Air Force, he or she may consult with a supervisory Air Force lawyer (see Rule 5.1 and Rule 5.2). If the situation cannot be resolved at that level, the senior lawyer should consult with appropriate Air Force lawyers at the next level of command. In extreme cases it may be necessary to refer the matter to The Judge Advocate General.

Conflicts of Interest. When Air Force interests are or become adverse to those of an individual authorized to act on behalf of the Air Force, the lawyer must advise the individual concerning the conflict. In such circumstances, the advice should explain that the lawyer cannot represent the individual, and that the individual may wish to obtain independent representation by an Air Force lawyer authorized to provide such representation or by other counsel. Care must be taken to ensure that the individual understands that when interests conflict, the Air Force lawyer represents the Air Force, not the individual, and discussions between the lawyer and the individual may not be privileged. The specific facts of each case will determine whether such a warning should be given by an Air Force lawyer to any official, member, or employee (see Rule 1.6 and Rule 5.4).

Rule 1.14. CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective measures pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.15. SAFEKEEPING PROPERTY

(a) [Substituted] Air Force lawyers will hold the property of clients or other persons only when doing so is necessary to further the representation of the client. When it is necessary for a lawyer to hold property, the lawyer must exercise the care of a fiduciary. Such property shall be clearly labeled or otherwise identified, held apart from the lawyer's personal property or from government property, and counsel should exercise substantial care to ensure the safety of the property. Property should be promptly returned when it is no longer necessary for the lawyer to retain it in order to further representation.

(b) [Substituted] When property of a client or third party is admitted into evidence or otherwise included in the record of an administrative or criminal proceeding, the lawyer should take reasonable action to ensure its prompt return.

DISCUSSION

Legal assistance lawyers and area defense counsel will often need to receive documents and other items from clients in order to properly investigate, research, and complete legal matters. This rule sets very basic, minimum standards for safeguarding such property. Subsection (b) requires counsel to take reasonable steps to secure the return of evidence to its owner, bearing in mind that return may not be possible until appellate review is completed.

In very rare circumstances, counsel may find it necessary to hold money or securities for a client or interested party. Counsel should be guided by existing Air Force instructions and policy as well as ABA Rule 1.15, which requires, inter alia, depositing funds or securities in an appropriate, separate trust account or safety deposit box. The same general rule applies in situations involving money. Such property should only be accepted and held by a lawyer when doing so is necessary to further the client's representation.

Rule 1.16. DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the AFRPC or the law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) [Modified] the lawyer is discharged by the client.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- [(6) Omitted]
- (7) or other good cause for withdrawal exists.

(c) [Modified] A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) [Modified] Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled. The lawyer may retain papers relating to the client to the extent permitted by other law.

DISCUSSION

Subsection (b)(6) was omitted because Air Force lawyers will rarely, if ever, be exposed to unreasonable financial burdens related to representation. Addition of the language "or other competent authority" in subsection (c) recognizes that Air Force lawyers are not always free to withdraw from representation. Competent authority may be supervising lawyers, or in some cases, counsel's superiors within his or her chain of command. Specific facts will govern each case. Finally, since Air Force lawyers will not receive advance payments or fees, reference to such payments was deleted from subsection (d).

Rule 1.17. SALE OF LAW PRACTICE [Omitted as inapplicable]

Rule 1.18. DUTIES TO PROSPECTIVE CLIENT [Modified]

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) [Modified] A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) [Modified] the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

CHAPTER 2**COUNSELOR****Rule 2.1. ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Rule 2.2. INTERMEDIARY (deleted).**Rule 2.3. EVALUATION FOR USE BY THIRD PERSONS**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule 2.4. LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

CHAPTER 3

ADVOCATE

Rule 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

(a) [Modified] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or discharge, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) [Added] A lawyer does not violate this rule by raising issues in good faith reliance upon court precedent.

DISCUSSION

See, for example, *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Rule 3.2. EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in a criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

DISCUSSION

Subsection (a)(3) emphasizes that lawyers must not help clients commit perjury, even by remaining silent when the lawyer knows that the client has offered false testimony. Subsection (a)(3) recognizes the special context of criminal defendants, requiring defense counsel to know (vice reasonably believing) the evidence is false before refusing to offer client testimony. Counsel must do everything in their power to dissuade a client from lying, including seeking leave to withdraw from representation (see Rule 1.16), advising the client that the lawyer cannot argue or otherwise use the false testimony, and that the lawyer is obligated to disclose the perjury. See *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). This rule must be distinguished from Rule 1.6, which addresses a lawyer's duty to preserve client confidences. By committing perjury, a client may be said to waive confidentiality as to the false testimony. As the Court pointed out in *Whiteside*, although a client may have the right to testify, that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *United States v. Baker*, 58 M.J. 380 (C.A.A.F. 2003); *United States v. Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. The obligations in this Rule also apply to counsel for witnesses, including Special Victims' Counsel. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

The term "legal authority in the controlling jurisdiction" in (a)(2) refers to Air Force or Department of Defense regulations or directives, the MCM, opinions by military appellate courts, or similar authorities.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

DISCUSSION

Rule 3.4(f) permits Air Force lawyers to advise officials, members, and employees of the Air Force to refrain from giving information to another party, especially when the individual's interests coincide with those of the Air Force. (See Rule 1.13 and Rule 4.2.)

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) [Modified] seek to influence a judge, court or board member, prospective court or board member, or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) [Modified] communicate with a court or board member or prospective court or board member after discharge of the court or board if:

(1) the communication is prohibited by law or court order;

(2) [Modified] the court or board member has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment.

(d) engage in conduct intended to disrupt a tribunal.

DISCUSSION

Terminology was modified to be consistent with Air Force practice.

Rule 3.6. PUBLICITY.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

or

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DISCUSSION

Air Force members must comply with applicable laws and regulations in making public statements of any kind. Public statements include comments made through social media. See, for example, AFI 51-201, Chapter 13; *The Freedom of Information Act* (FOIA), 5 U.S.C. 552; DoD 5400.7-R_AFMAN 33-302 *Freedom of Information Act Program*; *The Privacy Act*, 5 U.S.C. 552a; AFI 33-332, *Air Force Privacy Program*; and *The Victim and Witness Protection Act*, 42 U.S.C. 10601-10605. Defense counsel, both military and civilian, must refer not only to Rule 3.6, but also to Standard 4-1.3 and Standard 8-1.1. Air Force prosecuting lawyers must refer not only to Rule 3.6, but also to Standard 3-1.3 and Standard 8-1.1. Other court personnel must refer to Rule 3.6 and Standard 8-2.2. Finally, although not a party, special victims' counsel must also comply with this rule. Based on their position, extrajudicial statements by special victims' counsel could prejudice a proceeding.

Rule 3.7. LAWYER AS WITNESS

(a) [Modified] A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

DISCUSSION

See *United States v. Smith*, 35 M.J. 138 (C.M.A. 1992); *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988); *United States v. Barnes*, 63 M.J. 563 (A.F.Ct. Crim.App. 2006).

Rule 3.8. SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL [Modified]

The trial counsel in a criminal case shall:

(a) [Substituted] recommend that the convening authority withdraw any charge or specification not warranted by the evidence;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) [Modified] not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a pretrial investigation under Article 32, UCMJ;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal;

(e) [Omitted]

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the trial counsel in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6, or this Rule.

(g) When a trial counsel knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the trial counsel shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the trial counsel's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the accused was convicted of an offense that the accused did not commit.

(h) When a trial counsel knows of clear and convincing evidence establishing that an accused in the trial counsel's jurisdiction was convicted of an offense that the accused did not commit, the prosecutor shall seek to remedy the conviction.

DISCUSSION

This rule was modified to conform to military practice. In addition, the term "trial counsel" was substituted for "prosecutor"; however, the rule should be read to include other persons

involved in a prosecution such as, for example, the SJA and Chief of Military Justice. See also Rules 5.1 to 5.3.

Rule 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 3.3(a) through (c), Rule 3.4(a) through (c), and Rule 3.5.

CHAPTER 4

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.

DISCUSSION

Communication with an officer, employee, or member of an organization represented by counsel is also included under this rule (see Rule 1.13 and Rule 3.4). A lawyer may not contact such persons without the other lawyer's consent or unless otherwise authorized by law.

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law include, for example, the right of a party to a controversy to speak with Government officials about the matter. Communications authorized by law may also include investigative activities advised upon by government lawyers, which are done by investigative agents prior to the preferral of charges.

Rule 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

CHAPTER 5

THE JUDGE ADVOCATE GENERAL'S CORPS

Rule 5.1. RESPONSIBILITIES OF A SUPERVISORY LAWYER

(a) [Modified] The Judge Advocate General shall make reasonable efforts to ensure that the Corps has in effect measures giving reasonable assurance that Air Force lawyers conform to the AFRPC.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the *Rules*.

(c) A lawyer shall be responsible for another lawyer's violation of the *Rules* if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

DISCUSSION

This rule was modified slightly in order to conform to military practice and recognize The Judge Advocate General's specific authority under Article 6, UCMJ, and RCM 109. *See also* AFI 51-102, *The Judge Advocate General's Department*.

Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by these *Rules* notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these *Rules* if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a paralegal or other nonlawyer employed or retained by, associated with, or supervised by a lawyer:

(a) [Modified] the senior Air Force lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the conduct of nonlawyers is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these *Rules* if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

DISCUSSION

Subsections (a) and (c) were modified slightly in order to conform with Air Force practice.

Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

[Substituted] Notwithstanding a judge advocate's status as a commissioned officer, or a civilian Air Force lawyer's responsibilities to higher authorities, an Air Force lawyer detailed or assigned to represent an individual is expected to exercise unfettered loyalty to the individual client. The lawyer shall exercise professional independence during the course of the representation consistent with the *Rules*, and is ultimately responsible for acting in the best interest of the individual client.

DISCUSSION

The substituted language was adapted from the Army and Navy rules. This Rule recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes a similar status of a civilian Air Force lawyer. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties.

Not all direction given to a subordinate lawyer is an attempt to improperly influence the lawyer's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A lawyer subjected to outside pressures should make full disclosure of them to the client. If the lawyer or client believes the effectiveness of the representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client. The rule itself sets a clear standard that all lawyers are obligated to meet. See also Rules 1.6 and 1.13(f).

Rule 5.5. UNAUTHORIZED PRACTICE OF LAW [Modified]

Except as authorized by Air Force Instructions or other directives, a lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) [Substituted] assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(c) [Omitted]

(d) [Omitted]

DISCUSSION

An Air Force lawyer's performance of legal duties pursuant to military authorization is a federal function not subject to state regulation. Thus, an Air Force lawyer may perform legal assistance even though the lawyer is not licensed in the state where his or her duty station is located. Paragraph (b) does not prohibit a lawyer from using the services of nonlawyers and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, Air Force lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law (for example, claims adjusters, social workers, and other persons employed in government agencies). In addition, the comment to the ABA rule specifically permits lawyers to counsel nonlawyers who wish to proceed pro se, a situation which often arises during legal assistance counseling. Paragraphs (c) and (d) were omitted as inapplicable to Air Force practice.

Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE [Omitted]

Rule 5.7. RESPONSIBILITIES REGARDING JUDGE ADVOCATE NON-LAW DUTIES [Modified]

A judge advocate shall also be subject to these Rules with respect to non-legal, but official, duties performed as an officer.

DISCUSSION

This Rule is derived from ABA Model Rule 5.7, *Responsibilities regarding Law-Related Services*. The judge advocate practice of law is similar to a corporate practice in that an attorney performs a combination of non-law, law-related, and purely legal activities for a single employer. The non-law duties performed by a judge advocate meet the definition of “law-related services” found in paragraph (b) of Model Rule 5.7. These duties are commingled within the judge advocate practice and are not otherwise independent, separate, or distinguishable.

CHAPTER 6

PUBLIC SERVICE

Rule 6.1. VOLUNTARY PRO BONO PUBLICO SERVICE

[Modified] A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

DISCUSSION

Provided that all professional licensing requirements are met, active duty judge advocates and civilian attorneys may provide pro bono legal services. See paragraphs 10 through 10.5 of this instruction for specific requirements for pro bono service.

Rule 6.2. ACCEPTING APPOINTMENTS [Omitted]

Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

[Modified] A lawyer may serve as a director, officer, or member of a legal services organization, apart from the Air Force, notwithstanding that the organization serves persons having interests adverse to the Air Force. The lawyer shall not knowingly participate in a decision or action of an organization if such participation would be incompatible with the lawyer's obligations to the Air Force.

DISCUSSION

Rule 6.3, as modified, recognizes that Air Force lawyers may join legal services (i.e., professional) organizations. A lawyer's participation in such organizations must be consistent with the direction and guidance of the JER. For example, JER Section 3, paragraph 3-300b provides guidance on personal participation in non-federal entities, including professional associations and learned societies. *See also* Rule 1.7 and Rule 6.1. The second sentence recognizes that participation in certain of an organization's activities may not be permissible for Air Force lawyers. Some activities are, by their nature, contrary to Air Force interests. *See* JER Section 3, paragraph 3-300b.

Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

[Modified] A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of the Air Force.

DISCUSSION

See the JER, Rule 1.7, and Rule 6.3.

Rule 6.5. NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows the representation of the client involves a conflict of interest.

(2) [Omitted]

(b) [Omitted]

CHAPTER 7**INFORMATION ABOUT LEGAL SERVICES****Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2. ADVERTISING [Omitted]**Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS [Omitted]****Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE [Omitted]****Rule 7.5. AIR FORCE LETTERHEAD**

[Substituted] An Air Force lawyer shall not use official Air Force letterhead when communicating in a private capacity nor when representing a legal assistance client to a third party.

DISCUSSION

Air Force attorneys must avoid the appearance of governmental sanction or endorsement of personal activities. *See* JER 3-209 and 3-300. *See also* AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, paragraph 1.6.4, precluding the use of Air Force letterhead when writing on behalf of a legal assistance client. Special Victims' Counsel are authorized to use official letterhead in the course of representing victims. Additionally, this rule is not meant to prevent the use of official letterhead for letters of recommendation as authorized by 5 CFR 2635.702(b).

Rule 7.6. POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES [Omitted]

CHAPTER 8

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. BAR ADMISSIONS AND DISCIPLINARY MATTERS

[Modified] An applicant for admission to a bar; or a lawyer in connection with a bar admission application; a lawyer seeking appointment in The Judge Advocate General's Corps, USAF; or a lawyer in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity, concerning the qualifications or integrity of a judge, adjudicatory officer, public legal officer, or candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the *Air Force Uniform Code of Judicial Conduct*.

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the *Rules* that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) [Modified] This rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these *Rules*, knowingly assist or induce another to do so, or do so through the acts of another;

- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these *Rules* or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

DISCUSSION

An Air Force attorney that advises on a lawful investigative activity, including providing guidance on undercover activity that involves the use of subterfuge or misrepresentation by investigators, does not violate subsection (c) of this rule.

Rule 8.5. JURISDICTION

[Substituted] (a) These *Rules* apply to all military and civilian lawyers in the Air Force Judge Advocate General's Corps. This includes host nation lawyers employed overseas by the Department of the Air Force to the extent the *Rules* are not inconsistent with their domestic law and professional standards. Jurisdiction also applies to all lawyers who practice in Air Force courts and other proceedings under the MCM, including, but not limited to, civilian defense counsel with no connection to the Air Force. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

[Substituted] (b) A lawyer may be subject to the disciplinary authority of the Air Force and another jurisdiction for the same conduct. In the case of a conflict between these *Rules* and the rules of the lawyer's licensing authority, the lawyer should attempt to resolve the conflict with the assistance of a supervising lawyer. If the conflict is not resolved, these *Rules* will govern the conduct of the lawyer in the performance of the lawyer's official responsibilities. In the event of a conflict between these *Rules* and the rules of the lawyer's licensing authority for ANG judge advocates in the performance of official duties or while in a duty status, the more restrictive of the two shall govern. The rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer's official responsibilities.

DISCUSSION

While these *Rules* may preempt state rules in the event of a conflict, attorneys and managers should avoid such conflicts whenever possible. In the unlikely event that compliance with a state rule has the potential to interfere with the effective performance of Air Force duties, the lawyer should seek guidance from the supervisory chain, and, if necessary, seek an advisory opinion under these *Rules*.

Attachment 3
AIR FORCE STANDARDS FOR
CIVILITY IN PROFESSIONAL CONDUCT¹

PRINCIPLES OF GENERAL APPLICABILITY:
LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY

General Principles:

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staffs, parties, witnesses, judges, court personnel, and other staff, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.

2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor, our clients' ill feelings, if any, towards other participants in the legal process.

3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process; nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from directing disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.

4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.

5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.

6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry, in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation, as well as disputed matters that are not, or are not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of all transactions.

7. The foregoing General Principles apply to all aspects of legal proceedings, both in the presence and outside the presence of a court or tribunal.

¹ Adapted with the consent of the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996

Scheduling Matters:

8. We will endeavor to schedule dates for trials, hearings, depositions, meetings, negotiations, conferences, vacations, seminars, and other functions to avoid creating calendar conflicts for other participants in the legal process, provided our clients' interests will not be adversely affected.

9. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences need to be canceled or postponed. Early notice avoids unnecessary travel and expense and may enable the court and the other participants in the legal process to use the previously reserved time for other matters.

10. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' interests will not be adversely affected.

11. We will not request an extension of time for the purpose of unjustified delay.

PRINCIPLES PARTICULARLY APPLICABLE TO LITIGATION**Procedural Agreements:**

12. We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as requests for extensions of time, discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to the court.

13. We accept primary responsibility, after consultation with the client, for making decisions about procedural agreements. We will explain to our clients that cooperation between counsel in such matters is the professional norm and may be in the client's interest. We will explain the nature of the matter at issue in any such proposed agreements and explain how such agreements do not compromise the client's interests.

Discovery:

14. We will not use any form of discovery or discovery scheduling to harass, create unjustified delay, increase litigation expenses, or for any other improper purpose.

15. We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings, discovery requests, and objections.

16. We will not engage in any conduct during a deposition that would not be appropriate if a judge were present. Accordingly, we will not obstruct questioning during a deposition or object to deposition questions, unless permitted by the applicable rules to preserve an objection or privilege,

and we will ask only those questions we reasonably believe are appropriate in discovery under the applicable rules.

17. We will carefully craft document production requests so they are limited to those documents we reasonably believe are appropriate under the applicable rules. We will not design production requests for the purpose of placing an undue burden or expense on a party.

18. We will respond to document requests reasonably and in accordance with what the applicable rules require. We will not interpret a request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

19. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are appropriate under the applicable rules, and we will not design them for the purpose of placing an undue burden or expense on a party.

20. We will respond to interrogatories reasonably and in accordance with what the applicable rules require. We will not interpret interrogatories in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

21. We will base our discovery objections on a good faith belief in their merit. We will not object solely for the purpose of withholding or delaying the disclosure of properly discoverable information.

22. During discovery, we will not engage in acrimonious conversations or exchanges with opposing counsel, parties, or witnesses. We will advise our clients to conduct themselves in accordance with these provisions. We will not engage in undignified or discourteous conduct that degrades the legal proceeding.

Sanctions:

23. We will not seek court sanctions or disqualification of counsel unless reasonably justified by the circumstances determined after conducting a reasonable investigation, which includes attempting to confer with opposing counsel.

Lawyers' Duties to the Court:

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court to any tribunal, we shall use language that is respectful of courts or tribunals, the system of justice, and the symbolism that these represent.

25. We will not engage in conduct that offends the dignity or decorum of judicial or administrative proceedings, brings disorder or disruption to the courtroom or tribunal, or undermines the image of the legal profession.

26. We will advise clients and witnesses to act civilly and respectfully toward the court, educate them about proper courtroom decorum, and, to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

27. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities and will immediately make any clarifications and corrections as these become known to us.

28. We will not degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

29. We will act and speak civilly and respectfully to the judge's staff, the courtroom and tribunal staff, and other court or tribunal personnel, with an awareness that they, too, are an integral part of the judicial system. We will also advise clients and witnesses to act civilly and respectfully toward these participants in the legal process.

30. We recognize that judicial resources are scarce, that court dockets are crowded, and that justice is undermined when cases are delayed and/or disputes remain unresolved. Therefore, we will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

31. We recognize that tardiness and neglect show disrespect to the court and the judicial system. Therefore, we will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time and proceed efficiently. We will also educate clients and witnesses concerning the need to be punctual and prepared. If delayed, we will promptly notify the court and counsel, if at all possible.

32. Before dates for hearings or trials are set, or, if that is not feasible, immediately after such a date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

33. We will avoid ex parte communications with the court or tribunal, including the judge's staff, on pending matters, in person (whether in social, professional, or other contexts), by telephone, or in letters or other forms of written communication, unless such communications relate solely to scheduling or other non-substantive administrative matters, or are made with the consent of all parties, or are otherwise expressly authorized by law or court rule.

Judges' Duties to Lawyers and Others:

34. We will be courteous, respectful, and civil to lawyers, parties, agency personnel, and witnesses. We will maintain control of the proceedings, recognizing that we have both the

obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.

35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.

36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.

37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, witnesses, and of other courts. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

38. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. We will make all reasonable efforts to decide promptly any matters presented to us for decision.

39. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom, or the causes which, a lawyer represents.

41. We will do our best to ensure that court personnel act civilly towards lawyers, parties, and witnesses.

42. At an appropriate time and in an appropriate manner, we will bring to a lawyer's attention conduct which we observe that is inconsistent with these standards.

Judges' Duties to Each Other:

43. We will treat other judges with courtesy and respect.

44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.

45. We will endeavor to work cooperatively with other judges with respect to the availability of lawyers, witnesses, parties, and court resources.

OTHER GENERAL PRINCIPLES

46. We will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations, and will immediately make any clarifications and corrections as these become known to us.

47. We will not engage in personal vilification or other abusive or discourteous conduct in negotiations. We will not engage in acrimonious exchanges with opposing counsel or parties at the negotiating table. We will encourage our clients to conduct themselves in accordance with these principles.

48. We will honor all understandings with, and commitments we have made to, other lawyers. We will stand by proposals we have made in negotiations, unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them, and we will encourage our clients to conduct themselves in accordance with this principle.

49. We will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. We will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.

50. In memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely. In drafting proposed agreements based on letters of intent, we will strive to draft documents that fairly reflect the agreements of the parties.

Attachment 4

SUPPLEMENTAL RULES OF PROFESSIONAL CONDUCT FOR AIR FORCE RESERVE JUDGE ADVOCATES

A. Introduction. Government service is a public trust which requires placing loyalty to country, ethical principles, and the law above private gain and other interests. Practices that may be accepted in the private sector are not necessarily acceptable for reserve judge advocates. The purpose of these standards is to identify proscribed conduct that constitutes a conflict of interest. These standards supplement other ethical and professional guidance applicable to reserve judge advocates. Complaints involving these rules will be processed pursuant to paragraphs 4 and 5 of this instruction.

B. Rules.

Rule 1. REPRESENTATION ADVERSE TO THE AIR FORCE

A reserve judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the Air Force unless the Air Force first consents in writing.

DISCUSSION

The principle underlying this rule is that the Air Force is a reserve judge advocate's client. The rule ensures that the Air Force will be accorded the same protections that state rules of professional responsibility generally afford all clients. The rule also emphasizes the high ethical obligations of attorneys to protect the interests of the Air Force. It is based on *ABA Model Rules of Professional Conduct* Rule 1.7, which bars representation of a client which is adverse to another client unless each client consents. The rule does not establish a new definition of conflict of interest; rather, it identifies an area of potential conflicts and establishes a mechanism to avoid them.

Consent will be granted unless the proposed representation would create a conflict of interest with respect to Air Force duties actually performed by the reserve judge advocate. Notwithstanding this rule, the SJA may not grant consent where a statutory bar to representation has been imposed. See, e.g., 18 U.S.C. Section 207. Compliance with the consent procedures under this rule does not relieve the reserve judge advocate of his or her obligation to obtain the consent of the other client. See Part D for consent procedures.

EXAMPLES

(1) A reserve judge advocate attached for training to base X is asked to serve as civilian counsel by a military member in a court-martial at base X. The reserve judge advocate must obtain the consent of the SJA at base X. Consent will be granted by the SJA unless an actual conflict of interest is present. Air Force interests are served by allowing military members to be represented by counsel of their choice. The same result obtains with respect to representation in administrative proceedings.

(2) A reserve judge advocate attached for training to base X and retained as counsel in a tort action arising at base Y is required by this rule to obtain the consent of the SJA at base X. Consent will be granted unless an actual conflict of interest is present.

(3) A reserve judge advocate attached for training to base X and retained as counsel in a tort action arising at base X is required by this rule to obtain the consent of the SJA at base X. Consent should be granted unless circumstances exist which manifest an actual conflict of interest. In determining whether to grant consent, the SJA should consider the reserve judge advocate's actual involvement with the claims section. Organizational size, structure, and procedures, as well as the reserve judge advocate's geographic separation, should be evaluated to determine if he or she is sufficiently isolated to prevent either formal or casual involvement in the processing of the claim or access to privileged information concerning the claim.

Rule 2. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF THE AIR FORCE

Except as law may otherwise expressly permit, a reserve judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the reserve judge advocate participated personally and substantially on behalf of the Air Force. If a firm with which the reserve judge advocate is associated undertakes or continues representation after his or her disqualification under this rule, the reserve judge advocate shall:

a. advise the firm of the possible applicability of Rule 1.11, *Special Conflicts of Interest for Former and Current Government Officers and Employees* or analogous provision of the applicable jurisdiction; and

b. give prompt written notice to the Air Force, through the SJA, of the firm's participation in the matter, with sufficient information regarding the reserve judge advocate's role to enable the Air Force to ascertain compliance with this rule.

DISCUSSION

This rule is intended to avoid conflicts of interest between the reserve judge advocate's military and civilian positions where he or she previously represented the Air Force. The restriction applies only to those areas in which the reserve judge advocate participated personally and substantially. The term "personally and substantially" has the same meaning under this rule as it has under 18 U.S.C. Section 207.

Rule 3. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT

A reserve judge advocate shall not, in the performance of his or her official duties or while in duty status, participate in a matter in which he or she participated personally and substantially in his or her civilian capacity.

Rule 4. USE OF NONPUBLIC GOVERNMENT INFORMATION IN REPRESENTATION

A reserve judge advocate, having acquired information through his or her association with the Air Force which, could not have been known to the reserve judge advocate but for that association, shall not, in his or her civilian capacity, represent a client in a matter in which the information so acquired could be used to the material disadvantage of the Air Force or its employees, officers, contractors, or agents; nor shall he or she make any unauthorized disclosure of such information.

DISCUSSION

Regardless of whether an attorney-client relationship exists between a reserve judge advocate and the Air Force, every reserve judge advocate is provided access to information to which he or she could not otherwise have had access. This information may take many forms, including knowledge of specific facts, the existence of documents, the identity of personnel with specific knowledge, negotiation strategies or tactics, or views, opinions, or risk assessments of key Air Force personnel with respect to the particular case involved. It is acknowledged that a reserve judge advocate is permitted to utilize his or her knowledge of procedures relating to the Air Force. It is nonpublic factual information only which may impact upon the reserve judge advocate under this Rule. Reserve judge advocates representing clients in matters where such information can be used adversely to the interests of the Air Force have conflicting interests. Representation is precluded by the reserve judge advocate unless the written consent of all appropriately concerned parties has been obtained.

Rule 5. ADVERTISING

A reserve judge advocate shall not advertise his or her affiliation as a reserve judge advocate or attachment to a particular active or reserve unit or base. Inclusion of a reserve judge advocate's military status or affiliation in commercial sources is limited to rank and service component only.

DISCUSSION

Consistent with the JER, this rule does not prohibit the inclusion of reserve military grade and service component (e.g., "Captain, USAFR") in advertising or on business cards or stationery. In addition, the rule does not prohibit a simple statement of affiliation with the Air Force Judge Advocate General's Corps Reserve (TJAGCR) in biographical material, such as a resume, professional directory, or law firm home page on the Internet.

The reserve judge advocate's client is the Air Force and therefore the reserve attorney must not trade on his or her status as a judge advocate. The reserve judge advocate must avoid advertising his or her active affiliation with the TJAGCR because doing so might give the appearance that the reserve judge advocate is using his or her public office for private gain. Such an appearance would undermine public confidence in the integrity and professionalism of TJAGCR. In addition, the reserve judge advocate's special relationship with AFJAGC is such

that to allow that status to be carried in advertising could create an impression of favoritism by, or influence with, the Air Force. There also exists the potential that advertising such affiliation could lead to the impression that the Air Force endorses or otherwise sponsors the reserve judge advocate in his or her private business.

Rule 6. PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS

A reserve judge advocate shall not, while in active or inactive duty status, conduct private business during duty hours.

DISCUSSION

It is expected that SJAs will administer this rule reasonably and that a *de minimis* exception will be appropriately applied. The rule is not intended to preclude an occasional brief telephone call concerning appointments or the docketing of cases; nor is it intended to preclude the conduct of private business during off-duty hours. It is intended to preclude such activities as interviewing clients, conducting legal research, and drafting briefs during duty hours.

Rule 7. REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES

A reserve judge advocate shall not, for compensation, represent any individual, partnership, or corporation in connection with a matter where the initial contact with the individual with respect to such matter was as a judge advocate.

DISCUSSION

This rule is intended to preclude a reserve judge advocate from taking inappropriate advantage of his or her position. It bars representation when the initial contact occurred while the reserve judge advocate was acting in an official capacity, such as in providing legal assistance pursuant to AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, or investigating a claim. It is not intended to restrict representation so long as the initial contact was not made pursuant to the performance of the reserve judge advocate's official duties.

EXAMPLES

(1) A reserve judge advocate performing legal assistance interviews a client requesting a will. The client's estate requires more than the simple will provided by the legal office. The reserve judge advocate counsels the client regarding the need for specialized estate planning. He or she may not solicit the client's business for himself or herself or his or her firm in this matter. Furthermore, neither the reserve judge advocate nor the firm may accept this individual as a fee-paying client in this matter.

(2) Under the same set of facts as above, the same client later contacts the reserve judge advocate in his or her civilian capacity on an unrelated matter, such as the defense of a traffic violation. The reserve judge advocate may accept this client, but only with respect to the

unrelated matter (i.e., the traffic violation). Disclosure to the base SJA and discussion of potential problems is encouraged in all cases in which a client has previously been seen by the reserve judge advocate while serving as a judge advocate.

(3) A reserve judge advocate performing legal assistance counsels a client regarding an adoption. Completing the adoption process is beyond the scope of legal assistance. The reserve judge advocate may, however, in his or her civilian capacity, represent the client in this matter without fee. It is permissible for the client to pay court and other processing costs.

(4) While on duty, a reserve judge advocate is contacted by a military member concerning a private matter not covered by the legal assistance program. The reserve judge advocate may accept this client provided the initial contact with respect to the matter did not occur while the reserve judge advocate was: (a) providing legal assistance pursuant to AFI 51-504, or (b) responsible for taking official action on the matter for which representation is sought.

A reserve judge advocate may be asked to represent, in a private capacity, a member of the unit or organization to which the reserve judge advocate is assigned or attached. Such representation is not prohibited by this rule. However, before undertaking representation, the reserve judge advocate should consider all of the surrounding facts and circumstances.

A reserve judge advocate should use good judgment to avoid situations where the private representation of a member of the unit or organization may cause others in the unit or organization to perceive that the member will receive favorable treatment with respect to official matters. A reserve judge advocate should also avoid private representations that may preclude the effective discharge of his or her official duties, such as advising a commander on official matters affecting the member with whom there is a private attorney-client relationship.

Rule 8. SOLICITATION OF CLIENTS

A reserve judge advocate shall not solicit clients for himself or herself or his or her firm while in duty status or while in uniform; nor shall a reserve judge advocate solicit clients on military installations (other than through advertising permitted under Rule 5).

DISCUSSION

This rule is intended to preclude a reserve judge advocate from trading upon his or her status. It does not prohibit representation where the client initiated the request for legal services. As used in this rule, the term "client" includes "customer" as that term relates to a reserve judge advocate's business.

C. Definitions.

Representation. As used herein, this term encompasses acting on behalf of a client (including a corporation or government agency) not only as an advocate in formal judicial or administrative proceedings, but also in such activities as advising, counseling, or negotiating in connection with such matters as contracts, claims, or other controversies.

Staff Judge Advocate. This term refers to the SJA or civilian office chief of the reserve judge advocate's office of assignment or attachment for training, whether for inactive duty, annual training, or both. For purposes of these standards, HQ USAF and AFLOA directors and division chiefs shall be deemed to be SJAs. Judge advocates who exercise authority over discrete organizations (e.g., the Commandant of the Air Force Judge Advocate General School) shall be deemed SJAs for the purpose of these rules. In the case of Category A reserve judge advocates serving as SJAs, the SJA at HQ AFRC shall be deemed to be the SJA.

D. Requests for Consent.

(1) Where a reserve judge advocate seeks consent under Rule 1, he or she shall apply in writing, setting forth all relevant facts which are not privileged or protected from disclosure by law or by an ethical standard which is binding upon the reserve judge advocate. Consent may be requested and obtained orally in exigent circumstances when the relevant facts are clear and obtaining prior written consent is not practicable. In such cases, the reserve judge advocate shall apply for consent in writing within 5 working days. A request for consent shall be directed to the SJA of the office of assignment. In the case of Category A reserve judge advocates serving as SJAs, requests for consent shall be directed to the SJA, HQ AFRC. When granted, consent shall be deemed to be effective as of the date the representation began. If consent is denied, the reserve judge advocate will withdraw from the representation.

(2) SJAs are delegated the authority to grant consent on behalf of the Air Force. The acting SJA is authorized to grant consent in the absence of the SJA. Consent will be granted or denied within three working days of receipt of the request.

(3) If consent is denied, the reserve judge advocate may request reconsideration at the MAJCOM level. If consent is again denied, the reserve judge advocate may request reconsideration by the Mobilization Assistant to TJAG, and then TJAG, as appropriate. Reconsideration will be completed at each level within three working days of receipt.

(4) SJAs will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of each consent or denial will be provided to the reserve judge advocate, and an information copy of each request and the corresponding consent or denial shall be forwarded to the MAJCOM SJA. The SJA may file a copy of the consent in the applicable case, claim, or other file.

(5) Renewable consents for not longer than one year may be granted as to a class of matters.

(6) Consent authority may be exercised by SJAs to establish working arrangements with reserve judge advocates that protect the Air Force's interests while avoiding unnecessary restrictions upon reserve judge advocates' civilian activities. Tailored consent arrangements can take into account the relationship between a reserve judge advocate's military duties and the matter(s) for which consent is sought. Consideration may also be given to the structure and physical layout of the SJA's organization, the missions of organizations which are provided legal

services, the sensitivity of the matters involved, the specifics of the relationship of the reserve judge advocate to his or her firm, and the degree to which the reserve judge advocate has in the past cooperated in matters of proper conduct and ethics. When a class consent is involved, consideration may be given to the frequency with which matters within the class arise, the precision with which the class is described, and the impact of denial of class consent on the affected reserve judge advocate's private practice.

Attachment 5**SUPPLEMENTAL RULES OF PROFESSIONAL CONDUCT FOR AIR NATIONAL
GUARD JUDGE ADVOCATES**

A. Introduction. Government service is a public trust which requires placing loyalty to country, ethical principles, and the law above private gain and other interests. Practices that may be accepted in the private sector are not necessarily acceptable for Air National Guard (ANG) judge advocates. The purpose of these rules is to identify proscribed conduct that constitutes a conflict of interest. These rules supplement other ethical and professional guidance applicable to ANG judge advocates. They apply at all times when an ANG judge advocate is not serving in a Title 10 status. Complaints involving these rules will be processed pursuant to paragraphs 4 and 5 of this instruction.

B. Rules.**Rule 1. STATE ETHICS RULES AND GUIDELINES**

In addition to the Air Force rules and standards, an ANG judge advocate is bound by the ethics rules and guidance of each state where admitted to practice and of the state of permanent military assignment. In the event of a conflict between these *Rules* and state ethics rules, the more restrictive of the two shall govern. If performing duty in a state only status (as opposed to duty under Title 10 or Title 32), then the state rules govern.

Rule 2. APPEARANCE OF IMPROPRIETY

An ANG judge advocate should avoid conduct which may not involve an actual conflict of interest, but which may give an appearance of improper representation of adverse interests, and which may have a negative impact on the reputation of the Air Force, ANG, or state military department.

**Rule 3. REPRESENTATION ADVERSE TO THE AIR FORCE OR STATE MILITARY
DEPARTMENT**

An ANG judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the Air Force or state military department unless the Air Force or state military department first consents in writing.

DISCUSSION

The purpose of Rule 3 is to emphasize the high ethical obligations of attorneys and to protect the interests of the Air Force and the state. Rule 1.7 of the *ABA Model Rules of Professional Conduct* bars representation of a client which is adverse to another client unless each client consents. Rule 3 does not establish a new definition of conflict of interest. Normally, an ANG judge advocate may represent the Air Force, the state military department, or personnel assigned thereto, in an action against another military service, the Department of Defense, or a department of the state other than the military department of the state. State ethics rules may

preclude an ANG judge advocate or another attorney affiliated with his or her law firm from representing an Army National Guard member against the military department of the state.

Consent will be granted unless the proposed representation would create a conflict of interest with respect to the Air Force or state military department duties actually performed by the ANG judge advocate. Notwithstanding this rule, consent may not be granted where a statutory bar to representation has been imposed. See, e.g., 18 U.S.C. § 207. Compliance with consent procedures under this rule does not relieve the ANG judge advocate of his or her obligation to obtain the consent of the other client. See Part D for consent procedures.

EXAMPLES

(1) An ANG judge advocate is asked to serve as a civilian counsel by a military member in a court-martial at an active duty Air Force base. Where the ANG judge advocate has had no prior involvement in the investigation or processing of the case, there is no conflict of interest. Air Force interests are served by allowing military members to be represented by counsel of their choice. The same result obtains with respect to representation in administrative proceedings.

(2) An ANG judge advocate is asked to serve as civilian counsel by an Army National Guard (ARNG) technician (Army National Guard technician or Army National Guardsman) in a neighboring state regarding an adverse personnel action. Where the ANG judge advocate has no prior involvement in the investigation or processing of the case in the neighboring state, there is no conflict of interest.

(3) An ANG judge advocate is asked to serve as civilian counsel by an ANG or ARNG technician in the ANG judge advocate's state of military assignment regarding an adverse personnel action. Even where the ANG judge advocate has had no prior involvement in the investigation or processing of the case, there is a conflict of interest. Representation is precluded by both the ANG judge advocate and any other attorney in his or her affiliated law firm unless both the state military department and the technician consent.

(4) An ANG judge advocate is retained as civilian counsel in a tort action arising at an active duty Air Force base. Where the ANG judge advocate has had no prior involvement in the matter, there is no conflict of interest.

Rule 4. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF THE AIR FORCE OR THE STATE MILITARY DEPARTMENT

Except as applicable law or state ethical rules may otherwise permit, an ANG judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the ANG judge advocate participated personally and substantially on behalf of the Air Force or the state military department. If a firm with which the ANG judge advocate is associated undertakes or continues representation after his or her disqualification under this rule, the ANG judge advocate shall:

a. advise the firm of the possibility of the applicability of Rule 1.11, *Special Conflicts of Interest for Former and Current Government Officers and Employees*, or analogous provision of the applicable jurisdiction; and

b. give prompt written notice to the Air Force, through the SJA, of the firm's participation in the matter, with sufficient information regarding the ANG judge advocate's role to enable the Air Force to ascertain compliance with this rule.

DISCUSSION

The purpose of Rule 4 is to emphasize the avoidance of conflicts of interest between the ANG judge advocate's military and civilian positions where the ANG judge advocate previously represented the Air Force or the state military department. Rule 4 applies only to those areas in which the ANG judge advocate participated "personally and substantially." The term "personally and substantially" has the same meaning under this Rule as it has under 18 U.S.C. Section 207. Each case should be carefully evaluated on its own merits. For example, an ANG judge advocate assigned to a flying unit might not have participated "personally and substantially" on behalf of the state military department; that degree of participation might have been limited to an ANG judge advocate assigned to state headquarters.

EXAMPLE

Representing the military department, an ANG judge advocate testifies in favor of a bill extending private sector employment benefits to National Guardsmen. The ANG judge advocate and his or her affiliated law firm would be precluded from representing a private employer attempting to circumvent the force of that statute. However, neither the ANG judge advocate nor his or her affiliated law firm would be precluded from representing a private client attempting to circumvent or contest a different state statute.

Rule 5. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT

An ANG judge advocate shall not, in the performance of official duties or while in a duty status, participate in a matter in which the ANG judge advocate previously participated personally and substantially in his or her civilian capacity.

DISCUSSION

Absent a conflict, nothing precludes the ANG judge advocate from representing the Air Force or the state military department, or from giving either the benefit of the ANG judge advocate's familiarity with a question of law or the history of a particular statute, where such knowledge was derived from his or her general experiences as a civilian attorney.

EXAMPLE

An ANG judge advocate, while serving a civilian client in connection with a land development project, acquires an expertise in state legislation aimed at preserving the environment. Prior participation does not preclude his or her analysis of the legislation for the ANG commander.

Rule 6. PRIVATE USE OF NONPUBLIC GOVERNMENT INFORMATION

An ANG judge advocate, having acquired nonpublic information through his or her association with the Air Force or National Guard, which information could not have been known to the ANG judge advocate but for that association, shall not, in his or her civilian capacity, represent a client in a matter in which the information so acquired could be used to the material disadvantage of the Air Force, the National Guard, or any employee, officer, contractor, or agent of either; nor shall the ANG judge advocate make any unauthorized disclosure of such information.

DISCUSSION

Regardless of whether an attorney-client relationship exists between the ANG judge advocate and the Air Force or the ANG, every ANG judge advocate is provided access to nonpublic information which the ANG judge advocate could not have obtained otherwise. This information may take many forms, including knowledge of specific facts, the existence of documents, the identity of personnel with specific knowledge, negotiation strategies or tactics, or views, opinions, or risk assessments of key Air Force personnel with respect to the particular case involved. It is acknowledged that an ANG judge advocate is permitted to utilize his or her knowledge of procedures relating to the Air Force or National Guard. It is nonpublic factual information only which may impact upon the ANG judge advocate under this Rule. ANG judge advocates representing private clients in matters where such nonpublic information can be used are in a position of conflicting interests. Representation is precluded by the ANG judge advocate unless the written consent of all appropriately concerned parties has been obtained.

EXAMPLES

(1) An ANG judge advocate has a private case involving Air Force personnel as potential witnesses. During his annual training at an active duty Air Force base, he uses the Air Force Worldwide Locator to obtain current addresses for these witnesses. If this is in fact nonpublic information, the ANG judge advocate should not have used this resource for his private advantage. (Moreover, this raises the problem of his having performed private law work on government time. See Rule 8.)

(2) An ANG judge advocate is representing a spouse in a child custody dispute against a Guard member with whom he has had no previous professional contact. As a result of his military assignment, the ANG judge advocate learns that the Guard member has tested positive for cocaine. The ANG judge advocate has a conflict based upon his knowledge of this nonpublic information and should withdraw from representation of the spouse. Moreover, the ANG judge advocate should play no role in any adverse action against the Guard member which may impact adversely on the former client.

Rule 7. ADVERTISING

An ANG judge advocate shall not advertise his or her affiliation as an ANG judge advocate or assignment to a particular ANG unit. Inclusion of an ANG judge advocate's military status or affiliation in commercial sources is limited to rank and service component only.

DISCUSSION

Consistent with the JER, this rule does not prohibit the inclusion of ANG military grade and service component (e.g., "Captain, ANG") in advertising or on business cards or stationary. In addition, the rule does not prohibit a simple statement of reserve affiliation with AFJAGC in biographical material, such as a resume, professional directory, or law firm home page on the Internet.

An ANG judge advocate's client is the Air Force and ANG and therefore the ANG attorney must not trade on his or her status as a judge advocate. An ANG judge advocate must avoid advertising his or her affiliation with The Judge Advocate General's Corps Reserve (TJAGCR) because doing so might give the appearance that the ANG attorney is using his or her public office for private gain. Such an appearance would undermine public confidence in the integrity and professionalism of TJAGCR. In addition, the ANG judge advocate's special relationship with the TJACGR is such that to allow that status to be carried in advertising could create an impression of favoritism by, or influence, with the Air Force or ANG. There also exists the potential that advertising such affiliation could lead to the impression that the Air Force or ANG endorses or otherwise sponsors the ANG judge advocate in his or her private business.

EXAMPLES

(1) An ANG judge advocate proposes to run an advertisement which includes the following statement:

"Military Lawyer, currently serving in the Maryland Air National Guard."

This advertisement violates the rule in that it inferentially indicates his or her affiliation as an ANG judge advocate.

(2) An ANG judge advocate proposes to run the following advertisement:

"Jane B. Green, Esq. Areas of practice include military justice and sports law. Member of the American, Maryland, and Federal Bar Associations and an officer in the Maryland Air National Guard."

This advertisement does not violate Rule 5. Generally, applicable federal ethics rules do not preclude members of reserve components, not on active duty, from using their military titles in connection with commercial enterprises if they indicate their reserve or retired status. However, state ethics rules may preclude an ANG judge advocate from indicating membership in the state military department.

(3) An ANG judge advocate who has been selected as a speaker at a Law Day program in the local community provides biographical material to the bar association's project officer. The biographical material includes not only information concerning his educational background and civilian practice, but also his past and present military service as an ANG judge advocate. This is not an advertisement and, therefore, does not violate Rule 5. The purpose of the biographical material is to describe the credentials of the speaker. The line between advertisement and biographical material, however, is not always clear. The same information in an unsolicited general distribution would violate Rule 8 because such an advertisement would trade on his military status.

Rule 8. PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS

An ANG judge advocate shall not, while on active duty or inactive duty status, conduct private business during duty hours.

DISCUSSION

It is expected that this guideline will be administered reasonably and that a *de minimis* exception will be appropriately applied. The Rule is not intended to preclude an occasional brief telephone call concerning appointments or the docketing of cases. However, it is intended to remind ANG judge advocates that they should not engage in activities such as interviewing clients, conducting legal research, drafting briefs and the like during duty hours.

Rule 9. SOLICITATION OF CLIENTS

An ANG judge advocate shall not solicit clients for his or her private practice or business while in duty status or while in uniform; nor shall an ANG judge advocate solicit clients on military installations (other than through advertising permitted under Rule 5).

DISCUSSION

This Rule is intended to preclude ANG judge advocates from trading upon the ANG judge advocate's military status. It does not prohibit representation or other dealings where the client initiated the request for legal or business services. As used in this rule, the term "client" includes "customer" as that term relates to an ANG judge advocate's business.

Rule 10. REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES

An ANG judge advocate shall not, for compensation, knowingly agree to represent a member of his or her state's military department in connection with a matter for which the individual has an entitlement to legal assistance.

DISCUSSION

This rule is intended to preclude ANG judge advocates from taking inappropriate advantage of their positions by accepting compensation for private work which could have been performed at no expense to a client within the legal assistance program or pursuant to military assignment.

EXAMPLES

(1) An ANG judge advocate is initially contacted at his or her private law firm by an ANG member concerning the preparation of a will for which there is an entitlement to free legal assistance through ANG resources. The ANG judge advocate may not take the case as a private attorney.

(2) An ANG judge advocate is initially contacted at his or her private law office by an ARNG member of his or her state seeking civilian representation in an ARNG court-martial. The ANG judge advocate may not take the case if he or she could be detailed as military counsel to defend the ARNG member under the state military code at no cost to the member.

Rule 11. POTENTIAL STATE/FEDERAL CONFLICT

An ANG judge advocate may represent both the state in which he or she serves as a member of the ANG and the Air Force when the state and federal interests coincide. In the event of divergent interests, the ANG judge advocate should represent his or her state when serving in a state only status. In other situations, the ANG judge advocate should seek supervisory guidance in defining who the client is regarding the particular matter.

C. Definitions.

Representation. As used herein, this term encompasses acting on behalf of a client (including a corporation or government agency) not only as an advocate in formal judicial or administrative proceedings, but also in such activities as advising, counseling, or negotiating in connection with such matters as contracts, claims, or other controversies.

Staff Judge Advocate or SJA. Judge advocates who serve as the SJA of a unit, wing, or group shall be deemed SJAs for the purpose of these rules.

D. Requests for Consent.

1. Where an ANG judge advocate seeks consent under Rule 3, the judge advocate shall apply in writing, setting forth all relevant facts which are not privileged or protected from disclosure by law or by an ethical standard which is binding on the ANG judge advocate. Consent may be requested and obtained orally in exigent circumstances when the relevant facts are clear and obtaining prior consent is not practicable. In such cases, the ANG judge advocate shall apply for consent within 5 working days. A request for consent shall be directed towards the ANG Joint or State Headquarters SJA concerning potential conflicts with the state military department. For conflicts concerning the Air Force, requests shall be directed to the SJA whose office has direct responsibility for the matter on behalf of the Air Force. When granted, consent

shall be deemed to be effective as of the date the representation began. If consent is denied, the ANG judge advocate will withdraw from the representation.

2. The SJAs are delegated the authority to grant consent on behalf of the Air Force. The acting SJA is authorized to grant consent in the absence of the SJA. Consent will be granted or denied within three working days of receipt of the request.

3. If consent is denied, the ANG judge advocate may request reconsideration. Requests for reconsideration for conflicts involving the Air Force will be directed to the SSA for the office that has direct responsibility for the matter on behalf of the Air Force. If the SSA denies the request, the ANG judge advocate may request reconsideration by The Judge Advocate General. Reconsideration at each level will be completed within three working days of receipt of the request.

4. SJAs will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of each consent or denial will be provided to the ANG judge advocate and an information copy of each request and the corresponding consent or denial shall be forwarded to the State Headquarters SJA or SSA as appropriate. The SJA may file a copy of the consent in the applicable case, claim, or other file.

5. Renewable consents for not longer than one year may be granted as to a class of matters.

6. Consent authority may be exercised by SJAs to establish working arrangements with ANG judge advocates that protect the Air Force's interests while avoiding unnecessary restrictions upon ANG judge advocates' civilian activities. Tailored consent arrangements can take into account the relationship between an ANG judge advocate's military duties and the matter(s) for which consent is sought. Consideration may also be given to the structure and physical layout of the SJA's organization, the missions of organizations which are provided legal services, the sensitivity of the matters involved, the specifics of the relationship of the ANG judge advocate to his or her firm, and the degree to which the ANG judge advocate has in the past cooperated in matters of proper conduct and ethics. When a class consent is involved, consideration may be given to the frequency with which matters within the class arise, the precision with which the class is described, and the impact of denial of class consent on the affected ANG judge advocate's private practice.

Attachment 6**SAMPLE LEGAL SERVICES CONFIDENTIALITY AGREEMENT**

The Volunteer Program is an integral part of the functioning of the legal office. Volunteer responsibilities may include, but are not limited to: answering telephone queries; scheduling appointments; typing and filing official correspondence; greeting and assisting legal assistance clients, claims customers, unit commanders, first sergeants, law enforcement personnel, and others; and other duties that may expose me to confidential information.

I understand that maintaining confidentiality is of critical importance in my work as a volunteer in the office. During my work, I may learn confidential information that is related to the military and legal work of attorneys, paralegals, or support personnel assigned to the office. Command, client, and customer information, from any source and in any form, is strictly confidential. This includes the mere fact that an individual has come to the legal office or was discussed by personnel in the office.

I agree that I will not violate the confidentiality interests of any person whose circumstances I become aware of in the course of my volunteer duties. I will presume that any information I learn in the office is confidential unless I am explicitly advised otherwise by the Law Office Superintendent or a judge advocate. If at any time I learn of confidential information in which I have a personal interest (e.g., information regarding a family member, friend, or neighbor), I will disclose that personal interest to either the Staff Judge Advocate or the Law Office Superintendent.

This agreement does not prevent me from discussing the general nature of my work as a volunteer, the general nature of the work of the office, or official matters that are known to the general public. However, in the course of discussing those matters, I understand that under no circumstances may I reveal confidential information.

If I have any questions about this agreement or about disclosing any specific information, I will consult with either the Staff Judge Advocate or the Law Office Superintendent.

I have read this agreement and agree to abide by its terms.

Law Office Superintendent

Volunteer