

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

**DEPARTMENT OF THE AIR FORCE  
INSTRUCTION 51-110**



**12 JANUARY 2026**

**Law**

**PROFESSIONAL RESPONSIBILITY  
PROGRAM**

**COMPLIANCE WITH THIS PUBLICATION IS MANDATORY**

---

**ACCESSIBILITY:** This publication is available for downloading or ordering on the e-Publishing website at [www.e-Publishing.af.mil](http://www.e-Publishing.af.mil).

**RELEASABILITY:** There are no releasability restrictions on this publication.

---

OPR: AF/JAX

Certified by: AF/JAX  
(Col Dustin M. Tipling)

Supersedes: AFI 51-110, 11 December 2018

Pages: 111

---

This publication implements Air Force Policy Directive (AFPD) 51-1, *The Judge Advocate General's Department*, and Rule for Courts-Martial (RCM) 109. It provides guidance for the maintenance of professional responsibility and ethical standards within the Air Force Judge Advocate General's (AFJAG) Corps. This publication applies to Department of the Air Force (DAF) AFJAG Corps members, including all uniformed members and civilian employees of the Regular Air Force (RegAF), the United States Space Force (USSF), the Air Force Reserve (AFR), and the Air National Guard (ANG), as well as civilian counsel who represent individuals at courts-martial or other proceedings governed by the Uniform Code of Military Justice (UCMJ) or Manual for Courts-Martial (MCM), or at other administrative proceedings. This publication may not be supplemented or further implemented or extended. Refer recommended changes and questions about this publication to the Office of Primary Responsibility (OPR) using the DAF Form 847, *Recommendation for Change of Publication*; route DAF Forms 847 from the field through appropriate functional's chain of command. The authorities to waive wing, unit, or delta level requirements in this publication are identified with a tier ("T-0, T-1, T-2, T-3") number following the compliance statement. 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 all records generated as a result of processes prescribed in this publication adhere to Air Force Instruction (AFI) 33-322, *Records Management and Information Governance Program*, and are disposed of in accordance with Air Force Records Disposition Schedule, which is located in the Air Force Records Information Management System. This instruction requires the collection and/or maintenance of information protected by the Privacy Act of 1974 authorized by Title 10 United States Code, Section 9037 and RCM 109, MCM. The

applicable SORN, F051 AFJA E, *Judge Advocate General's Professional Conduct Files*, is available at: <http://dpclo.defense.gov/Privacy/SORNs.aspx>.

## ***SUMMARY OF CHANGES***

This document has been revised and should be completely reviewed. Changes include updated Senior Supervisory Attorney designations; the addition of the Civilian Career Field Manager as a member of The Judge Advocate General's (TJAG's) Advisory Committee on Professional Responsibility and Standards for civilian cases; consolidated and revised procedures for processing allegations; changes in line with the establishment of the USSF into the DAF; modifications to the Department of the Air Force Rules of Professional Conduct (DAFRPC), including major changes to Rules 1.6 and 7.5; consolidation of Supplemental Rules for Air Force Reserve (AFR) and Air National Guard (ANG) Judge Advocates; incorporation of the American Bar Association (ABA) Criminal Justice Standards by reference; and significant modifications to the Department of the Air Force Uniform Code of Judicial Conduct (DAFUCJC) and Regulations and Procedures Relating to Judicial Discipline.

<b>Chapter 1—PROGRAM OVERVIEW</b>	<b>5</b>
1.1. Overview.....	5
<b>Chapter 2—APPLICABILITY AND RESOLUTION AUTHORITY</b>	<b>6</b>
2.1. Applicability.....	6
2.2. Terminology.....	6
2.3. Other Actions.....	6
<b>Chapter 3—ROLES AND RESPONSIBILITIES</b>	<b>7</b>
3.1. The Judge Advocate General (TJAG) shall:.....	7
3.2. The Deputy Judge Advocate General (DJAG) shall:.....	7
3.3. TJAG's Professional Responsibility Administrator (TPRA) shall:.....	7
3.4. TJAG's Advisory Committee on Professional Responsibility and Standards (Advisory Committee) shall:.....	7
3.5. Senior Supervisory Attorneys (SSAs) shall:.....	8
3.6. Supervisory Attorneys shall:.....	8
3.7. Attorneys shall:.....	8
3.8. Paralegals and Nonlawyer Assistants shall:.....	9
3.9. Non-AFJAG Corps Civilian Attorneys shall:.....	9
<b>Chapter 4—REPORTING ALLEGED VIOLATIONS OF THE RULES</b>	<b>10</b>
4.1. Alleged Violations of the Rules by Judges.....	10

4.2.	Alleged Violations of the Rules by Attorneys, Paralegals, and Nonlawyer Assistants. ....	10
<b>Chapter 5—PROCESSING ALLEGATIONS OF RULES VIOLATIONS</b>		<b>11</b>
5.1.	Deferring the Processing of an Allegation. ....	11
5.2.	SSA Review. ....	11
5.3.	Credibility Determination. ....	11
5.4.	Conducting a Formal Review. ....	12
5.5.	Waiver of Formal Review in Cases Involving Separate Proceedings. ....	13
5.6.	Processing Alleged Non-Minor Violations of the Rules. ....	13
<b>Chapter 6—TJAG ACTION ON ALLEGATIONS OF RULES VIOLATIONS</b>		<b>15</b>
6.1.	Authority. ....	15
6.2.	Action. ....	15
6.3.	Notice. ....	15
<b>Chapter 7—POST DECISION PROCESSING</b>		<b>17</b>
7.1.	Notification of Case Conclusion. ....	17
7.2.	Reporting Cases to Licensing Officials. ....	17
<b>Chapter 8—ADVISORY OPINIONS</b>		<b>18</b>
8.1.	Authority. ....	18
8.2.	Requests. ....	18
8.3.	Written Opinions. ....	18
8.4.	Limitation. ....	18
<b>Chapter 9—OFF-DUTY LEGAL EMPLOYMENT</b>		<b>19</b>
9.1.	USAF or USSF as Primary Official Duty. ....	19
9.2.	Applicability. ....	19
9.3.	Definition. ....	19
9.4.	Approval Required. ....	19
9.5.	Compliance with Professional Responsibility Rules and Standards. ....	20
9.6.	Authority to Appear in Accordance with AFI 51-301, Civil Litigation. ....	21
<b>Chapter 10—USE OF LEGAL SERVICE VOLUNTEERS</b>		<b>22</b>
10.1.	Use of Legal Services Volunteers. ....	22
10.2.	Limitations. ....	22
10.3.	Confidentiality and Standards of Professional Conduct. ....	23

<b>Chapter 11—ANNUAL TRAINING AND CERTIFICATIONS</b>	<b>24</b>
11.1. Annual Training.....	24
11.2. Annual Certifications.....	24
<b>Attachment 1—GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION</b>	<b>25</b>
<b>Attachment 3—SUPPLEMENTAL DEPARTMENT OF THE AIR FORCE RULES OF PROFESSIONAL CONDUCT FOR AIR RESERVE COMPONENT JUDGE ADVOCATES</b>	<b>61</b>
<b>Attachment 4—DEPARTMENT OF THE AIR FORCE STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT</b>	<b>70</b>
<b>Attachment 5—DEPARTMENT OF THE AIR FORCE UNIFORM CODE OF JUDICIAL CONDUCT</b>	<b>76</b>
<b>Attachment 6—REGULATIONS AND PROCEDURES RELATING TO JUDICIAL DISCIPLINE</b>	<b>101</b>
<b>Attachment 7—THE DEPARTMENT OF THE AIR FORCE JUDICIAL ETHICS COMMISSION</b>	<b>109</b>
<b>Attachment 8—SAMPLE LEGAL SERVICES CONFIDENTIALITY AGREEMENT</b>	<b>111</b>

## Chapter 1

### PROGRAM OVERVIEW

**1.1. Overview.** This instruction provides guidance governing the ethical conduct of AFJAG Corps members and civilian counsel who represent individuals in proceedings governed by the Uniform Code of Military Justice, the Manual for Courts-Martial, or other administrative proceedings. It sets forth the Department of the Air Force Rules of Professional Conduct (DAFRPC) (Attachment 2), Supplemental DAFRPC for Air Reserve Component (ARC) Judge Advocates (Attachment 3), the DAF Standards for Civility in Professional Conduct (DAFSCPC) (Attachment 4), the DAF Uniform Code of Judicial Conduct (**Attachment 5**), and the Regulations and Procedures Relating to Judicial Discipline (**Attachment 6**) (collectively, the “Rules and Standards”). Additionally, this instruction establishes the procedures for receiving, processing, and acting on complaints of alleged violations of the Rules made against individuals practicing under the functional supervision of The Judge Advocate General (TJAG). It also provides limitations on and procedures for processing requests to engage in the outside practice of law by AFJAG Corps lawyers and for the use of legal services volunteers.

## Chapter 2

### APPLICABILITY AND RESOLUTION AUTHORITY

**2.1. Applicability.** This instruction applies to all AFJAG Corps members and certain non-AFJAG Corps civilian attorneys, including:

2.1.1. All RegAF judge advocates and paralegals;

2.1.2. All AFR and ANG judge advocates and paralegals, including when not performing duties as a judge advocate or paralegal in a Title 10 or Title 32 status;

2.1.3. All AFJAG Corps attorneys, paralegals, and nonlawyer personnel, but not foreign national personnel employed by the DAF;

2.1.4. All non-AFJAG Corps civilian attorneys who represent individuals at courts-martial or other proceedings governed by the UCMJ or MCM, or at other administrative proceedings;

2.1.5. All legal service volunteers serving under the supervision of an AFJAG Corps attorney; and

2.1.6. All other nonlawyer personnel under the functional supervision of TJAG, including, but not limited to, court reporters, law clerks, legal interns and externs, legal assistants, and secretaries.

**2.2. Terminology.** The term “lawyer” in each rule shall be read to include all individuals, including non-lawyers, listed in [paragraph 2.1](#).

**2.3. Other Actions.** This instruction does not limit authorities from taking other appropriate actions concerning conduct that is also subject to this instruction.

2.3.1. Nothing in this instruction limits the authority of TJAG to 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 to suspend any attorney from performing duties pending resolution of an allegation of unprofessional or unethical conduct.

2.3.2. Nothing in this instruction limits the authority of commanders, special trial counsel, or other supervisors from taking appropriate disciplinary or administrative action.

## Chapter 3

### ROLES AND RESPONSIBILITIES

#### 3.1. The Judge Advocate General (TJAG) shall:

- 3.1.1. Make reasonable efforts to ensure all members of the AFJAG Corps receive training on and act in conformity with the Rules and Standards contained herein.
- 3.1.2. Conduct formal reviews into allegations of Rules violations of the personnel listed in [paragraph 2.1](#), consistent with TJAG's authority under Title 10 United States Code Section 9037, *Judge Advocate General, Deputy Judge Advocate General: appointment; duties*, and the MCM, RCM 109, to maintain ethical standards in the AFJAG Corps.
- 3.1.3. Make all final decisions concerning violations of the Rules.

**3.2. The Deputy Judge Advocate General (DJAG) shall:** serve as the Senior Supervisory Attorney (SSA) on cases in which the subject is an SSA as defined in [paragraph 3.5](#); on cases in which the subject is assigned to Headquarters United States Air Force (USAF), a Field Operating Agency (FOA), or a Direct Reporting Unit (DRU); on cases involving a subject previously assigned to an Area Defense Counsel (ADC) or Victims' Counsel (VC) office at the time of the alleged violation, if appropriate and after coordination with the subject's current SSA; and on cases in which the subject attorney, paralegal, or nonlawyer assistant does not fall under the supervision of an SSA, including civilian attorneys who are not part of the AFJAG Corps.

#### 3.3. TJAG's Professional Responsibility Administrator (TPRA) shall:

- 3.3.1. Be assigned to the Professional Development Directorate (AF/JAX).
- 3.3.2. Carry out overall administration and management of TJAG's Professional Responsibility Program.
- 3.3.3. Report to TJAG through the Director, AF/JAX, on all professional responsibility matters.
- 3.3.4. Will provide general guidance on professional responsibility matters to AFJAG Corps members and will refer matters and provide assistance to TJAG's Advisory Committee on Professional Responsibility and Standards as appropriate.

#### 3.4. TJAG's Advisory Committee on Professional Responsibility and Standards (Advisory Committee) shall:

- 3.4.1. Advise TJAG on matters related to the maintenance of professional responsibility Rules and Standards.
- 3.4.2. Advise TJAG on alleged violations of the Rules. Neither the Advisory Committee nor its individual members have investigative powers while performing this function and will not communicate directly with the subject, counsel, or witnesses on matters under consideration.
- 3.4.3. Issue advisory opinions on professional responsibility matters under the procedures in [Chapter 8](#).
- 3.4.4. Be composed of the Director, Military Justice and Discipline Directorate (AF/JAJ); the Director, Civil Law and Litigation Directorate (AF/JAC); and the Director, Operations and International Law Directorate (AF/JAO). The Total Force Advisor (TFA) to TJAG, AF/JAX,

will augment the Advisory Committee in any case with an ARC subject. The Civilian Career Field Manager, AF/JAX, will augment the Advisory Committee in any case with DAF civilian personnel subjects. The Air Force Paralegal (5J) Career Field Manager, AF/JAX, will augment the Advisory Committee in any case with a military paralegal subject. The Director, AF/JAX, may appoint in writing alternate or substitute members who are in the grade of O-6/GS-15 or higher. The senior active duty member on the Advisory Committee will be the chairperson.

### **3.5. Senior Supervisory Attorneys (SSAs) shall:**

3.5.1. Make reasonable efforts to ensure attorneys, paralegals, and nonlawyer assistants under their supervision receive training and conform to the Rules and Standards.

3.5.2. Review and process allegations that AFJAG Corps members under their supervision have violated a Rule, in accordance with [Chapter 5](#).

3.5.3. Appoint formal review officers (FROs), in accordance with [Chapter 5](#), to develop facts and circumstances surrounding alleged violations of the Rules by attorneys, paralegals, and nonlawyer assistants under their supervision.

3.5.4. Consist of DJAG, Major Command Staff Judge Advocates (SJAs), the Combat Forces Command SJA, the Space Systems Command SJA, the Air Force District of Washington SJA, the Lead Special Trial Counsel, and the ANG Assistant to TJAG (for ANG judge advocates). For the purposes of this instruction, Major Commands include Institutional Component Commands and Service Component Commands; however, the SJAs of Air Forces Southern, Air Forces Northern / Air Forces Space, Air Forces Cyber, and Air Forces Central are not designated as SSAs. The Lead Special Trial Counsel may serve as the SSA for a subject previously assigned to the Office of the Special Trial Counsel (OSTC) at the time of the alleged violation, after coordination with the subject's current SSA. Individual Mobilization Augmentee (Category B) AFR judge advocates and Active Guard Reserve (AGR) judge advocates will fall under the SSA for the office to which they are attached. The Air Force Reserve Command SJA will serve as the SSA for traditional (Category A) AFR judge advocates.

### **3.6. Supervisory Attorneys shall:**

3.6.1. Make reasonable efforts to ensure attorneys, paralegals, and nonlawyer assistants under their supervision receive training and conform to the Rules and Standards.

3.6.2. Ensure AFJAG Corps members under their supervision receive training on the Rules and Standards as an organization on an annual basis in accordance with [paragraph 11.1](#).

3.6.3. Ensure AFJAG Corps members under their supervision individually certify their annual review of the applicable Rules and Standards in accordance with [paragraph 11.2.1](#).

3.6.4. Ensure AFJAG Corps members under their supervision complete the required annual certifications in accordance with [paragraph 11.2.2](#).

### **3.7. Attorneys shall:**

3.7.1. Know and comply with the applicable Rules and Standards, the rules of their respective licensing jurisdictions, and the ABA Criminal Justice Standards insofar as they apply to DAF practice.

3.7.2. Complete annual professional responsibility certifications through the PR CERT program as discussed in [paragraph 11.2](#).

3.7.3. Comply with ethics training and other professional responsibility requirements imposed by their licensing authorities if required to maintain eligibility to actively practice law in that licensing jurisdiction.

3.7.4. Provide associate non-AFJAG Corps civilian attorneys with a copy of the applicable Rules and Standards for their review.

3.7.5. Provide notice through their supervisory attorney and SSA to AF/JAX of the commencement of any licensing authority action or pending action against them, including an investigation, or of the loss of their required attorney licensing jurisdiction status in accordance with DAFI 51-101.

**3.8. Paralegals and Nonlawyer Assistants shall:**

3.8.1. Know and comply with the applicable Rules and Standards, as well as the ABA Criminal Justice Standards insofar as they apply to DAF practice.

3.8.2. Must complete annual professional responsibility certifications through the PR CERT program as discussed in [paragraph 11.2.1](#).

**3.9. Non-AFJAG Corps Civilian Attorneys shall:** know and comply with the applicable Rules and Standards, and the rules of their respective licensing authorities, when they represent an individual in courts-martial, other proceedings governed by the UCMJ and/or MCM, or DAF administrative proceedings.

## Chapter 4

### REPORTING ALLEGED VIOLATIONS OF THE RULES

**4.1. Alleged Violations of the Rules by Judges.** All allegations involving the professional conduct of AFJAG Corps judges will be reported and handled under the procedures outlined in **Attachment 6** of this publication.

**4.2. Alleged Violations of the Rules by Attorneys, Paralegals, and Nonlawyer Assistants.** An SSA may process an allegation of a Rule violation either on the SSA's own motion or upon complaint by any person. A complaint should ordinarily be in writing and detail the attorney, paralegal, or nonlawyer assistant's actions or omissions that constituted a violation of the Rules.

4.2.1. Complaints of alleged violations of the Rules will be reported or forwarded to the SSA of the subject attorney, paralegal, or nonlawyer assistant; alternatively, complaints may be forwarded to TPRA, who will coordinate with the subject's SSA. If DJAG is the SSA, the complaint will be forwarded to DJAG through TPRA. If the subject is an ANG judge advocate, complaints will be forwarded to the ANG Assistant to TJAG through the State Headquarters SJA of the state of the unit where the subject is assigned. If the ANG judge advocate is performing duty under Title 10, the complaint may be received and processed by the appropriate active duty SSA.

4.2.2. Upon receiving the allegation, the SSA will notify TPRA. TPRA will monitor the processing of the matter.

4.2.3. AFJAG Corps attorneys, paralegals, and nonlawyer assistants must notify TPRA prior to contacting the licensing authorities of another AFJAG Corps attorney regarding an alleged professional responsibility violation. **(T-1)** 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 AFJAG Corps.

## Chapter 5

### PROCESSING ALLEGATIONS OF RULES VIOLATIONS

**5.1. Deferring the Processing of an Allegation.** When the alleged violation of the Rules involves allegations of criminal misconduct, TJAG or the SSA as appropriate should defer processing the alleged violation until disposition of the matter. TJAG or the SSA may also defer processing when otherwise warranted (e.g., to prevent interference with ongoing litigation, post-trial actions, or the appellate process). TPRA will be informed of any decision to defer the processing of an allegation.

**5.2. SSA Review.** Upon receiving a complaint or information of a possible professional responsibility issue, the SSA of the subject at the time of the receipt of information first will make a threshold determination as to whether any Rules are implicated. If the complaint and all information available to the SSA, taken as true, could not reasonably result in a violation of the Rules, the SSA may determine the Rules are not implicated and will inform TPRA of the decision not to take further action on the issue. If the complaint or information implicates the Rules, the SSA may forward an alleged violation of the Rules to the subject and provide the subject an opportunity to provide an initial statement. The SSA may request additional limited clarification from a complainant, third party, or subject if needed to accomplish the SSA Review, but should initiate a formal review if significant information is required or if warranted by the seriousness of the allegation. If the Rules are implicated, the SSA will review the available evidence and:

5.2.1. Make recommendations on a credibility determination to the Advisory Committee through TPRA and process the allegation under [paragraph 5.3.](#);

5.2.2. Initiate a formal review and process the allegation under [paragraph 5.4.](#); or

5.2.3. Request waiver of the formal review of an allegation, if the underlying conduct was the subject of a separate proceeding, and process the allegation under [paragraph 5.5.](#)

**5.3. Credibility Determination.** In cases where the SSA does not initiate a formal review or request waiver of a formal review, the Advisory Committee will review the evidence to determine whether an allegation appears credible. An allegation is credible if the information received provides a reasonable belief the subject violated the Rules.

5.3.1. Not Credible: Senior Attorney Cases. When the subject of an alleged violation of the Rules is a general officer, colonel, or a civilian in the grade of GS-15 or higher, and the Advisory Committee determines an allegation is not credible and further action is unwarranted, the Advisory Committee will forward the allegation to TJAG through TPRA with a recommendation to close the case.

5.3.2. Not Credible: Other Attorney, Paralegal, and Nonlawyer Assistant Cases. When the subject of an alleged violation of the Rules is a lieutenant colonel or below; a civilian in the grade of GS-14 or below; or a civilian counsel who is not an AFJAG Corps attorney but represents an individual at a court-martial or other proceeding governed by the UCMJ and/or MCM, or other administrative proceeding, and the Advisory Committee finds an allegation is not credible, it will direct TPRA to return the case to the SSA to close the case.

5.3.3. Credible. If the Advisory Committee determines an allegation is credible, it will either direct TPRA to return the case to the SSA to initiate a formal review or recommend TJAG find it to be a minor violation.

5.3.4. TJAG Action on Credibility Determination. Upon receipt of the Advisory Committee's credibility determination, TJAG may (1) close the case, (2) refer the matter back to the SSA to initiate a formal review, (3) refer the matter back to the Advisory Committee to answer additional questions, or (4) find a minor violation. Formal review is not required to find a minor violation.

#### **5.4. Conducting a Formal Review.**

5.4.1. The purpose of conducting a formal review is to develop the facts and circumstances surrounding allegations of non-minor violations of the Rules so TJAG can determine whether a violation occurred and take appropriate action.

5.4.2. The initiation of a formal review 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 formal review to know and comply with his or her licensing authority's reporting requirements.

5.4.3. Formal Review Officer (FRO) Requirements. The SSA must appoint an FRO who is senior in rank to the subject of the allegation under formal review. The FRO will not come from the same office as the subject unless approved by TJAG or the Director, AF/JAX. The same FRO may be appointed to review related allegations involving multiple subjects.

5.4.3.1. If the subject of an allegation was a defense counsel or paralegal at the time of the alleged conduct, the FRO will be a sitting or former defense counsel or paralegal to the extent possible. If the FRO is to be a sitting defense counsel, the SSA will coordinate that appointment with the Chief, Trial Defense Division (AF/JAJD), for RegAF and AFR personnel.

5.4.3.2. If the subject of an allegation was a victims' counsel or paralegal at the time of the alleged conduct, the FRO will be a sitting or former victims' counsel or paralegal to the extent possible. If the FRO is to be a sitting victims' counsel, the SSA will coordinate that appointment with the Chief, Victims' Counsel Division (AF/JAJS), for RegAF and AFR personnel.

5.4.3.3. If the subject of an allegation was a Special Trial Counsel (STC) at the time of the alleged conduct, the FRO will be an STC, former STC, or experienced litigator to the extent possible. If the FRO is to be a sitting STC, the SSA will coordinate that appointment with the Lead Special Trial Counsel.

5.4.3.4. If the subject of an allegation is an ANG judge advocate who was not on Title 10 orders at the time of the alleged conduct, the ANG Assistant to TJAG will appoint an ANG judge advocate as FRO.

5.4.4. FRO Responsibilities. The FRO will determine the facts and circumstances surrounding the allegations by interviewing and obtaining statements from relevant witnesses under oath and collecting all relevant evidence.

5.4.4.1. Due Process. The FRO will notify the subject of the allegation(s) and the purpose of the formal review, interview the subject about the allegation(s), and provide the subject

an opportunity to submit a sworn statement and other evidence. **(T-1)** The provisions of Article 31, UCMJ, apply when the subject is a military member and the FRO has reason to believe or reasonably should believe the subject has committed a criminal offense. Judge advocates who are the subject of a formal review are entitled to the assistance of a military defense counsel or can retain civilian counsel at their own expense. Civilian attorneys are not entitled to the assistance of a military defense counsel but may, if they so choose, retain civilian counsel at their own expense.

5.4.4.2. Preparing and Submitting a Report. The FRO will prepare a report setting forth the facts of the case and conclusions as to whether or not the subject violated any of the Rules. **(T-1)** The FRO will attach to the report all statements and evidence obtained during the formal review. **(T-1)** The FRO will submit the report to the subject's SSA. **(T-1)** The SSA will continue processing the allegation under [paragraph 5.6](#).

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

## **5.5. Waiver of Formal Review in Cases Involving Separate Proceedings.**

5.5.1. If a separate proceeding made factual determinations concerning the conduct underlying an alleged violation of the Rules, and that proceeding afforded the subject of the allegation procedural protection equivalent to that of a formal review under this instruction, TJAG may waive the requirement for a formal review. Factual determinations from a separate proceeding may be considered final with respect to an alleged violation of the Rules.

5.5.2. Upon receipt of evidence from a separate proceeding concerning the conduct underlying an alleged violation of the Rules, the SSA may forego initiation of a formal review. The SSA may instead notify the subject of the allegation, provide the subject an opportunity to respond, and forward a request to waive the formal review. Matters related to the separate proceeding, the subject's response, if any, and the waiver request will be forwarded to the Advisory Committee, through TPRA, along with the SSA's recommendation under [paragraph 5.6.1](#).

5.5.3. Upon receipt of an SSA request to waive formal review of an allegation, the Advisory Committee may either deny the request and direct the SSA initiate a formal review or forward the request to TJAG, through TPRA, along with the Advisory Committee's recommendation under [paragraph 5.6.2](#).

## **5.6. Processing Alleged Non-Minor Violations of the Rules.**

5.6.1. SSA Recommendation. Upon receipt of a formal review report or evidence from a separate proceeding under [paragraph 5.5](#), the SSA will provide a written recommendation as to findings and disposition to the Advisory Committee through TPRA.

5.6.2. Advisory Committee Action. Upon receipt of the SSA recommendation, the Advisory Committee votes on a decision. In the event of a tie, the Committee chairperson's vote will determine the Committee's action. Members of the Committee who disagree with the majority are permitted to submit a separate recommendation. The Advisory Committee, through TPRA, may:

5.6.2.1. Return the case to the SSA for further review;

5.6.2.2. If the subject is not a senior attorney, find no violation occurred by clear and convincing evidence and return the case to the SSA for case closure;

5.6.2.3. If the subject is not a senior attorney, recommend TJAG find a violation occurred by clear and convincing evidence and provide a recommendation as to disposition; or

5.6.2.4. If the subject is a senior attorney, provide a recommendation as to whether TJAG should find a violation occurred by clear and convincing evidence and as to disposition.

## Chapter 6

### TJAG ACTION ON ALLEGATIONS OF RULES VIOLATIONS

**6.1. Authority.** TJAG is not bound by the recommendations received from the SSA or the Advisory Committee. TJAG has sole discretion to determine the appropriate action in a case. TJAG's action is final and not subject to appeal.

**6.2. Action.** TJAG may take any of the following actions after receiving an alleged violation of the Rules:

- 6.2.1. Find no violation and close the case;
- 6.2.2. Direct the SSA to conduct further review;
- 6.2.3. Seek an opinion from the Advisory Committee;
- 6.2.4. Find a minor violation and direct corrective counseling and/or remedial training; or
- 6.2.5. Find a non-minor violation and take any of the following actions individually or in combination:
  - 6.2.5.1. Direct corrective counseling and/or remedial training.
  - 6.2.5.2. Censure the subject. The censure will be in writing and served upon the subject. The censure will not afford the subject an opportunity to respond.
  - 6.2.5.3. Direct TPRA to forward the matter to the subject's SSA for appropriate action.
  - 6.2.5.4. Suspend the subject attorney's ability to practice before DAF courts-martial, the Air Force Court of Criminal Appeals, other proceedings governed by the UCMJ and MCM, and DAF administrative proceedings, pursuant to RCM 109 with proper notice in accordance with [paragraph 6.3](#).
  - 6.2.5.5. Suspend a civilian attorney's qualifications to practice law in a position in the AFJAG Corps pursuant to DAFI 51-101 with proper notice in accordance with [paragraph 6.3](#).
  - 6.2.5.6. Suspend or withdraw a judge advocate's certification pursuant to DAFI 51-101 with proper notice in accordance with [paragraph 6.3](#).
  - 6.2.5.7. Withdraw a judge advocate's designation pursuant to DAFI 51-101 with proper notice in accordance with [paragraph 6.3](#).

**6.3. Notice.** If TJAG determines action under paragraphs [6.2.5.4](#), [6.2.5.5](#), [6.2.5.6](#), or [6.2.5.7](#) is warranted, the following provisions apply before taking such action:

- 6.3.1. TJAG will advise the subject of the proposed action in accordance with DAFI 51-101 or RCM 109 and provide the subject the relevant evidence from the formal review report or separate proceeding. The evidence provided to the subject will be appropriately redacted to comply with the Privacy Act of 1974 and the subject will not receive the SSA or Advisory Committee Recommendations.
- 6.3.2. TJAG will provide the subject 14 calendar days to submit written matters as to why TJAG should not take such action. The subject of the proposed action does not have a right to a personal appearance with TJAG.

6.3.3. Extensions and Waiver. TJAG or the Director, JAX, may grant extensions to the period allowed to respond for good cause. A subject's failure to submit matters within the period provided constitutes a waiver of the opportunity to submit matters.

## Chapter 7

### POST DECISION PROCESSING

**7.1. Notification of Case Conclusion.** In all cases, TPRA will notify the subject and the subject's SSA of the findings reached in the case. TPRA also will notify the complainant, if any, of case closure, but the notification to the complainant will be made in accordance with the Privacy Act of 1974 and will not reveal any person's recommendations, opinions, or findings; the disposition of the allegation; or any action taken in the case.

**7.2. Reporting Cases to Licensing Officials.**

7.2.1. Formal reviews 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.

7.2.2. If TJAG determines any of the Rules have been violated and the seriousness of the violation warrants, TJAG may direct TPRA to report the matter to the subject attorney's licensing jurisdiction(s) 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.

## Chapter 8

### ADVISORY OPINIONS

**8.1. Authority.** The Advisory Committee may provide advisory opinions when requested, subject to TJAG approval. Only the Advisory Committee may issue advisory opinions. While TPRA may provide guidance on the Rules and procedures, such guidance should be general in nature and is not authoritative.

**8.2. Requests.** 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 attorneys should include their observations and recommendations. TJAG will review and approve all written advisory opinions before they are published.

**8.3. 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.

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

## Chapter 9

### OFF-DUTY LEGAL EMPLOYMENT

**9.1. USAF or USSF as Primary Official Duty.** AFJAG Corps members' primary professional responsibility is to the USAF or USSF, and all AFJAG Corps members 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 disqualification from matters that fall within the AFJAG Corps member's official duties.

**9.2. Applicability.** This guidance on off-duty legal employment applies to RegAF and civilian AFJAG Corps members. Trial and appellate military judges must also observe additional restrictions contained in the DAF Uniform Code of Judicial Conduct found at [Attachment 6](#) of this publication. Air Reserve Component (ARC) members must adhere to the rules pertaining to off-duty representation contained in [Attachment 3](#) of this instruction.

**9.3. 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 AFJAG Corps member (including employment while on terminal leave). Unless otherwise prohibited by statute or regulation, the following are excluded from this definition: (1) occasional uncompensated legal advice rendered to relatives or personal friends but not involving formal representation; (2) the uncompensated practice of law on the member's own behalf, or on behalf of a parent, spouse, or child of the member; (3) teaching law as part of a program of education or training, or legal writing for educational purposes or for publication; and (4) the provision of pro bono legal services.

#### **9.4. Approval Required.**

9.4.1. 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 commander or supervisor and comply with relevant command policies. **(T-3)** Additionally, they must forward such requests through command judge advocate channels to TJAG or TJAG's designee for approval. **(T-1)** The request must identify the nature of the off-duty legal employment (including description of work, duration, and frequency) and include the approval of the immediate commander or supervisor. **(T-1)** Supervisors should determine whether there are any conflicts of interest, violations of law or regulation, or other professional responsibility concerns present and include that information in their approval before forwarding to TJAG or TJAG's designee.

9.4.2. Other Attorneys and AFJAG Corps Members. Other AFJAG Corps members desiring approval to engage in off-duty legal employment must receive written approval of their supervisory attorney and comply with relevant command policies. **(T-1)**

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

**9.5. Compliance with Professional Responsibility Rules and Standards.** AFJAG Corps members engaging in off-duty legal employment must ensure they adhere to applicable professional responsibility Rules and Standards. **(T-1)**

9.5.1. Professional Responsibility Rules. AFJAG Corps members engaging in off-duty legal employment must comply with professional responsibility rules, including the DAFRPC as well as the 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.

9.5.2. Standards of Conduct. AFJAG Corps members engaging in off-duty legal employment must ensure that such activities are consistent with ethical standards of conduct. Accordingly, members must not engage in employment that would do any of the following **(T-0)**:

9.5.2.1. Violate any Federal statute, rule or regulation, including but not limited to: Title 18 United States Code Chapter 11, *Bribery, Graft, and Conflicts of Interest*; Title 5, Code of Federal Regulations (CFR), Part 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*, and Part 3601.106, *Prior approval for outside employment and business activities*; and the Joint Ethics Regulation. Examples of criminal conflict of interest statutes include the following:

9.5.2.1.1. 18 USC § 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.

9.5.2.1.2. 18 USC § 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.

9.5.2.1.3. 18 USC § 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.

9.5.2.2. 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 CFR Part 2635.705).

9.5.2.3. Provide legal services for compensation in an off-duty employment status to any person authorized legal assistance under AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*.

9.5.2.4. Otherwise cause a reasonable person to question the integrity of AFJAG Corps programs or operations. Accordingly, servicemembers must not wear a military uniform, 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 USAF or USSF endorses or has an interest in the matter.

**9.6. Authority to Appear in Accordance with AFI 51-301, *Civil Litigation*.** AFJAG Corps lawyers shall not wear a military uniform 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.

## Chapter 10

### USE OF LEGAL SERVICE VOLUNTEERS

**10.1. Use of Legal Services Volunteers.** Volunteers are an invaluable resource and perform many tasks worldwide, increasing the level of service the AFJAG Corps is able to provide to its clients. AFJAG Corps legal professionals should use volunteers to the maximum extent practicable, subject to the limitations on the functions they can perform as outlined below. SJAs and supervisory attorneys shall ensure all volunteers read and sign the appropriate part of the DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities or Nonappropriated Fund Instrumentalities*. (T-3)

#### 10.2. Limitations.

10.2.1. 31 USC § 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 AFJAG Corps practice include 10 USC § 1588, *Authority to accept certain voluntary services*, and 5 USC § 3111, *Acceptance of volunteer service*.

10.2.1.1. 10 USC § 1588 allows the Department of Defense to accept certain voluntary services, and DoDI 1100.21, *Voluntary Services in the Department of Defense*, paragraph 4.2.e, includes legal assistance as an accepted volunteer program under 10 USC § 1044, *Legal assistance*.

10.2.1.2. 5 USC § 3111 permits the acceptance of volunteer services pursuant to student extern programs. AF/JAX manages the AFJAG Corps' externship program. It is the responsibility of SJAs and supervisory attorneys to ensure externs comply with the requirements set forth in this instruction.

10.2.2. Judge Advocate Functions. By statute, only attorneys qualified and designated by TJAG as judge advocates may perform judge advocate functions. (See 10 USC § 8067(g)). (T-0) As a result, legal services volunteers, even if they are licensed attorneys, may not perform the functions of a judge advocate. These include any functions that the UCMJ or DAF regulations require to be performed by a judge advocate. Examples of such functions include acting as trial counsel, military defense counsel, victims' counsel, legal advisor, preliminary hearing officer, or military judge in a proceeding under the UCMJ, and serving as a recorder, legal advisor, or respondent's military counsel in an adverse administrative proceeding. Volunteers must be careful to avoid the provision of legal advice and the inadvertent creation of attorney-client relationships in such situations. For the purposes of this restriction, "judge advocates" are those officers designated as judge advocates in accordance with DAFI 51-101.

10.2.3. 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.

10.2.4. 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 USAF or USSF interests. They may, however, perform paralegal-type functions or provide other legal services if acting under the direction, supervision, and control of an AFJAG Corps military or civilian attorney. Examples of permissible uses include researching, drafting legal opinions for review and signature by an AFJAG Corps attorney, and assisting with legal assistance matters (such as drafting wills and providing tax return preparation) under the supervision of an AFJAG Corps 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.

**10.3. Confidentiality and Standards of Professional Conduct.** SJAs and supervisory attorneys shall ensure all legal service volunteers are briefed on, understand, and comply with the same confidentiality requirements applicable to all members of the legal staff. **(T-1)** All legal services volunteers must read and sign a confidentiality agreement. **(T-1)** A sample agreement is provided at **Attachment 8**. 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, 4, and 5**. **(T-1)**

## Chapter 11

### ANNUAL TRAINING AND CERTIFICATIONS

**11.1. Annual Training.** Supervisory attorneys must ensure AFJAG Corps attorneys, paralegals, and nonlawyer assistants under their supervision receive training on the Rules and Standards as an organization on an annual basis. **(T-1)** Organizational training is a separate requirement from the Annual Certifications listed in **paragraph 11.2**. There is no specified format for this training. It may be conducted in person or virtually, but it must be conducted as an organization and not through other means (e.g., through attendance at courses). Supervisory attorneys may obtain training resources from AF/JAX via the Federal Legal Information Through Electronics (FLITE) Knowledge Management (KM) page

#### **11.2. Annual Certifications.**

11.2.1. Review of Rules and Standards. All AFJAG Corps members must individually certify their annual review of the applicable Rules and Standards. **(T-1)** All personnel must also review the ABA Criminal Justice Standards insofar as they apply to DAF practice, but civilian attorneys, paralegals, and assistants who do not have duties in military justice are not required to review the ABA Criminal Justice Standards and the Uniform Rules of Practice Before DAF Courts-Martial. **(T-1)** Attorneys must also review the rules of their respective licensing jurisdictions. **(T-1)**

11.2.2. Additional Certifications. Consistent with DAFI 51-101, *The Air Force Judge Advocate General's (AFJAG) Corps Operations, Accessions, and Professional Development*, attorneys must 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. **(T-1)**

11.2.3. Accomplishing Certifications. Annual certifications will be done through the PR CERT online certification program in the FLITE database. **(T-1)**

MITCHEL NEUROCK  
Major General, USAF  
Performing the Duties of The Judge Advocate  
General

**Attachment 1****GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

5 USC § 3111, *Acceptance of volunteer service*

5 USC § 552, *The Freedom of Information Act*

5 USC § 7301, *Presidential Regulations*

10 USC § 1044, *Legal assistance*

10 USC §1054, *Defense of certain suits arising out of legal malpractice*

10 USC § 1588, *Authority to accept certain voluntary services*

10 USC § 9037, *Judge Advocate General, Deputy Judge Advocate General: appointment; duties*

10 USC § 8067, *Designation: officers to perform certain professional functions*

18 USC Chapter 11, *Bribery, Graft, and Conflicts of Interest*

28 USC § 372, *Retirement for disability; substitute judge on failure to retire*

28 USC § 1346, *United States as defendant*

28 USC § 2672, *Administrative adjustment of claims*

31 USC § 1342, *Limitation on voluntary services*

42 USC Chapter 112, *Victim Compensation and Assistance*

5 CFR Part 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*

*Manual for Courts-Martial, 2024*

DoD 5400.07\_AFMAN 33-302, *Freedom of Information Act Program, 27 April 2018*

DoDI 1100.21, *Voluntary Services in the Department of Defense, 27 March 2019*

*Joint Ethics Regulation, 15 May 2024*

AFPD 51-1, *The Air Force Judge Advocate General's Corps, 14 November 2018*

AFI 33-332, *Air Force Privacy and Civil Liberties Program, 10 March 2020*

AFI 51-301, *Civil Litigation, 2 October 2018*

AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs, 22 August 2018*

DAFI 51-101, *The Air Force Judge Advocate General's (AFJAG) Corps Operations, Accessions, and Professional Development, 20 June 2023*

DAFI 51-201, *Administration of Military Justice, 24 January 2024*

DAFI 90-301, *Inspector General Complaints Resolution, 4 January 2024*

OMB Circular No. A-76, *Performance of Commercial Activities*

***Adopted Forms***

DAF Form 847, *Recommendation for Change of Publication*

DD Form 2793, *Volunteer Agreement for Appropriated Fund Activities or Nonappropriated Fund Instrumentalities*

***Abbreviations and Acronyms***

**ABA**—American Bar Association

**ADC**—Area Defense Counsel

**AFI**—Air Force Instruction

**AFJAG**—Air Force Judge Advocate General's

**AFPD**—Air Force Policy Directive

**AFR**—Air Force Reserve

**AFMAN**—Air Force Manual

**ANG**—Air National Guard

**AFRPC**—Air Force Rules of Professional Conduct

**CFR**—Code of Federal Regulations

**DAF**—Department of the Air Force

**DAFI**—Department of the Air Force Instruction

**DAFRPC**—Department of the Air Force Rules of Professional Conduct

**DJAG**—Deputy Judge Advocate General

**DRU**—Direct Reporting Unit

**FLDCOM**—Field Command

**FLITE**—Federal Legal Information Through Electronics

**FOA**—Field Operating Agency

**FRO**—Formal Review Officer

**JER**—Joint Ethics Regulation

**MAJCOM**—Major Command

**MCM**—Manual for Courts-Martial

**RCM**—Rule for Courts-Martial

**SJA**—Staff Judge Advocate

**SSA**—Senior Supervisory Attorney

**STC**—Special Trial Counsel

**TJAG**—The Judge Advocate General

**TPRA**—The Professional Responsibility Administrator

**UCMJ**—Uniform Code of Military Justice

**USAF**—United States Air Force

**USC**—United States Code

**USSF**—United States Space Force

**VC**—Victims’ Counsel

### *Office Symbols*

**AF/JAC**—Civil Law and Litigation Directorate

**AF/JAJ**—Military Justice and Discipline Directorate

**AF/JAJD**—Trial Defense Division

**AF/JAJS**—Victims’ Counsel Division

**AF/JAO**—Operations and International Law Directorate

**AF/JAX**—Professional Development Directorate

**OSTC**—Office of the Special Trial Counsel

### *Terms*

**Clear and Convincing Evidence**—A standard of proof which means the evidence being presented produces a firm belief or conviction an allegation is true. The weight of proof is more than the civil standard of “preponderance of the evidence” but less than the criminal standard of “proof beyond a reasonable doubt.”

**Inherently Governmental Legal Function**—A function that is so intimately related to the public interest as to mandate performance by government employees.

**Minor Violation**—A violation of the Rules that does not warrant a sanction above corrective counseling or remedial training. A minor violation is one that involves little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the subject. A violation should not be considered minor if it results in or is likely to result in substantial prejudice to a client or other person; TJAG found the subject violated the Rules previously within the last three years; the subject violated Air Force Rule of Professional Conduct 8.4(b) or 8.4(c); or the violation is part of a pattern of similar conduct.

**Nonlawyer Assistant**—Includes AFJAG Corps personnel, military and civilian, who perform duties in a DAF legal office in support of AFJAG Corps attorneys. Nonlawyer assistants also include nonlawyer military personnel assigned to perform duties under a supervisory attorney.

**Off—duty Legal Employment**—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; (3) teaching law as part of a program of

education or training, or legal writing for educational purposes or for publication; and (4) the provision of pro bono legal services.

**Reasonable Belief**—A legal standard that describes what an ordinary person of average intelligence and sound mind would believe based on a given set of facts presented.

**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.

## **Attachment 2—DEPARTMENT OF THE AIR FORCE RULES OF PROFESSIONAL CONDUCT**

### **TABLE OF CONTENTS—CHAPTER 1 CLIENT-LAWYER RELATIONSHIP**

Rule 1.0 Terminology

Rule 1.1 Competence

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

Rule 1.3 Diligence

Rule 1.4 Communications

Rule 1.5 Fees

Rule 1.6 Confidentiality of Information

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.9 Duties to Former Clients

Rule 1.10 Imputation of Conflicts of Interest: General Rule

Rule 1.11 Special Conflicts of Interest for Government Officers and Employees

Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

Rule 1.13 The Organization as Client

Rule 1.14 Client with Diminished Capacity

Rule 1.15 Safekeeping Property

Rule 1.16 Declining or Terminating Representation

Rule 1.17 Sale of Law Practice

Rule 1.18 Duties to Prospective Client

### **CHAPTER 2 COUNSELOR—Rule 2.1 Advisor**

Rule 2.2 (Deleted)

Rule 2.3 Evaluation for Use by Third Persons

Rule 2.4 Lawyer Serving as Third-Party Neutral

### **CHAPTER 3 ADVOCATE—Rule 3.1 Meritorious Claims and Contentions**

Rule 3.2 Expediting Litigation

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

Rule 3.6 Trial Publicity

- Rule 3.7 Lawyer as Witness
- Rule 3.8 Special Responsibilities of a Trial Counsel
- Rule 3.9 Advocate in Nonadjudicative Proceedings

**CHAPTER 4 TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS—Rule**

- 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communication with Person Represented by Counsel
- Rule 4.3 Dealing with Unrepresented Person
- Rule 4.4 Respect for Rights of Third Persons

**CHAPTER 5 THE JUDGE ADVOCATE GENERAL’S CORPS—Rule 5.1 Responsibilities of a Supervisory Lawyer**

- Rule 5.2 Responsibilities of a Subordinate Lawyer
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistance
- Rule 5.4 Professional Independence of a Lawyer
- Rule 5.5 Unauthorized Practice of Law
- Rule 5.6 Restrictions on Right to Practice
- Rule 5.7 Responsibilities Regarding Non-Law Duties

**CHAPTER 6 PUBLIC SERVICE—Rule 6.1 Voluntary Pro Bono Publico Service**

- Rule 6.2 Accepting Appointments
- Rule 6.3 Membership in Legal Services Organization
- Rule 6.4 Law Reform Activities Affecting Client Interests
- Rule 6.5 Nonprofit and Court Annexed Limited Legal Services Programs

**CHAPTER 7 INFORMATION ABOUT LEGAL SERVICES—Rule 7.1 Communications Concerning a Lawyer’s Services**

- Rule 7.2 Communications Concerning a Lawyer’s Services: Specific Rules
- Rule 7.3 Solicitation of Clients
- Rule 7.4 (Deleted)
- Rule 7.5 Official Letterhead
- Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

**CHAPTER 8 MAINTAINING THE INTEGRITY OF THE PROFESSION—Rule 8.1 Bar Admission and Disciplinary Matters**

- Rule 8.2 Judicial and Legal Officials
- Rule 8.3 Reporting Professional Misconduct
- Rule 8.4 Misconduct
- Rule 8.5 Jurisdiction

**Preamble**—The *Department of the Air Force Rules of Professional Conduct* (DAFRPC or the *Rules*) apply to all military and civilian lawyers in the Air Force Judge Advocate General’s (AFJAG) Corps regardless of where the lawyer’s conduct occurs. The *Rules* also apply to non-AFJAG Corps civilian attorneys who practice in DAF courts, other proceedings under the UCMJ or MCM, and DAF administrative proceedings. The *Rules* do not apply to foreign nationals who are employed by the DAF but are not part of the AFJAG Corps, but supervisory attorneys still have responsibilities under Chapter 5 of the DAFRPC to ensure personnel under their authority conduct themselves in a manner compatible with their professional obligations. Although the DAFRPC are not punitive in nature, they establish the minimum standards of ethical conduct demanded of covered individuals. Assessment of a lawyer’s conduct will be made on the basis of facts and circumstances as they existed at the time of the conduct in question. 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 AFJAG Corps lawyers, they are specific to the problems and needs of our practice, and they are accessible to AFJAG Corps lawyers assigned throughout the world. The DAFRPC are directly adapted from the American Bar Association (ABA) Model Rules of Professional Conduct, with important contributions from Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*, and the Navy JAG Instruction 5803.1, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*. The ABA regularly amends its Model Rules of Professional Conduct and the DAF has adopted a number of these changes.

Where an ABA rule has been altered, the DAF rule indicates it was modified. Where material has been added, the new material is so labeled, and the term “substituted” indicates a rule has been entirely replaced. Simple terminology changes made to conform a rule to DAF 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 of Professional Conduct have not been incorporated, they may provide guidance and assistance in interpreting the *Rules*. The DAFRPC were specifically adapted to the unique needs and demands of DAF practice, and not all Comments to the ABA Model Rules will be helpful. The ABA Criminal Justice Standards, though aspirational in nature, represent the conduct expected of AFJAG Corps personnel and may help in interpreting the *Rules*.

In adapting the *Rules*, a conscious attempt was made to balance DAF needs with the position of AFJAG Corps 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 the AFJAG Corps provide ample assurance those obligations will be met.

## **CHAPTER 1—CLIENT-LAWYER RELATIONSHIP**

### **Rule 1.0—TERMINOLOGY**

- (a) “Belief” or “believes” denotes 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 given in writing by the person or a writing 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 the lawyer believes the matter in question and the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer denotes 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 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, a flying evaluation board, 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) [Added] A lawyer’s authority and control over decisions concerning representation may, by law, be expanded beyond the limits imposed by paragraphs (a) and (c).

(f) [Added] Client-lawyer relationships and representation of clients by lawyers may be terminated by The Judge Advocate General or by Senior Supervisory Attorneys, as defined by DAFI 51-110, para 3.5, for good cause shown.

## DISCUSSION

Paragraph (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 plea agreement, must be made jointly by the lawyer and client within the context of applicable regulations, the UCMJ, and the MCM. The paragraph was modified slightly to include the client's sole authority, within the limits prescribed by RCM 903 and in DAFI 51-201, to elect the composition of his or her court-martial.

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 client-lawyer relationships and representation of clients by lawyers is permissible only when authorized by competent authority. Thus, notwithstanding Rule 1.2(a) and (c), 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 and The Judge Advocate General 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 the client is aware of such limitations. Paragraph (e) was added to reflect this aspect of DAF practice. For the purposes of paragraph (f), representation of clients by defense counsel, victims' counsel, legal assistance attorneys, and Office of Airman's Counsel attorneys may be terminated by The Judge Advocate General and/or a Senior Supervisory Attorney for good cause shown.

### **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* 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**

[Substituted] A lawyer shall not receive outside compensation for work performed as part of official government duties.

### DISCUSSION

AFJAG Corps lawyers do not charge or collect fees (also see 18 USC § 209, prohibiting outside compensation for services as a federal government officer or employee). Civilian lawyers who do are regulated and may be sanctioned by state or federal authorities.

### **Rule 1.6—CONFIDENTIALITY OF INFORMATION**

(a) [Modified] 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 required by paragraph (b)(1) or permitted by paragraph (b)(2).

(b) [Modified] A lawyer:

(1) shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

(2) may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(i) [Added] to prevent substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system;

(ii) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services;

(iii) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(iv) to secure legal advice about the lawyer's compliance with these *Rules*;

(v) 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;

(vi) to comply with other law or court order; or

(vii) to detect and resolve conflicts of interest arising from a lawyer's change of employment or from changes in the composition or ownership of a lawyer's firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

## DISCUSSION

Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the DAF. 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 AFSCJ 4-3.7.

Rule 1.6 contemplates disclosure based on client consent. In the organizational context, the proper DAF authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or DAF official with decision 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 AFJAG Corps lawyer. Counsel should always ensure 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 AFSCJ 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 DAF authority to provide consent will depend on the circumstances. Absent specific regulatory guidance to the contrary, such authority will normally be the commander or DAF official with decision 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 on 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, or in a criminal case an aggregated agreement as to guilty pleas, 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). That regulation, the underlying Department of Defense Directive 5500.7, *Standards of Conduct*, and applicable Federal statutes (see generally 18 USC § 201, et seq) are an AFJAG Corps lawyer's primary authority concerning conflicts of this nature.

By adopting the ABA Rule, the DAF Rule establishes only ethical parameters. It is doubtful AFJAG Corps lawyers will find it necessary to obtain releases such as the ones described in 1.8(h). See 10 USC § 1054 and 28 USC §§ 1346(b) and 2672 limiting remedies for malpractice by AFJAG Corps lawyers to actions against the United States.

Paragraphs (f), (i) and (k) were omitted as being inapplicable to DAF practice. Paragraph (j) addresses sexual relations with clients. Additional regulatory guidance may further prohibit sexual relations between clients and attorneys, including rules on fraternization, unprofessional relationships, extramarital sexual conduct, 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. IMPUTATION OF CONFLICTS OF INTEREST—GENERAL RULE**

[Substituted] Lawyers who work in the same military law office are not automatically disqualified from representing a client even if other lawyers in that office would be prohibited from doing so by Rule 1.7, Rule 1.8, 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—SPECIAL CONFLICTS OF INTEREST FOR GOVERNMENT OFFICERS AND EMPLOYEES**

[Paragraphs (a), (b) and (c) are omitted. See the JER, applicable law, and the Discussion to Rule 1.8.]

(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, ARBITRATOR, MEDIATOR, OR OTHER THIRD—PARTY NEUTRAL**

(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—ORGANIZATION AS CLIENT**

(a) [Modified] Except when authorized to represent an individual client, the government of the United States, or another government agency, an AFJAG Corps lawyer represents the United States Air Force (USAF) or United States Space Force (USSF) acting through its authorized officials.

(b) [Modified] If a lawyer knows that an official, member, employee, or other person associated with the USAF or USSF 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 USAF or USSF or a violation of law which reasonably might be imputed to the USAF or USSF, the lawyer shall proceed as is reasonably necessary in the best interest of the USAF or USSF. 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 USAF or USSF 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 USAF or USSF 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 USAF or USSF authority;

(3) advising that person that the lawyer is ethically obligated to preserve the interests of the USAF or USSF and, as a result, must consider discussing the matter with senior AFJAG Corps 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 AFJAG Corps lawyers including, if warranted by the seriousness of the matter, referring the matter to the AFJAG Corps 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 DAF insists upon action or refusal to act that is clearly a violation of a legal obligation to the USAF or USSF, adverse to the legal interests or obligations of the USAF or USSF, or a violation of law, the lawyer may consult with senior AFJAG Corps lawyers at the same or higher level of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid any violation of legal interests or obligations, or of the law, by the USAF or USSF. In no event shall the lawyer participate or assist in the illegal activity.

(d) [Omitted]

(e) [Omitted]

(f) [Modified] In dealing with USAF or USSF officials, members, employees, or other persons associated with the USAF or USSF, a lawyer shall explain that the USAF or USSF is the lawyer's client when the lawyer knows or reasonably should know that the USAF's or USSF's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.

(g) [Modified] A lawyer representing the USAF or USSF may also represent any of its officials, members, or employees subject to the provisions of Rule 1.7 and other applicable authority. If the USAF's or USSF's consent to representation of such individuals is required by Rule 1.7, the consent shall be given by the Major Command (MAJCOM) or Field Command (FLDCOM) Staff Judge Advocate (SJA) or equivalent. If the MAJCOM or FLDCOM SJA or equivalent is requesting consent, then consent shall be given by the Deputy Judge Advocate General (DJAG).

## DISCUSSION

With limited exceptions, an AFJAG Corps lawyer represents the USAF or USSF acting through its authorized representatives. Exceptions include, but are not limited to, military judges when performing judicial duties, lawyers assigned to represent individuals, 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. Lawyers represent the USAF or USSF by interacting with USAF or USSF officials, members, and employees. When an USAF or USSF official, member, or employee, acting within the scope of his or her official duties, communicates with an AFJAG Corps lawyer, the communication is protected from disclosure to anyone outside the DAF under Rule 1.6. However, this does not mean the official, employee, or member is a client of the AFJAG Corps attorney. It is the USAF or USSF, not the official, employee, or member, that benefits from Rule 1.6 confidentiality. The USAF's or USSF's entitlement to confidentiality may not be asserted by an official, employee, or member to conceal personal misconduct from USAF or USSF authorities.

If a lawyer knows the USAF or USSF 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 DAF authority.

AFJAG Corps 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 USAF or USSF and cannot be compromised. As professional military officers and trusted counsel, it is also essential for AFJAG Corps 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 USAF or USSF.

Determining whether to reveal communications with a commander to higher AFJAG Corps authority requires mature judgment and common sense. A lawyer who perceives a conflict between his or her professional commitments to the commander and his or her ethical obligations to the USAF or USSF may consult with a supervisory AFJAG Corps 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 AFJAG Corps lawyers at the next level of command. In extreme cases it may be necessary to refer the matter to The Air Force Judge Advocate General.

**Conflicts of Interest.** When USAF or USSF interests are or become adverse to those of an individual authorized to act on behalf of the USAF or USSF, 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 AFJAG Corps lawyer authorized to provide such representation or by other counsel. Care must be taken to ensure the individual understands that when interests conflict, the AFJAG Corps lawyer represents the USAF or USSF, 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 AFJAG Corps 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 client-lawyer 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, guardian, or Article 6b representative.

(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.

### **DISCUSSION**

A client may have diminished capacity with regard to certain issues and not others. Lawyers are required to maintain, as far as reasonably possible, an ordinary client-lawyer relationship with clients with diminished capacity. Diminished capacity can be situational in nature and vary in degree. A client's diminished capacity may be affected by multiple factors.

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

A lawyer representing a minor should be mindful that the minor may have diminished capacity due to age and stage of development. As with adult clients with diminished capacity, the lawyer for a minor with diminished capacity should, as far as reasonable, maintain an ordinary client-lawyer relationship. A lawyer for a minor capable of providing direction should advocate for the minor's objectives of the representation.

For guidance on the applicability of the attorney-client evidentiary privilege, consult Military Rule of Evidence 502 and relevant case law.

#### **Rule 1.15—SAFEKEEPING PROPERTY**

(a) [Substituted] 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.

(c) [Omitted]

(d) [Omitted]

(e) [Omitted]

#### **DISCUSSION**

Legal assistance lawyers, defense counsel, and victims' 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. Paragraph (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 Department of the 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) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. 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 *Rules* or other 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.
- (4) [Omitted]

(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; or
- (6) [Omitted]
- (7) 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

Paragraph (b)(6) was omitted because AFJAG Corps lawyers will rarely, if ever, be exposed to unreasonable financial burdens related to representation. Addition of the language “or other competent authority” in paragraph (c) recognizes AFJAG Corps 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 AFJAG Corps lawyers will not receive advance payments or fees, reference to such payments was deleted from paragraph (d).

**Rule 1.17—SALE OF LAW PRACTICE [Omitted]**

**Rule 1.18—DUTIES TO PROSPECTIVE CLIENT**

(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—(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, discharge, or other adverse action, may nevertheless so defend the proceeding as to require that every element of the case be established.

## DISCUSSION

See, e.g., *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

**Rule 3.2—EXPEDITING LITIGATION**

[Modified] A lawyer shall make reasonable efforts to expedite litigation and other proceedings 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) [Modified] 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 an accused 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

Paragraph (a)(3) emphasizes lawyers must not help clients commit perjury, even by remaining silent when the lawyer knows the client has offered false testimony. Paragraph (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 (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 victims' counsel. (See Rule 1.16, AFSCJ 4-7.7, and AFSCJ 6-2.5.)

The term “legal authority in the controlling jurisdiction” in paragraph (a)(2) refers to the UCMJ, the MCM, appellate court opinions, federal regulations or directives, 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 AFJAG Corps lawyers to advise officials, members, and employees of the USAF or USSF to refrain from giving information to another party, especially when the individual’s interests coincide with those of the USAF or USSF. (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 panel or board if:
  - (1) [Modified] the communication is prohibited by law, regulation, 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; or
  - (d) engage in conduct intended to disrupt a tribunal.

## DISCUSSION

Terminology was modified to be consistent with DAF 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) [Modified] the claim, offense, or defense involved, and, except when prohibited by law or regulation, 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;
  - (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

AFJAG Corps 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, DAFI 51-201, Chapter 34; 5 USC § 552 *The Freedom of Information Act* (FOIA); DoD 5400.7\_AFMAN 33-302, *Freedom of Information Act Program*; 5 USC § 552a, *The Privacy Act*; AFI 33-332, *Air Force Privacy and Civil Liberties Program*; and 42 USC §§ 10601-05, *The Victim and Witness Protection Act*. Defense counsel, both military and civilian, must refer not only to Rule 3.6, but also to AFSCJ 4-1.3 and AFSCJ 8-1.1. AFJAG Corps prosecuting lawyers must refer not only to Rule 3.6, but also to AFSCJ 3-1.3 and AFSCJ 8-1.1. Other court personnel must refer to Rule 3.6 and AFSCJ 8-2.2. Finally, although not a party, victims' counsel must also comply with this Rule. Based on their position, extrajudicial statements by victims' counsel could prejudice a proceeding.

### **Rule 3.7—LAWYER AS WITNESS**

- (a) 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) [Modified] 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.C.C.A. 2006).

**Rule 3.8—SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL [Modified]**

[Modified] The trial counsel in a criminal case shall:

- (a) [Substituted] recommend 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 hearing under Article 32, UCMJ;
- (d) [Modified] make timely disclosure to the defense of all evidence or information known to the trial counsel 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; and
- (e) [Omitted]
- (f) except for statements that are necessary to inform the public of the nature and extent of trial counsel'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 trial counsel 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 accused did not commit an offense of which the accused was convicted, the trial counsel shall:
  - (1) promptly disclose that evidence to an appropriate court or authority, and
  - (2) [Modified] if the conviction was obtained within the DAF,
  - (i) [Modified] promptly disclose that evidence to the accused unless a court authorizes delay, and

(ii) [Modified] 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) [Modified] When a trial counsel knows of clear and convincing evidence establishing that an accused was convicted of an offense that the accused did not commit, trial counsel 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 the Staff Judge Advocate 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 or electronically stored information 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 lawyers conform to the *Rules*.

(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 or over the performance of specific legal work of 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 DAFI 51-

101, *The Air Force Judge Advocate General's (AFJAG) Corps Operations, Accessions, and Professional Development*.

### **Rule 5.2—RESPONSIBILITIES OF A SUBORDINATE LAWYER**

- (a) A lawyer is bound by the *Rules* notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the *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 ASSISTANCE**

[Modified] With respect to a paralegal or other nonlawyer acting under the authority, supervision, or direction of a lawyer:

- (a) [Modified] the senior 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**

Paragraphs (a) and (c)(2) were modified slightly in order to conform with DAF practice.

### **Rule 5.4—PROFESSIONAL INDEPENDENCE OF A LAWYER**

- (a) [Substituted] Notwithstanding a judge advocate's status as a commissioned officer, or a civilian AFJAG Corps lawyer's responsibilities to higher authorities, an AFJAG Corps lawyer 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.

(b) [Substituted] Notwithstanding a judge advocate's status as a commissioned officer, or a civilian AFJAG Corps lawyer's responsibilities to higher authorities, a lawyer detailed as a military judge exercises professional independence in the performance of judicial duties.

(c) [Omitted]

(d) [Omitted]

## DISCUSSION

This Rule recognizes 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 AFJAG Corps 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. For discussion on the duties of judicial office, see *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).

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]**

(a) [Substituted] Except as authorized by the UCMJ, the MCM, or federal regulations or directives, a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) [Omitted]

(c) [Omitted]

(d) [Omitted]

(e) [Omitted]

## DISCUSSION

An AFJAG Corps lawyer's performance of legal duties pursuant to military authorization is a federal function not subject to state regulation. Thus, an AFJAG Corps lawyer may perform legal assistance even though the lawyer is not licensed in the state where his or her duty station is located. Paragraph (a) 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, AFJAG Corps 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 ABA Model Rule 5.5 specifically permits lawyers to counsel nonlawyers who wish to proceed pro se, a situation which often arises during legal assistance counseling. Paragraphs (b), (c), (d), and (e) were omitted as inapplicable to DAF practice.

DAFI 51-101 lists requirements for AFJAG Corps attorneys to maintain their eligibility practice law under the DAF, including bar licensure status in the attorney's licensing jurisdiction. A lawyer who practices law after failing to maintain such eligibility may be a violation of Rule 5.5.

### **Rule 5.6—RESTRICTIONS ON RIGHT TO PRACTICE [Omitted]**

### **Rule 5.7. RESPONSIBILITIES REGARDING NON—LAW DUTIES**

**[Modified]**—[Substituted] An AFJAG Corps lawyer shall also be subject to the *Rules* with respect to non-law but official duties.

#### **DISCUSSION**

This Rule is derived from ABA Model Rule 5.7, *Responsibilities Regarding Law-related Services*. The DAF 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 lawyer meet the definition of “law-related services” found in paragraph (b) of ABA Model Rule 5.7. These duties are commingled within the DAF legal practice and are not otherwise independent, separate, or distinguishable.

## **CHAPTER 6—PUBLIC SERVICE**

### **Rule 6.1—PRO BONO PUBLIC 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, judge advocates and civilian attorneys may provide pro bono legal services. See [Chapter9](#) 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 USAF or USSF, notwithstanding that the organization serves persons having interests

adverse to the USAF or USSF. 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 USAF or USSF.

## DISCUSSION

Rule 6.3, as modified, recognizes AFJAG Corps lawyers may join legal services organizations. A lawyer's participation in such organizations must be consistent with the direction and guidance of the JER. The JER, Chapter 3, Section 2, provides guidance on personal participation in non-federal entities, including professional associations and learned societies. Rule 1.7 and Rule 6.1 provide further guidance.

### **Rule 6.4—LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS [Omitted]**

## DISCUSSION

This Rule was omitted because federal employees have unique responsibilities when it comes to influencing, or appearing to influence, legislation and political causes. Lawyers should review 18 USC § 1913, *The Anti-Lobbying Act*, the Joint Ethics Regulation; DoDD 1344.10, *Political Activities by Members of the Armed Forces*; and DAFI 51-508, *Political Activities, Free Speech and Freedom of Assembly*, before interacting with non-federal entities involved in reform of the law or its administration.

### **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. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES—SPECIFIC RULES [Omitted]**

**Rule 7.3—SOLITICTATION OF CLIENTS [Omitted]****Rule 7.4—(Deleted)****Rule 7.5—OFFICIAL LETTERHEAD [Substituted]**

[Substituted] A lawyer shall not use official letterhead when representing a client in a private capacity.

## DISCUSSION

AFJAG Corps attorneys must avoid the implication of inappropriate governmental endorsement. See JER, paragraphs 2-508, 3-102, and 3-200. This rule is not meant to prevent the use of official letterhead for letters of recommendation as authorized by 5 CFR § 2635.702(b), or by defense counsel, victims' counsel, legal assistance attorneys, or other official roles, consistent with the JER and the CFR, Chapter 5.

**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 ADMISSION AND DISCIPLINARY MATTERS**

[Modified] An applicant for admission to a bar, a lawyer in connection with a bar admission application, a lawyer seeking appointment in the AFJAG Corps, 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) [Modified] 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 a lawyer who is selected for assignment as a judge.
- (b) [Modified] A lawyer who is selected for assignment as a judge shall comply with the applicable provisions of the *Department of the Air Force 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.

## DISCUSSION

This Rule limits the reporting obligation to those offenses the AFJAG Corps must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Lawyers should consult a supervisory lawyer for further guidance on whether they are required to report a violation.

### **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) [Modified] state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these *Rules*, regulation, 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 AFJAG Corps attorney who 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 paragraph (c) of this rule.

Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. It is

not necessary for a lawyer to be convicted of, or even charged with, a crime to violate this Rule.

**Rule 8.5—JURISDICTION [Substituted]**

[Modified] (a) These *Rules* apply to all military and civilian lawyers in the AFJAG Corps. Jurisdiction also applies to all lawyers, including, but not limited to, non-AFJAG Corps civilian defense counsel, who represent individuals in DAF courts and other proceedings under the UCMJ or MCM, or in other administrative proceedings. The *Rules* apply to a lawyer subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs, whether performing official duties, or whether performing duty in a Title 10 or Title 32 status.

[Substituted] (b) A lawyer may be subject to the disciplinary authority of the DAF 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; however, if the lawyer is an ANG judge advocate in a Title 32 or State duty status, the more restrictive of the two Rules will 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 compliance with a state rule has the potential to interfere with the effective performance of USAF or USSF duties, the lawyer should seek guidance from the supervisory chain, and, if necessary, seek an advisory opinion under these *Rules*.

### Attachment 3

## SUPPLEMENTAL DEPARTMENT OF THE AIR FORCE RULES OF PROFESSIONAL CONDUCT FOR AIR RESERVE COMPONENT JUDGE ADVOCATES

### A. Preamble

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 Reserve Component (ARC) judge advocates. These Supplemental Rules apply at all times, including when an Air Force Reserve (AFR) judge advocate is not in active or inactive duty status or when an Air National Guard (ANG) judge advocate is not serving in a Title 10 or Title 32 status. Complaints involving these Supplemental Rules will be processed pursuant to Chapters 4 and 5 of this instruction.

### B. Supplemental Rules

#### Rule 1. REPRESENTATION ADVERSE TO THE AIR FORCE, SPACE FORCE, OR STATE MILITARY DEPARTMENT

An ARC judge advocate in his or her civilian capacity shall not represent a client in a matter adverse to the United States Air Force (USAF), United States Space Force (USSF), or ANG judge advocate's state military department, unless the USAF, USSF, or state military department first consents in writing.

#### DISCUSSION

The principle underlying this Rule is that the USAF, USSF, or a state military department is an ARC judge advocate's client. The Rule ensures the USAF, USSF, or state military department 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 USAF, USSF, or state military department. It is based on *ABA Model Rules of Professional Conduct*, Rule 1.7, which bars representation of a client 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 should normally be granted unless the proposed representation would create a conflict of interest with respect to Air Force duties actually performed by the ARC judge advocate. Notwithstanding this Rule, the supervisory attorney may not grant consent where a statutory bar to representation exists (e.g., 18 USC § 207). Compliance with the consent procedures under this Rule does not relieve the ARC judge advocate of his or her obligation to obtain the consent of the other client. See Part C for consent procedures.

#### EXAMPLES

(1) An AFR 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 ARC judge advocate must obtain the consent of his or her supervisory attorney. Consent should normally be granted unless an actual conflict of interest is present. USAF and USSF interests are served by allowing military members to be represented by counsel of their choice. The same result pertains to representation in administrative proceedings.

(2) An ARC 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 ARC judge advocate's supervisory attorney at base X. Consent will be granted unless an actual conflict of interest is present.

(3) An ANG judge advocate is asked to serve as civilian counsel by an Army National Guard (ARNG) technician 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.

(4) An ANG judge advocate is asked to serve as civilian counsel by an ANG 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 unless both the state military department and the technician consent.

(5) An ARC 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 his or her supervisory attorney at base X. Consent will be granted unless an actual conflict of interest is present. In determining whether to grant consent, the supervisory attorney should consider the AFR judge advocate's actual involvement with the claims section. Organizational size, structure, and procedures, as well as the AFR 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, SPACE FORCE, OR STATE MILITARY DEPARTMENT**

(a) Except as law may otherwise expressly permit, an ARC judge advocate acting in his or her civilian capacity shall not represent a client in connection with a matter in which the ARC judge advocate participated personally and substantially on behalf of the USAF, USSF, or state military department.

(b) If a firm with which the ARC judge advocate is associated undertakes or continues representation after his or her disqualification under this Rule, the ARC judge advocate shall:

(1) advise the firm of the possible applicability of Rule 1.11, *Special Conflicts of Interest for Government Officers and Employees*, or analogous provision of the applicable jurisdiction; and

(2) give prompt written notice to the USAF, USSF, or state military department, through his or her supervisory attorney, of the firm's participation in the matter, with sufficient information regarding the ARC judge advocate's role to ascertain compliance with this Rule.

#### DISCUSSION

This Rule is intended to avoid conflicts of interest between the ARC judge advocate's military and civilian positions when he or she previously represented the USAF, USSF, or state military department on a matter. The restriction applies only to those areas in which the ARC judge advocate participated personally and substantially. The term "personally and substantially" has the same meaning under this Rule as it has under 18 USC § 207.

#### 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 3. PRIOR PARTICIPATION IN A MATTER ON BEHALF OF A PRIVATE CLIENT**

An ARC judge advocate shall not, in the performance of his or her official duties, participate in a matter in which he or she participated personally and substantially in his or her civilian capacity.

#### DISCUSSION

Absent a conflict, nothing precludes an ARC judge advocate from representing the USAF, USSF, or state military department 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 4. USE OF NONPUBLIC GOVERNMENT INFORMATION IN PRIVATE REPRESENTATION**

An ARC judge advocate, having acquired information through his or her association with the USAF, USSF, or state military department which could not have been known to the ARC judge advocate but for that association shall not, in his or her civilian capacity:

- (a) represent a client in a matter in which the information so acquired could be used to the material disadvantage of the USAF, USSF, state military department, or their employees, officers, contractors, or agents; or
- (b) make any unauthorized disclosure of such information.

## DISCUSSION

Regardless of whether a client-lawyer relationship exists, every ARC 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; information gained through databases, such as the Global Address List or the Federal Legal Information Through Electronics (FLITE); the identity of personnel with specific knowledge, negotiation strategies or tactics; or views, opinions, or risk assessments of key DAF personnel with respect to the particular case involved. However, an ARC judge advocate is permitted to utilize his or her knowledge of procedures relating to the USAF or USSF.

## EXAMPLES

(1) An ARC 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 Global Address List to obtain current addresses for these witnesses. If this is in fact nonpublic information, the ARC judge advocate should not have used this resource for his private advantage.

(2) An ARC judge advocate is representing a spouse in a child custody dispute against a military member with whom he has had no previous professional contact. As a result of his military assignment, the ARC judge advocate learns the military member has tested positive for cocaine. The ARC judge advocate has a conflict based upon his knowledge of this nonpublic information and should withdraw from representation of the spouse. Moreover, the ARC judge advocate should play no role in any adverse action against the military member which may impact adversely on the former client.

## **Rule 5. SOLICITATION OF CLIENTS**

- (a) An ARC judge advocate shall not advertise his or her affiliation as a judge advocate or attachment to a particular military organization.
- (b) An ARC judge advocate shall not solicit clients for himself or herself or his or her firm while in duty status, in uniform, or on military installations.

## DISCUSSION

Consistent with the Joint Ethics Regulation (JER), inclusion of an ARC judge advocate's military status or affiliation in commercial sources is limited to rank and service component only (e.g., "Captain, USAFR") in advertising or on business cards or stationery.

The ARC judge advocate's client is the USAF, USSF, or state military department, and therefore the ARC attorney must not trade on his or her status as a judge advocate. The ARC judge advocate must avoid advertising his or her active affiliation with the AFJAG Corps because doing so might give the appearance the ARC 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 the AFJAG Corps. In addition, such advertising could create an impression of favoritism or endorsement by the USAF, USSF, or state military department.

The restrictions do 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 an ARC judge advocate's business.

#### EXAMPLES

(1) An ANG judge advocate runs the following advertisement: "*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 runs 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 Supplemental 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 AFR 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 her educational background and civilian practice, but also her past and present military service as an AFR judge advocate. This is not an advertisement and, therefore, does not violate Supplemental 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 Supplemental Rule 5 because such an advertisement would trade on her military status.

#### **Rule 6. PRIVATE BUSINESS ACTIVITIES DURING DUTY HOURS**

An ARC judge advocate shall not, while in active or inactive duty status, conduct private business during duty hours except on a *de minimis* basis.

## DISCUSSION

It is expected supervisory attorneys will administer this Rule reasonably and the *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, drafting briefs, and participating in court hearings, depositions, mediations, or similar proceedings during duty hours.

### **Rule 7. REPRESENTATION OF THE SAME CLIENT IN BOTH JUDGE ADVOCATE AND PRIVATE CAPACITIES**

An ARC judge advocate shall not, for compensation:

(a) represent a client in the same or substantially the same matter in which the judge advocate encountered the person in the judge advocate's official capacity; or

(b) represent an individual on a matter for which the ARC judge advocate knows the individual is eligible for legal assistance under DAF or state military department regulations.

## DISCUSSION

This Rule is intended to preclude ARC judge advocates from taking inappropriate advantage of their positions. It bars representation when the initial contact occurred while the ARC judge advocate was acting in an official capacity, such as in providing legal assistance pursuant to AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs*, or investigating a claim. It is not intended to restrict representation when the initial contact was not made pursuant to the performance of the ARC judge advocate's official duties, or concerning a matter unrelated to the matter in which the ARC judge advocate made contact with the person in the judge advocate's official capacity.

Paragraph (b) recognizes it is inappropriate to accept 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.

An ARC 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 the member will receive favorable treatment with respect to official matters. An ARC judge advocate should also avoid private representations that may implicate conflicts of interest, such as advising a commander on official matters affecting the member with whom there is a private client-lawyer relationship.

## EXAMPLES

(1) An AFR 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 AFR 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 AFR judge advocate nor the AFR judge advocate's 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 AFR judge advocate in his or her civilian capacity on an unrelated matter, 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 supervisory attorney and discussion of potential problems is encouraged in all cases in which a client has previously been seen by the AFR judge advocate while performing duties as a judge advocate.

(3) An AFR judge advocate performing legal assistance counsels a client regarding an adoption. Completing the adoption process is beyond the scope of legal assistance. The AFR 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 military member contacts an AFR judge advocate concerning a private matter not covered by the legal assistance program. The AFR judge advocate may accept this client provided the initial contact with respect to the matter did not occur while the AFR judge advocate was providing legal assistance pursuant to AFI 51-304 or representing the USAF or USSF on the matter for which representation is sought.

(5) 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.

(6) 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 8. POTENTIAL STATE/FEDERAL CONFLICT**

An ANG judge advocate may represent both the ANG judge advocate's state military department and the USAF or USSF on a matter only when the state and federal interests in that matter coincide.

## **DISCUSSION**

In the event of divergent interests, an ANG judge advocate generally should represent the state military department when not serving in Title 10 or Title 32 status. In other situations, the

ANG judge advocate should seek supervisory attorney guidance in identifying the client on the particular matter.

An ANG judge advocate should be proactive in identifying potential conflicts so as to avoid a scenario in which the judge advocate may be forced to withdraw from representing one or both parties on a matter. In the event state and federal interests coincide initially but a conflict later arises, the judge advocate should seek supervisory attorney guidance and ensure compliance with the Department of the Air Force Rules of Professional Conduct, including Rules 1.6, *Confidentiality of Information*; 1.7, *Conflict of Interest: Current Clients*; 1.8, *Conflict of Interest: Current Clients: Specific Rules*; 1.9, *Duties to Former Clients*; and 1.16, *Declining or Terminating Representation*.

### **C. Requests for Consent**

(1) Where an ARC judge advocate seeks consent under Supplemental 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 a binding ethical standard. 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 ARC judge advocate shall afterward apply for consent in writing.

(2) A request for consent shall be directed to the Staff Judge Advocate (SJA) or equivalent of the organization with direct responsibility over the matter. If consent is denied, the ARC judge advocate will not undertake representation or, if already undertaken, will withdraw from the representation.

(3) For matters involving a state military department, an ANG judge advocate's request for consent shall be directed to the ANG Joint or State Headquarters SJA concerning potential conflicts with the state military department.

(4) For matters involving the USAF and USSF, the SJA or equivalent of the organization with direct responsibility over the matter is delegated the authority to grant consent on behalf of the USAF and USSF. Consent will be granted or denied within three duty days of receipt of the request. If consent is denied, the ARC judge advocate may request reconsideration from the Senior Supervisory Attorney (SSA) of the organization with direct responsibility over the matter. The SSA must act on the request within three duty days. If the SSA denies the request, the ARC judge advocate may request reconsideration by The Judge Advocate General (TJAG).

(5) Supervisory attorneys will establish and maintain a permanent file for requests and their corresponding consent or denial. One copy of the consent or denial will be provided to the ARC judge advocate, and an information copy of each request and the corresponding consent or denial shall be forwarded through attorney supervisory channels to the Total Force Advisor to TJAG and TJAG's Professional Responsibility Administrator.

(6) Renewable consents for not longer than one year may be granted as to a class of matters.

(7) SJAs or equivalents may exercise consent authority to establish working arrangements with ARC judge advocates that protect USAF or USSF interests while avoiding unnecessary restrictions upon ARC judge advocates' civilian activities. Tailored consent arrangements should consider the relationship between an ARC judge advocate's official duties and the matter for which consent is sought. Consideration may also be given to the structure and physical layout of the judge advocate's organization, the organization's mission, the sensitivity of the matters involved, the relationship of the ARC judge advocate to his or her firm, and the ARC judge advocate's history of ethical conduct. 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 ARC judge advocate's private practice.

## Attachment 4

### DEPARTMENT OF THE AIR FORCE STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT

#### Preamble

The *Department of the Air Force Standards for Civility in Professional Conduct* (DAFSCPC) are adapted from the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996. The DAFSCPC have been specifically adapted to the unique needs and demands of Air Force legal practice. Although in adapting the DAFSCPC every effort was made to resolve inconsistencies, in the event of conflict, the Uniform Code of Military Justice (UCMJ), Manual for Courts-Martial (MCM), Department of the Air Force (DAF) regulations, the *Department of the Air Force Rules of Professional Conduct* (DAFRPC or the *Rules*), and case law will control. The DAFSCPC are aspirational in nature and represent the conduct expected of AFJAG Corps personnel.

#### PRINCIPLES OF GENERAL APPLICABILITY: LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY

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.

**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. We will immediately make any clarifications and corrections as misrepresentations 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 5

### DEPARTMENT OF THE AIR FORCE UNIFORM CODE OF JUDICIAL CONDUCT

#### I. INTRODUCTION

#### II. PREAMBLE

#### III. TERMINOLOGY

#### IV. CANONS:

CANON 1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

CANON 2. A judge shall perform the duties of judicial office impartially, competently, and diligently.

CANON 3. A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

CANON 4. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. [Omitted]

### 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. The ABA *Model Code of Judicial Conduct* was adopted by the House of Delegates of the ABA in 1990 and amended in 1997, 1999, 2003, 2007, and 2010. This *Department of the Air Force Uniform Code of Judicial Conduct* (DAFUCJC, or the "Code") is based on the ABA *Model Code of Judicial Conduct* with modifications as noted to accommodate the unique aspects of service as a DAF trial or appellate military judge.

### PART II. PREAMBLE

An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They

should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

The DAFUCJC establishes standards for the ethical conduct of judges. It is not intended as an exhaustive guide for the conduct of judges, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

The Code consists of three Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code.

The Canons state overarching principles of judicial ethics all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as “may” or “should,” the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not mean the Comment itself is binding or enforceable; it signifies the Rule in question, properly understood, is obligatory as to the conduct at issue.

Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

The Rules of the DAFUCJC are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

The Code is not a general order or regulation within the meaning of Article 92, Uniform Code of Military Justice (UCMJ), and is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

The Code is designed to apply to both Regular Air Force and Air Reserve Component (ARC) trial and appellate military judges, but its application to ARC 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.

**“Court personnel”** does not include the lawyers in a proceeding before a judge.

**“De minimis,”** in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.

**“Domestic partner”** means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.

**“Economic interest”** denotes ownership of a more than a *de minimis* legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (i) an interest in the individual holdings within a mutual or common investment fund;
- (ii) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
- (iii) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (iv) an interest in the issuer of government securities held by the judge.

**“Fiduciary”** includes such relationships as executor, administrator, trustee, and guardian.

**“Impartial,” “impartiality,”** and **“impartially”** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.

**“Impending matter”** is a matter that is imminent or expected to occur in the near future.

**“Impropriety”** includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge’s independence, integrity, or impartiality.

**“Independence”** means a judge’s freedom from influence or controls other than those established by law.

**“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character.

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

**“Knowingly,” “knowledge,” “known,” and “knows”** mean actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

**“Law”** encompasses court rules, as well as statutes, constitutional provisions, service regulations, and decisional law.

**“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

**“Member of a judge’s family residing in the judge’s household”** means 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.

**“Nonpublic information”** means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports.

**“Pending matter”** is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

**“Personally solicit”** means a direct request made by a judge for financial support or in-kind services, whether made by letter, telephone, or any other means of communication.

**“Political organization”** means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office.

**“Third degree of relationship”** includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

## PART IV. CANONS

### CANON 1

**A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY,  
AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY  
AND THE APPEARANCE OF IMPROPRIETY.**

**Rule 1.1. COMPLIANCE WITH THE LAW**

A judge shall comply with the law, including the Department of the Air Force Uniform Code of Judicial Conduct.

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.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.

RCM 908.

*ABA Criminal Justice Standards*, Criminal Appeals.

*ABA Criminal Justice Standards*, The Special Functions of the Trial Judge.

**Rule 1.2.. PROMOTING CONFIDENCE IN THE JUDICIARY**

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENTS

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

### **Rule 1.3.. AVOIDING ABUSE OF THE PRESTIGE OF JUDICIAL OFFICE**

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

#### COMMENTS

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with law enforcement. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge of a person the judge dealt with in the course of federal employment or whom the judge is recommending for federal employment, consistent with the Joint Ethics Regulation. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

## **CANON 2**

### **A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.**

#### **Rule 2.1. GIVING PRECEDENCE TO THE DUTIES OF JUDICIAL OFFICE**

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

#### COMMENTS

[1] To ensure judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

## **Rule 2.2. IMPARTIALITY AND FAIRNESS**

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

### COMMENTS

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

## **Rule 2.3. BIAS, PREJUDICE, AND HARASSMENT**

(a) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(b) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(c) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(d) The restrictions of paragraphs (b) and (c) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

#### COMMENTS

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to: epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

#### **Rule 2.4.. EXTERNAL INFLUENCES ON JUDICIAL CONDUCT**

(a) A judge shall not be swayed by public clamor or fear of criticism.

(b) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(c) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

#### COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

#### **Rule 2.5.. COMPETENCE, DILIGENCE, AND COOPERATION**

(a) A judge shall perform judicial and administrative duties, competently and diligently.

(b) A judge shall cooperate with other judges and court officials in the administration of court business.

#### COMMENTS

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] 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 take reasonable measures to ensure court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

#### **Rule 2.6.. ENSURING THE RIGHT TO BE HEARD**

(a) 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.

(b) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

#### **COMMENTS**

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement

discussions could influence a judge's decision-making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(a)(1).

### **Rule 2.7.. RESPONSIBILITY TO DECIDE**

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

#### COMMENTS

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

### **Rule 2.8.. DECORUM, Demeanor, AND COMMUNICATION WITH JURORS**

(a) A judge shall require order and decorum in proceedings before the court.

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

(c) A judge shall not commend or criticize court members for their verdict other than in a court order or opinion in a proceeding.

#### COMMENTS

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] 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.

[3] A judge who is not otherwise prohibited by law from doing so may meet with court members who choose to remain after trial but should be careful not to discuss the merits of the case.

### **Rule 2.9.. EX PARTE COMMUNICATIONS**

(a) 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 or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

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

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(b) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(c) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(d) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

## COMMENTS

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

[2] Whenever the presence of a party or notice to a party is required by this Rule, 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.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (a)(2).

## **Rule 2.10.. JUDICIAL STATEMENTS ON PENDING AND IMPENDING CASES**

(a) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(b) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(c) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (a) and (b).

(d) Notwithstanding the restrictions in paragraph (a), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(e) Subject to the requirements of paragraph (a), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENTS

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, or represents a client as permitted by these Rules. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

### **Rule 2.11.. DISQUALIFICATION**

(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

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

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(i) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(iv) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, 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 in a party to the proceeding.

(4) The judge has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(i) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(ii) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(iii) was a material witness concerning the matter; or

(iv) previously presided as a judge over the matter in another court.

(b) 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 or domestic partner and minor children residing in the judge's household.

(c) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (a)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

## COMMENTS

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (a)(1) through (5) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] 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 probable cause. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] 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 itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (a), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (a)(2)(iii), the judge's disqualification is required.

[5] A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] “Economic interest,” as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (4) an interest in the issuer of government securities held by the judge.

#### **Rule 2.12.. SUPERVISORY DUTIES**

(a) A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.

(b) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

#### **COMMENTS**

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge’s direction or control. A judge may not direct court personnel to engage in conduct on the judge’s behalf or as the judge’s representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

#### **Rule 2.13.. ADMINISTRATIVE APPOINTMENTS [Omitted]**

#### **Rule 2.14.. DISABILITY AND IMPAIRMENT**

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

#### COMMENTS

[1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

#### **Rule 2.15.. RESPONDING TO JUDICIAL AND LAWYER MISCONDUCT**

(a) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(b) A judge having knowledge that a lawyer has committed a violation of the Department of the Air Force Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(c) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(d) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Department of the Air Force Rules of Professional Conduct shall take appropriate action.

#### COMMENTS

[1] Taking action to address known misconduct is a judge’s obligation. Paragraphs (a) and (b) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one’s judicial colleagues or members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (c) and (d). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated

this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority. Similarly, actions to be taken in response to information indicating a lawyer has committed a violation of the Department of the Air Force Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

**Rule 2.16. COOPERATION WITH DISCIPLINARY AUTHORITIES**

(a) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary processes.

(b) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an inquiry into a judge or a lawyer.

**COMMENT**

[1] Cooperation with judicial and lawyer disciplinary processes, as required in paragraph (a), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

**CANON 3**

**A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.**

**Rule 3.1. EXTRAJUDICIAL ACTIVITIES IN GENERAL**

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(a) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(b) participate in activities that will lead to frequent disqualification of the judge;

(c) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

(d) engage in conduct that would appear to a reasonable person to be coercive; or

(e) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

## COMMENTS

[1] To the extent time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(a), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

**Rule 3.2. APPEARANCES BEFORE GOVERNMENTAL BODIES AND CONSULTATION WITH GOVERNMENT OFFICIALS [Omitted]**

**Rule 3.3. TESTIFYING AS A CHARACTER WITNESS**

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

## COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

**Rule 3.4. APPOINTMENTS TO GOVERNMENTAL POSITIONS [Omitted]**

**Rule 3.5. USE OF NONPUBLIC INFORMATION**

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

## COMMENTS

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

**Rule 3.6. AFFILIATION WITH DISCRIMINATORY ORGANIZATIONS**

(a) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(b) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (a). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

## COMMENTS

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

**Rule 3.7. PARTICIPATION IN EDUCATIONAL, RELIGIOUS, CHARITABLE, FRATERNAL, OR CIVIC ORGANIZATIONS AND ACTIVITIES**

(a) [Modified] Subject to the requirements of Rule 3.1, and federal government ethics regulations, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fundraising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(i) will be engaged in proceedings that would ordinarily come before the judge; or

(ii) will frequently be engaged 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.

(b) A judge may encourage lawyers to provide pro bono publico legal services.

#### COMMENTS

[1] The activities permitted by paragraph (a) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fundraising purpose, does not constitute a violation of paragraph (a). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fundraising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] [Omitted]

[5] A judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

#### **Rule 3.8. APPOINTMENTS TO FIDUCIARY POSITIONS**

(a) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, 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.

(b) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely 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.

(c) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(d) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable.

#### COMMENT

[1] A judge should recognize other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

### **Rule 3.9. SERVICE AS ARBITRATOR OR MEDIATOR**

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

#### COMMENT

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

### **Rule 3.10. PRACTICE OF LAW**

[Modified] A judge shall not practice law except with the approval of The Judge Advocate General. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.

#### COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

### **Rule 3.11. FINANCIAL, BUSINESS, OR REMUNERATIVE ACTIVITIES**

(a) A judge may hold and manage investments of the judge and members of the judge's family.

(b) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(c) A judge shall not engage in financial activities permitted under paragraphs (a) and (b) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;

(4) result in violation of other provisions of this Code; or

(5) [Added] result in violation of federal ethics regulations.

#### COMMENTS

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

#### **Rule 3.12. COMPENSATION FOR EXTRAJUDICIAL ACTIVITIES**

[Modified] A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or result in a violation of federal ethics regulations.

#### COMMENTS

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed, and federal ethics

regulations permit such activities. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting.

**Rule 3.13. ACCEPTANCE AND REPORTING OF GIFTS, LOANS, BEQUESTS, BENEFITS, OR OTHER THINGS OF VALUE**

[Modified] A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

COMMENT

[1] In addition to the concerns underlying the federal ethics prohibition on accepting gifts given due to official position by a prohibited source, whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk.

**Rule 3.14. REIMBURSEMENT OF EXPENSES AND WAIVERS OF FEES OR CHARGES [Omitted]**

COMMENT

[1] This Rule was omitted because 31 USC § 1353 and federal ethics regulations govern reimbursement of travel from non-federal sources with respect to attendance of federal employees and/or the spouses of employees at a meeting or similar function relating to the official duties of the employee.

**Rule 3.15. REPORTING REQUIREMENTS [Omitted]**

COMMENT

[1] This Rule was omitted because military judges must follow existing law financial disclosure reporting requirements as implemented in the Joint Ethics Regulation.

**CANON 4**

**A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY. [Omitted]**

COMMENT

[1] Canon 4 is not adopted for trial and appellate military judges because a military judge's duties, rights, and responsibilities in this area are covered by existing law and federal ethics regulations.

**Attachment 6****REGULATIONS AND PROCEDURES RELATING TO JUDICIAL DISCIPLINE**

## I. INTRODUCTION

## II. TERMINOLOGY

## III. INQUIRY

## 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

## IV. ACTION ON REPORT OF JUDICIAL INQUIRY COMMISSION

## V. IMPLEMENTATION OF ACTION BY THE JUDGE ADVOCATE GENERAL

## VI. FINALITY

**I. INTRODUCTION**

These regulations and procedures are based on the federal statute dealing with the discipline of federal judges, 28 USC § 372(c), Rule for Courts-Martial (RCM) 109, the *ABA Model Rules for Judicial Disciplinary Enforcement*, and judicial precedent addressing the initiation, screening, review, and appeal of judicial disciplinary proceedings. The basic premise is to preserve the independence and integrity of the judiciary. That premise is the benchmark of these regulations and procedures.

These regulations and procedures relating to judicial discipline are established to ensure allegations of unprofessional conduct by trial and appellate military judges are examined by the military judiciary and 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 of the Tenth Circuit*, 382 U.S. 1003 (1966), 398 U.S. 74 (1970).

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 RCM 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.

## II. TERMINOLOGY

**Department of the Air Force Uniform Code of Judicial Conduct (DAFUCJC, or the “Code”)** refers to the Code in [Attachment 5](#) to this instruction.

**Department of the Air Force Judicial Ethics Commission (JEC)** refers to the council established by [Attachment 7](#) of this instruction.

**Chief Trial Judge.** Chief Trial Judge refers to the Chief Trial Judge of the Department of the Air Force Trial Judiciary.

**Complaint** refers information in any form from any source that alleges or from which a reasonable inference can be drawn that a judge committed unprofessional conduct.

**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 Rule of Evidence 509 as follows: “Except as provided in Mil. R. Evid. 606, the deliberations of courts, courts-martial, military judges, 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 a complaint of unprofessional conduct by 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 detailed to judicial duties

under Article 26(a), UCMJ, or Article 30a, UCMJ, 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 and United States Space 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 inquiry 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.

**Minor unprofessional conduct** is unprofessional conduct that results in counseling or the issuance of an oral or written admonition or reprimand.

**Sufficient cause** is the screening standard that must be met before a JIC is appointed to process a complaint alleging unprofessional conduct. Sufficient cause to proceed means that the complaint against the judge, taken as true, would constitute unprofessional conduct.

**Unprofessional conduct** is any conduct that violates a provision of the Code or demonstrates unfitness for further duty as a judge. 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 (i.e., conviction of a felony or equivalent offense);
2. willful misconduct in office (i.e., 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 (e.g., minor criminal offenses);
4. conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer, in office or outside of judicial duties, that gives the appearance of impartiality or impropriety; and
5. any conduct that constitutes a violation of the DAFUCJC or the Department of the Air Force Rules of Professional Conduct.

### III. INQUIRY

**A. Confidentiality.** Confidentiality is required during the initial procedures undertaken pursuant to this regulation to protect a judge 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:

*N.M.C.M.R. v. Carlucci*, 26 M.J. 328, 337-41 (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, 1520-25 (11th Cir. 1986).

**C. Judicial Ethics Commission.** During any stage of the inquiry, the Judicial Ethics Commission may be consulted. The Judicial Ethics Commission is composed of three persons appointed by TJAG. The opinions of the Judicial Ethics Commission are not binding.

**D. Judicial Privilege Review Commission (JPRC).** Upon request from the appointing authority, the JPRC reviews the JIC's determination on a complained-against judge's claim of judicial privilege. TJAG may appoint three Air Force Court of Criminal Appeals judges to the JPRC. The JPRC judges should ordinarily be of the same or higher grade as the complained-

against judge. TJAG may appoint a sitting judge from another service's Court of Criminal Appeals with the approval of that service's Judge Advocate General.

**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 inquiry into alleged judicial misconduct.

## **F. Complaint Procedure.**

### **1. Submission of Complaint.**

a. Any person may submit a complaint, orally or in writing, with a brief statement of the alleged facts. If possible, complaints should be made under oath. Complaints 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 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 service regulations, 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 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 applicable service regulations.

### **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 Judge. Upon receipt of a complaint against a trial judge filed under [paragraph 1.a](#) 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 Judge or Chief Trial Judge. Upon receipt of a complaint against an appellate military judge or the Chief Trial Judge filed under **paragraph 1.b** 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 RCM 109(c)(4), prior to the commencement of an initial inquiry, TJAG shall be notified a complaint has been filed and 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.

**2. Inquiry.** The JIC shall conduct an inquiry which is as extensive and as formal as it considers necessary and shall give the complained-against judge notice and the opportunity to respond to the allegations. The JIC 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 inquiry 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 inquiry, 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. Findings of fact include finding 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 51-304, *Legal Assistance, Notary, Preventive Law, and Tax 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.

The JIC shall submit the report to the appointing authority.

#### **IV. ACTION ON REPORT OF JUDICIAL INQUIRY COMMISSION**

Upon receipt of a JIC report, the Chief Trial Judge shall forward the report with his or her recommendations to TJAG. Upon TJAG's receipt of a JIC report (and recommendations, if applicable), TJAG may:

1. conduct or direct any additional inquiry 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 the alleged unprofessional conduct is not substantiated;
4. take appropriate action if he or she finds the alleged unprofessional conduct is substantiated by a preponderance of the evidence for minor unprofessional conduct or by clear and convincing evidence for unprofessional conduct;
5. if appropriate, refer the matter to other authorities;
6. provide written notice to the complainant, if known, that the matter has concluded, in accordance with the Privacy Act and without regard to the findings made; and
7. notify the complained-against judge of any action taken under this paragraph or contemplated under Part VII.

#### **V. IMPLEMENTATION OF ACTION BY THE JUDGE ADVOCATE GENERAL**

Where TJAG determines an allegation of unprofessional conduct has been substantiated by clear and convincing evidence and he or she may take 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 bar licensing jurisdiction, then the complained-against judge is entitled to written notice of the contemplated 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 duty days after receipt of notification to inform TJAG of his or her decision to exercise these due process rights.

#### **VI. FINALITY**

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



## Attachment 7

### THE DEPARTMENT OF THE AIR FORCE JUDICIAL ETHICS COMMISSION

#### I. ESTABLISHMENT

A Judicial Ethics Commission (JEC or Commission) shall be established pursuant to Rule for Courts-Martial (RCM) 109(c)(7) for the purpose of issuing advisory opinions on questions relating to the propriety of judicial conduct under the Department of the Air Force Uniform Code of Judicial Conduct (DAFUCJC, or the “Code”). Opinions of the Commission 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 TJAG’s designee.

#### II. PURPOSE

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

#### III. COMPOSITION

The Judicial Ethics Commission shall be appointed by TJAG. The Commission shall be composed of at least three active duty or reserve component 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 COMMISSION

The Judicial Ethics Advisory Commission 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 Commission 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 Commission of the urgency for resolution of the question before it. The Commission should then provide an opinion expeditiously. An oral opinion followed by written confirmation is acceptable. Pending an opinion of the Commission, 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 Commission are not binding; however, TJAG and any Judicial Inquiry Commission will consider any good faith reliance on a Commission'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 Commission 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.

**Attachment 8**

**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 maintaining confidentiality is of critical importance in my work as a volunteer in the office. During my work, I may learn confidential information 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 an individual has come to the legal office or was discussed by personnel in the office.

I agree 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 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