

**DEPARTMENT OF DEFENSE****Department of the Navy**

[No. USN–2013–0011]

RIN 0703–AA92

**32 CFR Part 776****Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General****AGENCY:** Department of the Navy, DoD.**ACTION:** Proposed rule.

**SUMMARY:** The Department of the Navy (DoN) is revising its Rules of Professional Conduct and procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of the Judge Advocate General of the Navy (JAG). The revision to this part generally aligns with recent changes to the American Bar Association Model Rules of Professional Conduct. The revisions clarify when an attorney shall reveal confidential information and when such disclosure is discretionary, and allows for covered attorneys to make reasonable disclosures necessary to ensure compliance with the Rules of Professional Conduct. The revision contains administrative corrections throughout.

**DATES:** *Comment date:* Interested parties should submit written comments on or before July 1, 2013.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>.

Follow the instructions for submitting comments.

*Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, 2nd floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

*Instructions:* All submissions received must include the agency name and docket or RIN number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Commander Catherine K.

Chiappetta, JAGC, U.S. Navy, Office of the Judge Advocate General (Administrative Law), Department of the Navy, 1322 Patterson Ave. SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone: 703–614–7408.

**SUPPLEMENTARY INFORMATION:****Executive Summary**

This proposed rule serves as an update to the current 32 CFR Part 776 and replaces current regulations. The revision generally aligns with the American Bar Association Model Rules of Professional Conduct. Significant updates were made to Sec. 776.25 of this part (Confidentiality), clarifying when an attorney shall reveal confidential information and when such disclosure is discretionary. The update to this part also allows covered attorneys to make reasonable disclosures necessary to ensure compliance with the Rules of Professional Conduct. Section 776.26 of this part (Conflicts, generally) was revised to require that a client give informed consent, in writing, when waiving a potential or actual conflict of interest. Section 776.42 of this part (Candor and Obligations Toward the Tribunal) is revised to clearly articulate a covered attorney's responsibility for false evidence presented by a client, witness, or the attorney. Procedural revisions to this part include the addition of the Chief Judge of the Navy as the designated Rules Counsel for professional responsibility matters involving military judges, and the removal of the requirement to route professional responsibility complaints concerning Marine judge advocates through the General Court-Martial Convening Authority. Additional commentary and annotation applicable to the Navy JAG's Professional Responsibility Rules are contained in JAG Instruction 5803.1[series], which can be accessed through [www.jag.navy.mil](http://www.jag.navy.mil).

The DoN is revising 32 CFR Part 776, to comport with current policy as stated in JAG Instruction 5803.1 (Series) governing the professional conduct of attorneys practicing under the cognizance and supervision of the Judge Advocate General. This revision updates the existing part to generally align with the American Bar Association Model Rules of Professional Conduct. Interested persons are invited to comment in writing on this revision. All written comments received will be considered in making the proposed revisions to 32 CFR Part 776. It has been determined that this rule revision is not a major rule within the criteria specified

in Executive Order 12866, as amended by Executive Order 13258, and does not have substantial impact on the public.

**Matters of Regulatory Procedure**

*Executive Order 12866, "Regulatory Planning and Review"*

It has been determined that 32 CFR part 776 is not a significant regulatory action. The rule does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

*Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)*

It has been certified that 32 CFR Part 776 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

*Public Law 96–511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)*

It has been certified that 32 CFR Part 776 does not impose any reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

*Federalism (Executive Order 13132)*

It has been certified that 32 CFR Part 776 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of government.

**List of Subjects in 32 CFR Part 776**

Rules of Professional Conduct, and Complaint Processing Procedures.

For the reasons set forth in the preamble, revise part 776 to read as follows:

**PART 776—PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL**

**Subpart A—General**

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- 776.39 Evaluation for use by third persons.
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- 776.41 Expediting litigation.
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- 776.49 Truthfulness in statements to others.
- 776.50 Communication with person represented by counsel.
- 776.51 Dealing with an unrepresented person.
- 776.52 Respect for rights of third persons.
- 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.
- 776.54 Responsibilities of a subordinate attorney.

- 776.55 Responsibilities regarding non-attorney assistants.
- 776.56 Professional independence of a covered USG attorney.
- 776.57 Unauthorized practice of law.
- 776.58–776.65 [Reserved]
- 776.66 Bar admission and disciplinary matters.
- 776.67 Judicial and legal officers.
- 776.68 Reporting professional misconduct.
- 776.69 Misconduct.
- 776.70 Jurisdiction.
- 776.71 Requirement to remain in good standing with licensing authorities.
- 776.72–776.75 [Reserved]

**Subpart C—Complaint Processing Procedures**

- 776.76 Policy.
- 776.77 Related investigations and actions.
- 776.78 Informal complaints.
- 776.79 The formal complaint.
- 776.80 Initial screening.
- 776.81 Forwarding the Complaint.
- 776.82 Interim suspension.
- 776.83 Preliminary inquiry.
- 776.84 Ethics investigation.
- 776.85 Effect of separate proceeding.
- 776.86 Action by the Judge Advocate General.
- 776.87 Finality.
- 776.88 Report to licensing authorities.

**Subpart D—Outside Practice of Law**

- 776.89 Background.
- 776.90 Definition.
- 776.91 Policy.
- 776.92 Action.
- 776.93 Revalidation.
- 776.94 Outside Law Practice Questionnaire and Request.

**Subpart E—Relations With Non-USG Counsel**

- 776.95 Relations with Non-USG Counsel.

**Authority:** 10 U.S.C. 806, 806a, 826, 827, 1044; Manual for Courts-Martial, United States, 2012; U.S. Navy Regulations, 1990; Department of Defense Instruction 1442.02 (series); Secretary of the Navy Instruction 5430.27 (series), Responsibility of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for Supervision and Provision of Certain Legal Services.

**Subpart A—General**

**§ 776.1 Purpose.**

In furtherance of the authority citations (which, if not found in local libraries, are available from the Office of the Judge Advocate General, 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard DC 20374–5066), which require the Judge Advocate General of the Navy (JAG) to supervise the performance of legal services under JAG cognizance throughout the Department of the Navy (DoN), this part is promulgated:

(a) To establish Rules of Professional Conduct (subpart B of this part) for attorneys subject to this part;

(b) To establish procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of the JAG, whether arising from professional legal activities in DoN proceedings and matters, or arising from other, non-U.S. Government related professional legal activities or personal misconduct that suggests the attorney is ethically, professionally, or morally unqualified to perform legal services within the DoN;

(c) To prescribe limitations on and procedures for processing requests to engage in the outside practice of law by those DoN attorneys practicing under the supervision of the JAG; and

(d) To ensure quality legal services at all proceedings under the cognizance and supervision of the JAG.

**§ 776.2 Applicability.**

(a) This part applies to all “covered attorneys” as defined herein.

(b) “Covered attorneys” include:

(1) The following U.S. Government (USG) attorneys, referred to collectively as “covered USG attorneys” throughout this part:

(i) All active-duty Navy judge advocates (designator 2500 or 2505) or Marine Corps judge advocates (Military Occupational Specialty (MOS) 4402 or 9914).

(ii) All active-duty judge advocates of other U.S. armed forces who practice law or provide legal services under the cognizance and supervision of the JAG.

(iii) All civil service and contracted civilian attorneys who practice law or perform legal services under the cognizance and supervision of the JAG. This includes civilian attorneys employed by the DoN as Executive Agent for Combatant Commands, and for whom the JAG serves as the “qualifying authority” under the authority citations.

(iv) All Reserve or Retired judge advocates of the Navy or Marine Corps (and any other U.S. armed force), who, while performing official DoN duties, practice law, provide legal services under the cognizance and supervision of the JAG or are serving in non-legal MOS billets.

(v) All other attorneys appointed by the JAG (or the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) in Marine Corps matters) to serve in billets or to provide legal services normally provided by Navy or Marine Corps judge advocates. This policy applies to officer and enlisted Reservists, active-duty personnel, and any other personnel who are licensed to practice law by any Federal or state authority but who are not members of

the Judge Advocate General's Corps or who do not hold the 4402 or 9914 MOS designation in the Marine Corps.

(vi) All qualified volunteer attorneys that have been certified as legal assistance attorneys by the JAG, or his designee, pursuant to the authority citations.

(2) The following non-U.S. Government attorneys, referred to collectively as "covered non-USG attorneys" throughout this part:

(i) All civilian attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(3) The term "covered attorney" does not include those civil service or civilian attorneys who practice law or perform legal services under the cognizance and supervision of the General Counsel of the Navy.

(c) Professional or personal misconduct unrelated to a covered attorney's DoN activities, while normally outside the ambit of Subpart B of this part, may be reviewed under procedures established herein and may provide the basis for decisions by the JAG regarding the covered attorney's continued qualification to provide legal services in DoN matters.

(d) Although subpart B of this part do not apply to non-attorneys, they do define the type of ethical conduct that the public and the military community have a right to expect from DoN legal personnel. Accordingly, Subpart B of this part shall serve as the model of ethical conduct for the following personnel when involved with the delivery of legal services under the supervision of the JAG:

(1) Navy Legalmen and Marine Corps legal administrative officers, legal service specialists, and legal services reporters;

(2) Limited duty officers (LAW);

(3) Legal interns; and

(4) Civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions. Covered USG attorneys who supervise non-attorney DoN employees are responsible for their ethical conduct to the extent provided for in § 776.55 of this part.

#### **§ 776.3 Policy.**

(a) Covered attorneys shall maintain the highest standards of professional ethical conduct. Loyalty and fidelity to the United States, the law, clients, both

institutional and individual, and the rules and principles of professional ethical conduct set forth in subpart B of this part must come before private gain or personal interest.

(b) Subpart B of this part and related procedures set forth herein concern matters solely under the purview of the JAG. Whether conduct or failure to act constitutes a violation of the professional duties imposed by this part is a matter within the sole discretion of the JAG or officials authorized to act for the JAG. Subpart B of this part are not substitutes for, and do not take the place of, other rules and standards governing DoN personnel, such as the Department of Defense Joint Ethics Regulation, the Code of Conduct for members of the Armed Forces, the Uniform Code of Military Justice (UCMJ), and the general precepts of ethical conduct to which all DoN service members and employees are expected to adhere. Similarly, action taken per this part is not supplanted or barred by, and does not, even if the underlying misconduct is the same, supplant or bar the following action from being taken by authorized officials:

(1) Punitive or disciplinary action under the UCMJ; or

(2) Administrative action under the Manual for Courts-Martial (MCM), U.S. Navy Regulations, or under other applicable authority.

(c) Inquiries into allegations of professional misconduct will normally be held in abeyance until any related criminal investigation or proceeding is complete. However, a pending criminal investigation or proceeding does not bar the initiation or completion of a professional misconduct investigation stemming from the same or related conduct or prevent the JAG from imposing professional disciplinary sanctions as provided for in this part.

#### **§ 776.4 Attorney-client relationships.**

(a) The executive agency to which the covered USG attorney is assigned (DoN in most cases) is the client served by the covered USG attorney unless detailed to represent another client by competent authority. Specific guidelines are contained in § 776.32 of this part.

(b) Covered USG attorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority. Wrongfully establishing an attorney-client relationship may subject the attorney to discipline administered per this part. See § 776.21 of this part.

(c) Employment of a non-USG attorney by an individual client does not alter the professional responsibilities of a covered USG

attorney detailed or otherwise assigned by competent authority to represent that client. Specific guidance is set forth in subpart E.

#### **§ 776.5 Judicial conduct.**

To the extent that it does not conflict with statutes, regulations, or this part, the current version of the American Bar Association Model Code of Judicial Conduct (as amended), hereafter referred to as the 'Code of Judicial Conduct,' applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under the JAG's supervision within the DoN.

#### **§ 776.6 Conflict.**

(a) To the extent that a conflict exists between this part and the rules of other jurisdictions that regulate the professional conduct of attorneys, this part will govern the conduct of covered attorneys engaged in legal functions under JAG cognizance and supervision. Specific and significant instances of conflict between the rules contained in subpart B of this part and the rules of other jurisdictions shall be reported promptly to the Rules Counsel (see § 776.9 of this part), via the supervisory attorney. See § 776.53 of this part.

(b) In the case of Navy and Marine Corps personnel engaged in legal functions under Department of Defense (DoD) vice JAG cognizance and supervision (e.g., DoD Office of Military Commissions), this part and the applicable DoD professional responsibility rules apply. In such a case, to the extent that a conflict exists between Subpart B of this part and applicable DoD professional responsibility rules, the DoD rules shall take precedence.

#### **§ 776.7 Reporting requirements.**

Covered USG attorneys shall report promptly to the Rules Counsel (see § 776.9 of this part) any disciplinary or administrative action, including initiation of investigation, by any licensing authority or Federal, State, or local bar, possessing the power to revoke, suspend, or in any way limit the authority to practice law in that jurisdiction, upon himself, herself, or another covered attorney. Failure to report such discipline or administrative action may subject the covered USG attorney to discipline administered per this part. See § 776.71 of this part.

#### **§ 776.8 Professional Responsibility Committee.**

(a) *Composition.* This standing committee will consist of the Assistant Judge Advocate General (AJAG) for Military Justice; the Deputy Chiefs of

Staff for Naval Legal Service Offices (or Defense Services Offices, effective 1 October 2012), and Region Legal Service Offices; the Chief Judge, Navy-Marine Corps Trial Judiciary; and in cases involving Marine Corps judge advocates, the Deputy Staff Judge Advocate to the Commandant of the Marine Corps (DSJA to CMC); and such other personnel as the JAG from time-to-time may appoint. A majority of the members constitutes a quorum. The Chairman of the Committee shall be the AJAG for Military Justice. The Chairman may excuse members disqualified for cause, illness, or exigencies of military service, and may appoint additional or alternate members on a permanent basis.

(b) *Purpose.* (1) When requested by the JAG, the SJA to CMC, or the Rules Counsel, the Committee will provide formal advisory opinions to the JAG regarding application of subpart B of this part to individual or hypothetical cases.

(2) On its own motion, the Committee may also issue formal advisory opinions on ethical issues of importance to the DoN legal community.

(3) Upon written request, the Committee may also provide formal advisory opinions to covered attorneys about the propriety of proposed courses of action under subpart B of this part. If such requests are predicated upon full disclosure of all relevant facts, and if the Committee advises that the proposed course of conduct does not violate subpart B of this part, then no adverse action under this instruction may be taken against a covered attorney who acts consistently with the Committee's advice. Such requests must be made via the Rules Counsel.

(4) The Chairman will forward copies of all opinions issued by the Committee to the Rules Counsel.

(c) *Limitation.* The Committee will not normally provide ethics advice or opinions concerning professional responsibility matters that are then the subject of litigation.

#### **§ 776.9 Rules Counsel.**

Appointed by JAG to act as special assistants for the administration of subpart B of this part, the Rules Counsel derive authority from JAG and, as detailed in this part, have "by direction" authority. The Rules Counsel shall cause opinions issued by the Professional Responsibility Committee of general interest to the DoN legal community to be published in summarized, non-personal form in suitable publications. Unless another officer is appointed by JAG to act in

individual cases, the following officers shall act as Rules Counsel:

(a) The SJA to CMC, for cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under his cognizance;

(b) Assistant Judge Advocate General, Chief Judge, DoN (AJAG-CJ) for cases involving Navy and Marine Corps trial and appellate judges; and

(c) AJAG (Civil Law), in all other cases.

#### **§ 776.10 Informal ethics advice.**

(a) *Advisors.* Covered attorneys may seek informal ethics advice either from the officers named below or from supervisory attorneys in the field. Within the Office of the Judge Advocate General (OJAG) and the Office of the SJA to CMC, the following officials are designated to respond, either orally or in writing, to informal inquiries concerning this instruction in the areas of practice indicated:

(1) Director, Criminal Law Division (OJAG Code 20): Military justice matters;

(2) Director, Trial Counsel Assistance Program (TCAP): Trial counsel matters;

(3) Director, Defense Counsel Assistance Program (DCAP): Defense counsel matters;

(4) Director, Legal Assistance Division (OJAG Code 16): Legal assistance matters;

(5) The DSJA to CMC and Head, Research and Civil Law Branch (JAR), Judge Advocate (JA) Division, Headquarters United States Marine Corps (HQMC): Cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of SJA to CMC;

(6) Deputy Chief Judge, Navy-Marine Corps Trial Judiciary: judicial matters; and

(7) Professional Responsibility Coordinator, Administrative Law Division (OJAG Code 13): all other matters.

(b) *Limitation.* Informal ethics advice will not normally be provided by JAG/HQMC advisors concerning professional responsibility matters that are then the subject of litigation.

(c) *Written advice.* A request for informal advice does not relieve the requester of the obligation to comply with subpart B of this part.

(1) Although covered attorneys are encouraged to seek advice when in doubt as to their responsibilities, they remain personally accountable for their professional conduct. If, however, an

attorney receives written advice on an ethical matter after full disclosure of all relevant facts and reasonably relies on such advice, no adverse action under this part will be taken against the attorney. Written advice may be sought from either a supervisory attorney or the appropriate advisor in paragraph (a) of this section.

(b) The JAG is not bound by unwritten advice or by advice provided by personnel who are not supervisory attorneys or advisors. See § 776.8(b)(3) and § 776.54(c) of this part.

#### **§ 776.11 Outside practice of law.**

A covered USG attorney's primary professional responsibility is to the client, as defined by § 776.4 of this part, and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of Subpart B of this part and other regulations concerning the provision of legal services within the DoN. The outside practice of law, therefore, must be carefully monitored. Covered USG attorneys who wish to engage in the outside practice of law, including while on terminal leave, must first obtain permission from the JAG. Failure to obtain permission before engaging in the outside practice of law may subject the covered USG attorney to administrative or disciplinary action, including professional sanctions administered per subpart C of this part. Further details are contained in § 776.57 and subpart D of this part.

#### **§ 776.12 Maintenance of files.**

Pursuant to SECNAVINST 5211.5 (series) and SECNAVINST 5212.5 (series) ethics complaint records and outside practice of law request files shall be maintained by the Office of the Chief Judge, DoN (Code 05) for judicial conduct matters; the Research and Civil Law Branch, JA Division, HQMC (JAR) for Marine matters; and the Office of the JAG, Administrative Law Division (Code 13) for all other matters.

(a) Requests for access to such records should be referred to the Office of the Chief Judge, Washington Navy Yard, 1254 Charles Morris Street SE., Suite 320, Washington, DC, 20374-5124; Deputy Assistant Judge Advocate General (Administrative Law), Office of the Judge Advocate General (Code 13), 1322 Patterson Avenue SE., Suite 3000, Washington Navy Yard, DC 20374-5066; or to Head, Research and Civil Law Branch, Office of the Staff Judge Advocate to the Commandant of the Marine Corps, Headquarters United States Marine Corps, 3000 Marine Corps

Pentagon (Room 4D556), Washington, DC 20350–3000, as appropriate.

(b) Local command files regarding professional responsibility complaints will not be maintained. Commanding officers and other supervisory attorneys may, however, maintain personal files but must not share their contents with others.

(c) All records maintained under this part shall be maintained in accordance with the following procedures established by JAGINST 5801.2 (series) and DON Privacy Act Notice N05813–1:

(1) Records shall be maintained for a minimum of two years;

(2) Records shall be maintained for as long as an attorney remains subject to JAG-imposed limitations on practice; and

(3) Records pertaining to unsubstantiated complaints, or to attorneys who are no longer subject to limitation on practice, shall be destroyed after 10 years.

#### **§ 776.13–776.17 [Reserved]**

### **Subpart B—Rules of Professional Conduct**

#### **§ 776.18 Preamble.**

(a) A covered attorney is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the DoN and to individual clients. These Rules of Professional Conduct (Subpart B of this part) govern the ethical conduct of covered attorneys practicing under the Uniform Code of Military Justice, the MCM, 10 U.S.C. 1044 (Legal Assistance), other laws of the United States, and regulations of the DoN.

(b) Subpart B of this part not only address the professional conduct of judge advocates, but also apply to all other covered attorneys who practice under the cognizance and supervision of the Navy JAG.

(c) All covered attorneys are subject to professional disciplinary action, as outlined in this part, for violation of subpart B of this part. Action on allegations of professional or personal misconduct undertaken per Subpart B of this part does not prevent other Federal, state, or local bar associations, or other licensing authorities, from taking professional disciplinary or other administrative action for the same or similar conduct.

#### **§ 776.19 Principles.**

Subpart B of this part is based on the following principles. Interpretation of subpart B of this part should flow from

their common meaning. To the extent that any ambiguity or conflict exists, subpart B of this part should be interpreted consistent with these general principles.

(a) Covered attorneys shall:

(1) Obey the law and applicable military regulations, and counsel clients to do so.

(2) Follow all applicable ethics rules.

(3) Protect the legal rights and interests of clients, organizational and individual.

(4) Be honest and truthful in all dealings.

(5) Not derive personal gain, except as authorized, for the performance of legal services.

(6) Maintain the integrity of the legal profession.

(b) Ethical rules should be consistent with law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based.

(c) The military criminal justice system is a truth-finding process consistent with constitutional law.

#### **§ 776.20 Competence.**

(a) *Competence.* A covered attorney shall provide competent, diligent, and prompt representation to a client. Competent representation requires the legal knowledge, skill, access to evidence, thoroughness, and expeditious preparation reasonably necessary for representation. Initial determinations as to competence of a covered USG attorney for a particular assignment shall be made by a supervising attorney before case or issue assignments; however, assigned attorneys may consult with supervisors concerning competence in a particular case.

(b) [Reserved]

#### **§ 776.21 Establishment and scope of representation.**

(a) *Establishment and scope of representation.* Formation of attorney-client relationships by covered USG attorneys with, and representation of, clients is permissible only when the attorney is authorized to do so by competent authority. For purposes of this part, Military Rules of Evidence 502, the Manual of the Judge Advocate General (JAGINST 5800.7 series), and the Naval Legal Service Command Manual (COMNAVLEGSVCCOMINST 5800.1 series), generally define when an attorney-client relationship is formed between a covered USG attorney and a client servicemember, dependent, or employee.

(b) Generally, the subject matter scope of a covered attorney's representation will be consistent with the terms of the

assignment to perform specific representational or advisory duties. A covered attorney shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the attorney towards the client.

(c) A covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements.

(d) A covered attorney's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(e) A covered attorney shall not counsel or assist a client to engage in conduct that the attorney knows is criminal or fraudulent, but a covered attorney may discuss the legal and moral consequences of any proposed course of conduct with a client, and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(f) [Reserved]

#### **§ 776.22 Diligence.**

(a) *Diligence.* A covered attorney shall act with reasonable diligence and promptness in representing a client, and shall consult with a client as soon as practicable and as often as necessary upon being assigned to the case or issue.

(b) [Reserved]

#### **§ 776.23 Communication.**

(a) *Communication.* A covered attorney shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A covered attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) [Reserved]

#### **§ 776.24 Fees.**

(a) *Fees.* A covered USG attorney shall not accept any salary, fee, compensation, or other payments or benefits, directly or indirectly, other than Government compensation, for services provided in the course of the covered USG attorney's official duties or employment.

(b) A covered USG attorney shall not accept any salary or other payments as compensation for legal services rendered, by that covered USG attorney in a private capacity, to a client who is eligible for assistance under the DoN Legal Assistance Program, unless so authorized by the JAG. This rule does

not apply to Reserve or Retired judge advocates not then serving on extended active-duty.

(c) A Reserve or Retired judge advocate, whether or not serving on extended active-duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the attorney's official Navy or Marine Corps duties, shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity, unless so authorized by the JAG.

(d) Covered non-USG attorneys may charge fees. Fees shall be reasonable. Factors considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the attorney or attorneys performing the services; and

(8) Whether the fee is fixed or contingent.

(e) When the covered non-USG attorney has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(f) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (a)(7) of this section or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the covered non-USG attorney in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the covered non-USG attorney

shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(g) A covered non-USG attorney shall not enter into an arrangement for, charge, or collect a contingent fee for representing an accused in a criminal case.

(h) A division of fees between covered non-USG attorneys who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each attorney or, by written agreement with the client, each attorney assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the attorneys involved; and

(3) The total fee is reasonable.

(i) *Covered Non-USG Attorneys.* Paragraphs (d) through (h) of this section apply only to private civilian attorneys practicing in proceedings conducted under the cognizance and supervision of the JAG. The primary purposes of paragraphs (d) through (h) of this section are not to permit the JAG to regulate fee arrangements between civilian attorneys and their clients but to provide guidance to covered USG attorneys practicing with non-USG attorneys and to supervisory attorneys who may be asked to inquire into alleged fee irregularities. Absent paragraphs (d) through (h) of this section, such supervisory attorneys have no readily available standard against which to compare allegedly questionable conduct of a civilian attorney.

#### **§ 776.25 Confidentiality of information.**

(a) Confidentiality of information. A covered attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) of this section.

(b) A covered attorney shall reveal information relating to the representation of a client to the extent the covered attorney reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm; or

(2) To prevent the client from committing a criminal act that the covered attorney reasonably believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A covered attorney may reveal such information to the extent the covered attorney reasonably believes necessary:

(1) To secure legal advice about the covered attorney's compliance with Subpart B of this part;

(2) To establish a claim or defense on behalf of the covered attorney in a controversy between the covered attorney and the client, to establish a defense to a criminal charge or civil claim against the covered attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the attorney's representation of the client; and/or

(3) To comply with other law or a court order.

(d) Examples of conduct likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system include: Divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft could not conduct an assigned mission, or that the vessel or aircraft and crew could be lost; and compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b) of this section is not intended to and does not mandate the disclosure of conduct that may have a slight impact on the readiness or capability of a unit, vessel, aircraft, or weapon system. Examples of such conduct are: Absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property.

#### **§ 776.26 Conflict of interest: General rule.**

(a) *Conflict of interest: General rule.* Except as provided by paragraph (b) of this section, a covered attorney shall not represent a client if the representation of that client 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 covered attorney's responsibilities to another client, a former client or a third person or by a personal interest of the covered attorney.

(b) Notwithstanding the existence of a concurrent conflict of interest under

paragraph (a) of this section, a covered attorney may represent a client if:

(1) The covered attorney reasonably believes that the covered attorney will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law or regulation;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the covered attorney in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

(c) *Reserve or Retired Judge Advocates.* These conflict-of-interest rules apply to Reservists only while they are actually drilling or on active-duty-for-training, or, as is the case with Retirees, on extended active-duty or when performing other duties subject to JAG supervision. Therefore, unless otherwise prohibited by criminal conflict-of-interest statutes, Reserve or Retired attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose attorneys represent clients, with interests adverse to the United States.

(1) Reserve judge advocates who, in their civilian capacities, represent persons whose interests are adverse to the DoN will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter.

(2) Reserve judge advocates shall refrain from undertaking any official action or representation of the DoN with respect to any particular matter in which they are providing representation or services to other clients.

#### **§ 776.27 Conflict of interests: Prohibited transactions.**

(a) *Conflict of interests: Prohibited transactions.* Covered USG attorneys shall strictly adhere to current DoD Ethics Regulations and shall not:

(1) Knowingly enter into any business transactions on behalf of, or adverse to, a client's interest that directly or indirectly relate to or result from the attorney-client relationship; or

(2) Provide any financial assistance to a client or otherwise serve in a financial or proprietary fiduciary or bailment relationship, unless otherwise specifically authorized by competent authority.

(b) No covered attorney shall:

(1) Use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Subpart B of this part;

(2) Prepare an instrument giving the covered attorney or a person related to the covered attorney as parent, child, sibling, or spouse any gift from a client, including a testamentary gift, except where the client is related to the donee;

(3) In the case of covered non-USG attorneys, accept compensation for representing a client from one other than the client unless the client consents after consultation, there is no interference with the covered attorney's independence of professional judgment or with the attorney-client relationship, and information relating to representation of a client is protected as required by § 776.25 of this part;

(4) Negotiate any settlement on behalf of multiple clients in a single matter unless each client provides fully informed consent;

(5) Prior to the conclusion of representation of the client, make or negotiate an agreement giving a covered attorney literary or media rights for a portrayal or account based in substantial part on information relating to representation of a client;

(6) Represent a client in a matter directly adverse to a person whom the covered attorney knows is represented by another attorney who is related as parent, child, sibling, or spouse to the covered attorney, except upon consent by the client after consultation regarding the relationship; or

(7) Acquire a proprietary interest in the cause of action or subject matter of litigation the covered attorney is conducting for a client.

(c) [Reserved]

#### **§ 776.28 Conflict of interest: Former client.**

(a) *Conflict of interest: Former client.* A covered attorney 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 covered attorney who 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 or to the covered attorney's own advantage, except as Subpart B of this part 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 subpart B of this part would permit or require with respect to a client.

(c) [Reserved]

#### **§ 776.29 Imputed disqualification: General rule.**

(a) *Imputed disqualification: General rule.* Covered USG attorneys working in the same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by § 776.26, § 776.27, § 776.28, or § 776.38 of this part. Covered non-USG attorneys must consult their federal, state, and local bar rules governing the representation of multiple or adverse clients within the same office before such representation is initiated, as such representation may expose them to disciplinary action under the rules established by their licensing authorities.

(b)(1) The circumstances of military (or Government) service may require representation of opposing sides by covered USG attorneys working in the same law office. Such representation is permissible so long as conflicts of interests are avoided and independent judgment, zealous representation, and protection of confidences are not compromised. Thus, the principle of imputed disqualification is not automatically controlling for covered USG attorneys. The knowledge, actions, and conflicts of interests of one covered USG attorney are not imputed to another simply because they operate from the same office. For example, the fact that a number of defense attorneys operate from one office and normally share clerical assistance would not prohibit them from representing co-accused at trial by court-martial. Imputed disqualification rules for non-USG attorneys are established by their individual licensing authorities and may well proscribe all attorneys from one law office from representing a co-accused, or a party with an adverse interest to an existing client, if any attorney in the same office were so prohibited.

(2) Whether a covered USG attorney is disqualified requires a functional analysis of the facts in a specific situation. The analysis should include consideration of whether the following will be compromised: Preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client. See, e.g., *U.S. v. Stubbs*, 23 M.J. 188 (CMA 1987).

(3) Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in a particular circumstance, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which covered



USG attorneys work together. A covered USG attorney may have general access to files of all clients of a military law office (e.g., legal assistance attorney) and may regularly participate in discussions of their affairs; it may be inferred that such a covered USG attorney in fact is privy to all information about all the office's clients. In contrast, another covered USG attorney (e.g., military defense counsel) may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a covered USG attorney in fact is privy to information about the clients actually served but not to information of other clients.

Additionally, a covered USG attorney changing duty stations or changing assignments within a military office has a continuing duty to preserve confidentiality of information about a client formerly represented. See § 776.25 and § 776.28 of this part.

(4) In military practice, where covered USG attorneys representing adverse interests are sometimes required to share common spaces, equipment, and clerical assistance, inadvertent disclosure of confidential or privileged material may occur. A covered attorney who mistakenly receives any such confidential or privileged materials should refrain from reviewing them (except for the limited purpose of ascertaining ownership or proper routing), notify the attorney to whom the material belongs that he or she has such material, and either follow instructions of the attorney with respect to the disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. A covered attorney's duty to provide his or her client zealous representation does not justify a rule allowing the receiving attorney to take advantage of inadvertent disclosures of privileged and/or confidential materials. This policy recognizes and reinforces the principles of: Confidentiality and the attorney-client privilege; analogous principles governing the inadvertent waiver of the attorney-client privilege; the law governing bailments and missent property; and considerations of common sense, reciprocity, and professional courtesy.

(5) Maintaining independent judgment allows a covered USG attorney to consider, recommend, and carry out any appropriate course of action for a client without regard to the covered USG attorney's personal

interests or the interests of another. When such independence is lacking or unlikely, representation cannot be zealous.

(6) Another aspect of loyalty to a client is the general obligation of any attorney to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation normally requires abstention from adverse representation by the individual covered attorney involved, but, in the military legal office, abstention is not required by other covered USG attorneys through imputed disqualification.

#### **§ 776.30 Successive Government and private employment.**

(a) *Successive Government and private employment.* Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person that was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(1) The disqualified former covered USG attorney must ensure that he or she is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom; and,

(2) Must provide written notice promptly to the appropriate Government agency to enable it to ascertain compliance with the provisions of applicable law and regulations.

(b) Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person which was acquired while a covered USG attorney, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is

apportioned no part of the fee or any other benefit therefrom.

(c) Except as the law or regulations may otherwise expressly permit, a covered USG attorney shall not:

(1) Participate in a matter in which the covered USG attorney participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the covered USG attorney's stead in the matter; or,

(2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially.

(d) 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 DoD, DoN, or other appropriate Government agency.

(e) As used in the Rule, the term "confidential Governmental information" means information that has been obtained under Governmental authority and that, at the time this Rule is applied, the Government is prohibited by law or regulations from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

(f) [Reserved]

#### **§ 776.31 Former judge or arbitrator.**

(a) *Former judge or arbitrator.* Except as stated in paragraph (c) of this section, a covered USG attorney shall not represent anyone in connection with a matter in which the covered USG attorney participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A covered USG attorney shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the covered USG attorney is participating personally and substantially as a judge or other adjudicative officer. A covered USG attorney serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating



personally and substantially, but only after the covered USG attorney has notified the judge, other adjudicative officer, or arbitrator, and been disqualified from further involvement in the matter.

(c) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

(d) [Reserved]

#### **§ 776.32 Department of the Navy as client.**

(a) *Department of the Navy as client.* Except when representing an individual client pursuant to paragraph (f) of this section, a covered USG attorney represents the DoN (or the Executive agency to which assigned) acting through its authorized officials. These officials include the heads of organizational elements within the naval service, such as the commanders of fleets, divisions, ships and other heads of activities. When a covered USG attorney is assigned to such an organizational element and designated to provide legal services to the head of the organization, an attorney-client relationship exists between the covered attorney and the DoN as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the attorney-client privilege or the rule of confidentiality for the head of the organization's own benefit but may invoke either for the benefit of the DoN. In invoking either the attorney-client privilege or attorney-client confidentiality on behalf of the DoN, the head of the organization is subject to being overruled by higher authority.

(b) If a covered USG attorney knows that an officer, employee, or other member associated with the organizational client is engaged in action, intends to act or refuses to act in a matter related to the representation that is either adverse to the legal interests or obligations of the DoN or a violation of law that reasonably might be imputed to the DoN, the covered USG attorney shall proceed as is reasonably necessary in the best interest of the naval service. In determining how to proceed, the covered USG attorney shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the covered USG attorney's representation, the responsibility in the naval service and the apparent motivation of the person involved, the policies of the naval service concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize prejudice

to the interests of the naval service and the risk of revealing information relating to the representation to persons outside the service. Such measures shall include:

(1) Asking for reconsideration of the matter by the acting official;

(2) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the naval service;

(3) Referring the matter to, or seeking guidance from, higher authority in the chain of command including, if warranted by the seriousness of the matter, referral to the supervisory attorney assigned to the staff of the acting official's next superior in the chain of command; or

(4) Advising the acting official that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the covered USG attorney, and the covered USG attorney's responsibility is to the organization.

(c) If, despite the covered USG attorney's efforts per paragraph (b) of this section, the highest authority that can act concerning the matter insists upon action or refuses to act, in clear violation of law, the covered USG attorney shall terminate representation with respect to the matter in question. In no event shall the attorney participate or assist in the illegal activity. In this case, a covered USG attorney shall report such termination of representation to the attorney's supervisory attorney or attorney representing the next superior in the chain of command.

(d) In dealing with the officers, employees, or members of the naval service a covered USG attorney shall explain the identity of the client when it is apparent that the naval service's interests are adverse to those of the officer, employee, or member.

(e) A covered USG attorney representing the naval service may also represent any of its officers, employees, or members, subject to the provisions of § 776.26 of this part and other applicable authority. If the DoN's consent to dual representation is required by § 776.26 of this part, the consent shall be given by an appropriate official of the DoN other than the individual who is to be represented.

(f) A covered USG attorney who has been duly assigned to represent an individual who is subject to criminal or disciplinary action or administrative proceedings, or to provide legal assistance to an individual, has, for those purposes, an attorney-client relationship with that individual.

(g) [Reserved]

#### **§ 776.33 Client with diminished capacity.**

(a) *Client with diminished capacity.* 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 covered attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

(b) When the covered attorney 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 covered attorney may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.

(c) Information relating to the representation of a client with diminished capacity is protected by § 776.25 of this part. When taking protective action pursuant to paragraph (b) of this section, the covered attorney is impliedly authorized under § 776.25(a) of this part to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

(d) [Reserved]

#### **§ 776.34 Safekeeping property.**

(a) *Safekeeping property.* Covered USG attorneys shall not normally hold or safeguard property of a client or third persons in connection with representational duties. See § 776.27 of this part.

(b) [Reserved]

#### **§ 776.35 Declining or terminating representation.**

(a) *Declining or terminating representation.* Except as stated in paragraph (c) of this section, a covered attorney shall not represent a client or, when representation has commenced, shall seek to withdraw from the representation of a client if:

(1) The representation will result in violation of subpart B of this part or other law or regulation;

(2) The covered attorney's physical or mental condition materially impairs his or her ability to represent the client; or

(3) The covered attorney is dismissed by the client.

(b) Except as stated in paragraph (c) of this section, a covered attorney may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) The client persists in a course of action involving the covered attorney's

services that the covered attorney reasonably believes is criminal or fraudulent;

(2) The client has used the covered attorney's services to perpetrate a crime or fraud;

(3) The client insists upon pursuing an objective that the covered attorney considers repugnant or imprudent;

(4) In the case of covered non-USG attorneys, the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(5) Other good cause for withdrawal exists.

(c) A covered attorney 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 covered attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a covered attorney 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 assignment or employment of other counsel, and surrendering papers and property to which the client is entitled and, where a non-USG attorney provided representation, refunding any advance payment of fee that has not been earned. The covered attorney may retain papers relating to the client to the extent permitted by law.

(e) [Reserved]

#### **§ 776.36 Prohibited sexual relations.**

(a) *Prohibited sexual relations.* A covered attorney shall not have sexual relations with a current client. A covered attorney shall not require, demand, or solicit sexual relations with a client incident to any professional representation.

(b) A covered attorney shall not engage in sexual relations with another attorney currently representing a party whose interests are adverse to those of a client currently represented by the covered attorney.

(c) A covered attorney shall not engage in sexual relations with a judge who is presiding or who is likely to preside over any proceeding in which the covered attorney will appear in a representative capacity.

(d) A covered attorney shall not engage in sexual relations with other persons involved in the particular case, judicial or administrative proceeding, or other matter for which representation has been established, including but not limited to witnesses, victims, co-

accused, and court-martial or board members.

(e) For purposes of this Rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the covered attorney for the purpose of arousing or gratifying the sexual desire of either party.

(f) [Reserved]

#### **§ 776.37 Advisor.**

(a) *Advisor.* In representing a client, a covered attorney shall exercise independent professional judgment and render candid advice. In rendering advice, a covered attorney 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.

(b) [Reserved]

#### **§ 776.38 Mediation.**

(a) *Mediation.* A covered attorney may act as a mediator between individuals if:

(1) The covered attorney consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the attorney-client confidentiality, and obtains each individual's consent to the mediation;

(2) The covered attorney reasonably believes that the matter can be resolved on terms compatible with each individual's best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and,

(3) The covered attorney reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the covered attorney has to any of the individuals.

(b) While acting as a mediator, the covered attorney shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that each individual can make adequately informed decisions.

(c) A covered attorney shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a)(1) of this section is no longer satisfied. Upon withdrawal, the covered attorney shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

(d) [Reserved]

#### **§ 776.39 Evaluation for use by third persons.**

(a) *Evaluation for use by third persons.* A covered attorney may provide an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) The covered attorney reasonably believes that making the evaluation is compatible with other aspects of the covered attorney's relationship with the client; and

(2) The client provides informed consent, confirmed in writing.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by § 776.25 of this part.

(c) [Reserved]

#### **§ 776.40 Meritorious claims and contentions.**

(a) *Meritorious claims and contentions.* A covered attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A covered attorney representing an accused in a criminal proceeding or the respondent in an administrative proceeding, that could result in incarceration, discharge from the Naval service, or other adverse personnel action, may nevertheless defend the client at the proceeding as to require that every element of the case is established.

(b) [Reserved]

#### **§ 776.41 Expediting litigation.**

(a) *Expediting litigation.* A covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client.

(b) [Reserved]

#### **§ 776.42 Candor and obligations toward the tribunal.**

(a) *Candor and obligations toward the tribunal.* A covered attorney shall not knowingly:

(1) Make a false statement of material 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 covered attorney;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the covered attorney to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) Offer evidence that the covered attorney knows to be false.

(i) If a covered attorney, the attorney's client, or a witness called by the covered attorney, has offered material evidence and the covered attorney comes to know of its falsity, the covered attorney shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(ii) A covered attorney may refuse to offer evidence, other than the testimony of an accused in a criminal matter, that the covered attorney reasonably believes is false; or

(4) Disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

(b) A covered attorney who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in 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 paragraph (a) of this section continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by § 776.25 of this part.

(d) In an ex parte proceeding, a covered attorney shall inform the tribunal of all material facts known to the covered attorney that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) [Reserved]

#### **§ 776.43 Fairness to opposing party and counsel.**

(a) *Fairness to opposing party and counsel.* A covered attorney shall not:

(1) Unlawfully obstruct a party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A covered attorney shall not counsel or assist another person to do any such act;

(2) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(3) Knowingly disobey an order of the tribunal except for an open refusal based on an assertion that no valid obligation exists;

(4) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by a party;

(5) In trial, allude to any matter that the covered attorney 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

(6) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(i) The person is a relative, an employee, or other agent of a client; and

(ii) The covered attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(b) [Reserved]

#### **§ 776.44 Impartiality and decorum of the tribunal.**

(a) *Impartiality and decorum of the tribunal.* A covered attorney shall not:

(1) Seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law or regulation;

(2) Communicate ex parte with such a person except as permitted by law or regulation; or

(3) Engage in conduct intended to disrupt a tribunal.

(b) [Reserved]

#### **§ 776.45 Extra-tribunal statements.**

(a) *Extra-tribunal statements.* A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(b) A statement referred to in paragraph (a) of this section ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

(1) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(2) The possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any forensic examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) Information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of materially prejudicing an impartial proceeding;

(6) The fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(7) The credibility, reputation, motives, or character of civilian or military officials of the DoD.

(c) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) The general nature of the claim, offense, or defense;

(2) The information contained in a public record;

(3) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(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 the 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 paragraphs (c)(1) through (6) of this section:

(i) The identity, duty station, 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 apprehension; and

(iv) The identity of investigating and apprehending officers or agencies and the length of the investigation.

(d) Notwithstanding paragraphs (a) and (b)(1) through (7) of this section, a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) The protection and release of information in matters pertaining to the DoN is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

(f) [Reserved]

#### **§ 776.46 Attorney as witness.**

(a) *Attorney as witness.* A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and quality of legal services rendered in the case; or

(3) Disqualification of the covered attorney would work substantial hardship on the client.

(b) A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28 of this part.

(c) [Reserved]

#### **§ 776.47 Special responsibilities of a trial counsel and other government counsel.**

(a) *Special responsibilities of a trial counsel and other government counsel.* A trial counsel in a criminal case shall:

(1) Recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;

(2) 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;

(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) 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 all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.45 of this part; and

(6) Except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions 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.

(b)(1) Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to:

- (i) Land-line telephone conversations;
- (ii) Facsimile transmissions;
- (iii) U.S. mail, and;
- (iv) Email.

(2) Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.

(c)(1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ; see also R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

(i) Paragraph (a)(1) of this section recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors.

(ii) The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities.

(iii) Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See *United States v. Howe*, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also § 776.42(d) of this part (governing ex parte proceedings). Applicable law may require other measures by the trial counsel.

(iv) Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of § 776.69 of this part.

(2) Paragraph (a)(3) of this part does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph (a)(4) of this section recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph (a)(5) of this section in a number of ways. These include personally informing others of the trial counsel's obligations under § 776.46 of this part, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph (a)(6) of this part supplements § 776.45 of this part, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a trial counsel may make that comply with § 776.45 of this part.

(6) The "ABA Standards for Criminal Justice: The Prosecution Function," (3d

ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See *United States v. Howe*, 37 M.J. 1062 (NMCRS 1993); *United States v. Dancy*, 38 M.J. 1 (CMA 1993); *United States v. Hamilton*, 41 M.J. 22 (CMA 1994); *United States v. Meek*, 44 M.J. 1 (CMA 1996).

(d) [Reserved]

**§ 776.48 Advocate in nonadjudicative proceedings.**

(a) *Advocate in nonadjudicative proceedings.* A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of § 776.42 (a) through (d), § 776.43 and § 776.44 of this part.

(b) [Reserved]

**§ 776.49 Truthfulness in statements to others.**

(a) *Truthfulness in statements to others.* In the course of representing a client a covered attorney shall not knowingly;

(1) Make a false statement of material fact or law to a third person; or

(2) 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 § 776.25 of this part.

(b) [Reserved]

**§ 776.50 Communication with person represented by counsel.**

(a) *Communication with person represented by counsel.* In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

**§ 776.51 Dealing with an unrepresented person.**

(a) *Dealing with an unrepresented person.* When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter,

the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

**§ 776.52 Respect for rights of third persons.**

(a) *Respect for rights of third persons.* In representing a client, a covered attorney 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) [Reserved]

**§ 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.**

(a) *Responsibilities of the Judge Advocate General and supervisory attorneys.* The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to Subpart B of this part.

(b) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to Subpart B of this part.

(c) A supervisory attorney shall be responsible for another subordinate covered attorney's violation of Subpart B of this part if:

(1) The supervisory attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The supervisory attorney has direct supervisory authority over the other attorney and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) A supervisory attorney is responsible for ensuring that the subordinate covered attorney is properly trained and is competent to perform the duties to which the subordinate covered attorney is assigned.

(e) [Reserved]

**§ 776.54 Responsibilities of a subordinate attorney.**

(a) *Responsibilities of a subordinate attorney.* A covered attorney is bound by this part notwithstanding that the covered attorney acted at the direction of another person.

(b) In recognition of the judge advocate's unique dual role as a commissioned officer and attorney, subordinate judge advocates shall obey lawful directives and regulations of supervisory attorneys when not inconsistent with this part or the duty of a judge advocate to exercise independent professional judgment as to the best interest of an individual client.

(c) A subordinate covered attorney does not violate this part if that covered attorney acts in accordance with a supervisory attorney's written and reasonable resolution of an arguable question of professional duty.

(d) [Reserved]

**§ 776.55 Responsibilities regarding non-attorney assistants.**

(a) *Responsibilities regarding non-attorney assistants.* With respect to a non-attorney acting under the authority, supervision, or direction of a covered attorney:

(1) The senior supervisory attorney in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney;

(2) A covered attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney; and

(3) A covered attorney shall be responsible for conduct of such a person that would be a violation of this part if engaged in by a covered attorney if:

(i) The covered attorney orders or, with the knowledge of the specific conduct, explicitly or impliedly ratifies the conduct involved; or

(ii) The covered attorney 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.

(b) [Reserved]

**§ 776.56 Professional independence of a covered USG attorney.**

(a) *Professional independence of a covered USG attorney.* Notwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with subpart B of this part and remains ultimately responsible for acting in the best interest of the individual client.

(b) Notwithstanding a civilian USG attorney's status as a Federal employee subject, generally, to the authority of superiors, a civilian USG attorney detailed or assigned to represent an individual member or employee of the DoN is expected to exercise unfettered loyalty and professional independence during the representation consistent with this part and remains ultimately responsible for acting in the best interest of the individual client.

(c) The exercise of professional judgment in accordance with paragraphs (a) or (b) of this section shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

(1) Subpart B of this part recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered attorney'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 covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1998.

#### **§ 776.57 Unauthorized practice of law.**

(a) *Unauthorized practice of law.* A covered USG attorney shall not:

(1) Except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction; or

(2) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(3) Engage in the outside practice of law without receiving proper authorization from the JAG.

(b) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the states. Thus, a covered

USG attorney may perform legal assistance duties even though the covered attorney is not licensed to practice in the jurisdiction within which the covered attorney's duty station is located. Paragraph (a)(2) of this section does not prohibit a covered USG attorney from using the services of non-attorneys and delegating functions to them, so long as the covered attorney supervises the delegated work and retains responsibility for it. See § 776.55 of this part. Likewise, it does not prohibit covered USG attorneys from providing professional advice and instruction to non-attorneys whose employment requires knowledge of law; for example, claims adjusters, social workers, accountants and persons employed in Government agencies. In addition, a covered USG attorney may counsel individuals who wish to proceed pro se or non-attorneys authorized by law or regulation to appear and represent themselves or others before military proceedings.

#### **§§ 776.58–776.65 [Reserved]**

#### **§ 776.66 Bar admission and disciplinary matters.**

(a) *Bar admission and disciplinary matters.* A covered attorney, in connection with any application for bar admission, appointment as a judge advocate, employment as a civilian USG attorney, certification by the JAG or his designee, or in connection with any disciplinary matter, shall not:

(1) Knowingly make a false statement of fact; or

(2) 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 part does not require disclosure of information otherwise protected by § 776.25 of this part.

(b) The duty imposed by subpart B of this part extends to covered attorneys and other attorneys seeking admission to a bar, application for appointment as a covered USG attorney (military or civilian) or certification by the JAG or his designee. Hence, if a person makes a false statement in connection with an application for admission or certification (e.g., misstatement by a civilian attorney before a military judge regarding qualifications under R.C.M. 502), it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application.

(1) The duty imposed by subpart B of this part applies to a covered attorney's

own admission or discipline as well as that of others. Thus, it is a separate professional offense for a covered attorney to make a knowing misrepresentation or omission in connection with a disciplinary investigation of the covered attorney's own conduct.

(2) Subpart B of this part also requires affirmative clarification of any misunderstanding on the part of the admissions, certification, or disciplinary authority of which the person involved becomes aware.

#### **§ 776.67 Judicial and legal officers.**

(a) *Judicial and legal officers.* A covered attorney shall not make a statement that the covered attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) [Reserved]

#### **§ 776.68 Reporting professional misconduct.**

(a) *Reporting professional misconduct.* A covered attorney having knowledge that another covered attorney has committed a violation of subpart B of this part that raises a substantial question as to that covered attorney's honesty, trustworthiness, or fitness as a covered attorney in other respects, shall report such violation in accordance with the procedures set forth in this part.

(b) A covered attorney having knowledge 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 report such violation in accordance with the procedures set forth in this part.

(c) This part does not require disclosure of information otherwise protected by § 776.25 of this part.

(d) [Reserved]

#### **§ 776.69 Misconduct.**

(a) *Misconduct.* It is professional misconduct for a covered attorney to:

(1) Violate or attempt to violate subpart B of this part, knowingly assist or induce another to do so, or do so through the acts of another;

(2) Commit a criminal act that reflects adversely on the covered attorney's honesty, trustworthiness, or fitness as an attorney in other respects;

(3) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) Engage in conduct that is prejudicial to the administration of justice;

(5) State or imply an ability to influence improperly a government agency or official; or

(6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(b)(1) Judge advocates hold a commission as an officer in the Navy or Marine Corps and assume legal responsibilities going beyond those of other citizens. A judge advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and attorney. This concept has similar application to civilian USG attorneys.

(2) Covered non-USG attorneys, Reservists, and Retirees (acting in their civilian capacity), like their active-duty counterparts, are expected to demonstrate model behavior and exemplary integrity at all times. The JAG may consider any and all derogatory or beneficial information about a covered attorney, for purposes of determining the attorney's qualification, professional competence, or fitness to practice law in DoN matters, or to administer discipline under this instruction. Such consideration shall be made, except in emergency situations necessitating immediate action, according to the procedures established in this instruction.

#### **§ 776.70 Jurisdiction.**

(a) *Jurisdiction.* All covered attorneys shall be governed by this part.

(b)(1) Many covered USG attorneys practice outside the territorial limits of the jurisdiction in which they are licensed. While covered attorneys remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to subpart B of this part.

(2) When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, the provisions contained in Subpart B of this part supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed. However, covered attorneys practicing in State or Federal civilian court proceedings will abide by the rules adopted by that State or Federal civilian court during the proceedings. As for covered non-USG attorneys practicing under the supervision of the JAG, violation of the

provisions contained in Subpart B of this part may result in suspension from practice in DoN proceedings.

(3) Covered non-USG attorneys, Reservists, or Retirees (acting in their civilian capacity) who seek to provide legal services in any DoN matter under JAG cognizance and supervision, may be precluded from such practice of law if, in the opinion of the JAG (as exercised through this instruction) the attorney's conduct in any venue renders that attorney unable or unqualified to practice in DoN programs or proceedings.

#### **§ 776.71 Requirement to remain in good standing with licensing authorities.**

(a) *Requirement to remain in good standing with licensing authorities.* Each officer of the Navy appointed as a member of the JAG Corps, each officer of the Marine Corps designated a judge advocate, and each civil service and contracted civilian attorney who practices law under the cognizance and supervision of the JAG shall maintain a status considered "in good standing" at all times with the licensing authority admitting the individual to the practice of law before the highest court of at least one State, Territory, Commonwealth, or the District of Columbia.

(b) The JAG, the Staff Judge Advocate to the Commandant of the Marine Corps, or any other supervisory attorney may require any covered USG attorney over whom they exercise authority to establish that the attorney continues to be in good standing with his or her licensing authority. Representatives of the JAG or of the Staff Judge Advocate to the Commandant of the Marine Corps, may also inquire directly of any such covered USG attorney's licensing authority to establish whether he or she continues to be in good standing and has no disciplinary action pending.

(c) Each covered USG attorney shall immediately report to the JAG if any jurisdiction in which the covered USG attorney is or has been a member in good standing commences disciplinary investigation or action against him or her or if the covered USG attorney is disciplined, suspended, or disbarred from the practice of law in any jurisdiction.

(d) Each covered non-USG attorney representing an accused in any court-martial or administrative separation proceeding shall be a member in good standing with, and authorized to practice law by, the bar of a Federal court or of the bar of the highest court of a State, or a lawyer otherwise authorized by a recognized licensing authority to practice law and found by

the military judge to be qualified to represent the accused.

(e)(1) Generally, the JAG relies on the licensing authority granting the certification or privilege to practice law to define the phrase "good standing." However, as circumstances require, the JAG may, instead, use separate criteria to determine compliance. At a minimum, "good standing" means the individual:

(i) Is subject to the jurisdiction's disciplinary review process;

(ii) Has not been suspended or disbarred from the practice of law within the jurisdiction;

(iii) Is current in the payment of all required fees;

(iv) Has met applicable continuing legal education requirements that the jurisdiction has imposed (or the cognizant authority has waived); and

(v) Has met such other requirements as the cognizant authority has set for eligibility to practice law. So long as these conditions are met, a covered USG attorney may be "inactive" as to the practice of law within a particular jurisdiction and still be "in good standing" for purposes of subpart B of this part.

(2) Rule for Court-Martial 502(d)(3)(A) requires that any civilian defense counsel representing an accused in a court-martial be a member of the bar of a Federal court or of the bar of the highest court of a State. This civilian defense counsel qualification only has meaning if the attorney is a member "in good standing," and is then authorized to practice law within that jurisdiction. See *United States v. Waggoner*, 22 M.J. 692 (AFCMR 1986). It is appropriate for the military judge, in each and every case, to ensure that a civilian defense counsel is qualified to represent the accused.

(3) Failure of a judge advocate to comply with the requirements of subpart B of this part may result in professional disciplinary action as provided for in this instruction, loss of certification under Articles 26 and/or 27(b), UCMJ, adverse entries in military service records, and administrative separation under SECNAVINST 1920.6 (series) based on the officer's failure to maintain professional qualifications. In the case of civil service and contracted civilian attorneys practicing under the JAG's cognizance and supervision, failure to maintain good standing or otherwise to comply with the requirements of subpart B of this part may result in adverse administrative action under applicable personnel regulations, including termination of employment.



(4) A covered USG attorney need only remain in good standing in one jurisdiction. If admitted to the practice of law in more than one jurisdiction, however, and any jurisdiction commences disciplinary action against or disciplines, suspends or disbars the covered USG attorney from the practice of law, the covered USG attorney must so advise the JAG.

(5) An essential time to verify that a judge advocate is currently in good standing is upon accession. Other appropriate times for verification are before a judge advocate is promoted to a higher grade, detailed to a new command, or assigned to duties where there is a statutory requirement to be a member of the bar, such as a military judge per 10 U.S.C. 826(b). The JAG, the SJA to CMC, or any other supervisory attorney may need to verify the professional qualifications of a judge advocate, either periodically or on an occasional basis. JAGINST 5803.2 (series) establishes a biennial requirement for all covered attorneys to provide proof of good standing.

(6) Certification by the United States Court of Appeals for the Armed Forces that a judge advocate is in good standing with that court will not satisfy the requirement of this section, since such status is normally dependent on Article 27, UCMJ, certification.

#### **§§ 776.72–776.75 [Reserved]**

### **Subpart C—Complaint Processing Procedures**

#### **§ 776.76 Policy.**

(a) It is JAG's policy to investigate and resolve, expeditiously and fairly, all allegations of professional impropriety lodged against covered attorneys under JAG supervision.

(b) Rules Counsel approval will be obtained before conducting any preliminary inquiry or formal investigation into an alleged violation of the Rules of Professional Conduct (subpart B of this part) or the ABA Model Code of Judicial Conduct (Code of Judicial Conduct). The Rules Counsel will notify the JAG prior to the commencement of any preliminary inquiry or investigation. The preliminary inquiry and any subsequent investigation will be conducted according to the procedures set forth in this subpart.

#### **§ 776.77 Related investigations and actions.**

Acts or omissions by covered attorneys may constitute professional misconduct, criminal misconduct, poor performance of duty, or a combination of all three. Care must be taken to

characterize appropriately the nature of a covered attorney's conduct to determine who may and properly should take official action.

(a) Questions of legal ethics and professional misconduct by covered attorneys are within the exclusive province of the JAG. Ethical or professional misconduct will not be attributed to any covered attorney in any official record without a final JAG determination, made in accordance with this part, that such misconduct has occurred.

(b) Criminal misconduct is properly addressed by the covered USG attorney's commander through the disciplinary process provided under the UCMJ and implementing regulations, or through referral to appropriate civil authority.

(c) Poor performance of duty is properly addressed by the covered USG attorney's reporting senior through a variety of administrative actions, including documentation in fitness reports or employee appraisals.

(d) Prior JAG approval is not required to investigate allegations of criminal conduct or poor performance of duty involving covered attorneys. When, however, investigations into criminal conduct or poor performance reveal conduct that constitutes a violation of this part, or of the Code of Judicial Conduct in the case of judges, such conduct shall be reported to the Rules Counsel immediately.

(e) Generally, professional responsibility complaints will be processed in accordance with this part upon receipt. Rules Counsel may, however, on a case-by-case basis, delay such processing to await the outcome of pending related criminal, administrative, or investigative proceedings.

(f) Nothing in this part prevents a military judge or other appropriate official from removing a covered attorney from acting in a particular court-martial or prevents the JAG, the SJA to CMC, or the appropriate official from reassigning a covered attorney to different duties prior to, during, or subsequent to proceedings conducted under the provision of this part.

#### **§ 776.78 Informal complaints.**

Informal, anonymous, or "hot line" type complaints alleging professional misconduct must be referred to the appropriate authority (such as the JAG Inspector General or the concerned supervisory attorney) for inquiry. Such complaints are not, by themselves, cognizable under this subpart but may, if reasonably confirmed, be the basis of

a formal complaint described in § 776.79 of this part.

#### **§ 776.79 The formal complaint.**

(a) The formal complaint shall:  
(1) Be in writing and be signed by the complainant;

(2) State that the complainant has personal knowledge, or has otherwise received reliable information indicating, that:

(i) The covered attorney concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity, that constitutes a violation of this part or the Code of Judicial Conduct or a failure to meet the ethical standards of the profession; or

(ii) The covered attorney concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(iii) Contain a complete, factual statement of the acts or omissions constituting the substance of the complaint, as well as a description of any attempted resolution with the covered attorney concerned. Supporting statements, if any, should be attached to the complaint.

(b) A complaint may be initiated by any person, including the Administrative Law Division of the Office of the Judge Advocate General (OJAG) Administrative Law Division (Code 13) or the Judge Advocate Research and Civil Law Branch, Office of the SJA to CMC, HQMC (JAR).

#### **§ 776.80 Initial screening.**

(a) Complaints involving conduct of a Navy or Marine Corps trial or appellate judge shall be forwarded to OJAG (Code 05). All other complaints shall be forwarded to OJAG (Code 13) or, in cases involving Marine Corps judge advocates or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of the SJA to CMC, to JAR. In cases involving Marine judge advocates, including trial and appellate judges, where the SJA to CMC is not the Rules Counsel, the cognizant Rules Counsel will notify the SJA to CMC when a complaint is received.

(b) OJAG (Code 05), OJAG (Code 13), and JAR shall log all formal complaints received and will ensure a copy of the complaint and allied papers is provided to the covered attorney who is the subject of the complaint. Service of the formal complaint and other materials on the covered attorney must be accomplished through personal service or registered/certified mail sent to the covered attorney's last known address reflected in official Navy and Marine Corps records or in the records of the

state bar(s) that licensed the attorney to practice law. The covered attorney's supervisory attorney must also be report notice of the complaint.

(c) The covered attorney concerned may elect to provide an initial statement, normally within ten calendar days from receipt, regarding the complaint to the Rules Counsel's consideration. The covered attorney will promptly inform OJAG (Code 05), OJAG (Code 13), or JAR if he or she intends to submit any such statement. At this screening stage, forwarding of the complaint to the Rules Counsel will not be unduly delayed to await the covered attorney's submission.

(d) The cognizant Rules Counsel shall initially review the complaint, and any statement submitted by the covered attorney complained of, to determine whether it complies with the requirements set forth in paragraph (4) of this section. The Rules Counsel is not required to delay the initial review of the complaint awaiting the covered attorney's submission.

(1) Complaints that do not comply with the requirements may be returned to the complainant for correction or completion, and resubmission to OJAG (Code 05), OJAG (Code 13), or JAR.

(i) If the complaint is not corrected or completed and resubmitted within 30 days of the date of its return, the Rules Counsel may close the file without further action.

(ii) OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence relating to the return and resubmission of a complaint, and shall notify the covered attorney concerned, as well as the supervisory attorney, if and when the Rules Counsel takes action to close the file.

(2) Complaints that comply with the requirements shall be further reviewed by the cognizant Rules Counsel to determine whether the complaint establishes probable cause to believe that a violation of subpart B of this part or Code of Judicial Conduct has occurred.

(e) The cognizant Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe a violation has occurred. The Rules Counsel shall notify the complainant, the covered attorney concerned, and the supervisory attorney, that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file.

(f) The cognizant Rules Counsel may close the file if there is a determination that the complaint establishes probable cause but the violation is of a minor or

technical nature appropriately addressed through corrective counseling. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.)

(1) The Rules Counsel shall ensure the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and the supervisory attorney that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file.

(2) The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting of such action.

#### **§ 776.81 Forwarding the Complaint.**

(a) If the Rules Counsel determines there is probable cause to believe that a violation of subpart B of this part or of the Code of Judicial Conduct has occurred, and the violation is not of a minor or technical nature, the Rules Counsel shall notify the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, the SJA to CMC shall also be notified.) The Rules Counsel shall forward the complaint and any allied papers, as follows:

(1) In cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(2) In cases involving a military appellate judge, if practicable, to a covered attorney with experience as a military appellate judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(3) In all other cases, to such covered attorney as the cognizant Rules Counsel may designate (normally senior to the covered attorney complained of and not previously involved in the case), and assign the officer to conduct a preliminary inquiry into the matter.

(b) The Rules Counsel shall provide notice of the complaint (if not

previously informed) as well as notice of the preliminary inquiry:

(1) To the covered attorney against whom the complaint is made as well as the supervisory attorney;

(2) In cases involving a covered USG attorney on active duty or in civilian Federal service, to the commanding officer, or equivalent, of the covered USG attorney concerned;

(3) In cases involving Navy or Marine Corps judge advocates serving in Naval Legal Service Command (NLSC) units, to Commander, NLSC;

(4) In cases involving Navy attorneys serving in Marine Corps units, involving Marine Corps attorneys serving in Navy units, or involving Marine Corps trial and appellate judges, to the SJA to CMC (Attn: JAR);

(5) In cases involving trial or appellate court judges, to either the Chief Judge, Navy-Marine Corps Trial Judiciary or Chief Judge, Navy-Marine Corps Court of Criminal Appeals, as appropriate; and

(6) In cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other uniformed services, to the appropriate military service attorney discipline section.

#### **§ 776.82 Interim suspension.**

(a) Where the Rules Counsel determines there is probable cause to believe that a covered attorney has committed misconduct and poses a substantial threat of irreparable harm to his or her clients or the orderly administration of military justice, the Rules Counsel shall so advise the JAG. Examples of when a covered attorney may pose a "substantial threat of irreparable harm" include, but are not limited to:

(1) When charged with the commission of a crime which involves moral turpitude or reflects adversely upon the covered attorney's fitness to practice law, and where substantial evidence exists to support the charge;

(2) When engaged in the unauthorized practice of law (e.g., failure to maintain good standing in accordance with § 776.71 of this part); or

(3) Where unable to represent client interests competently.

(b) Upon receipt of information from the Rules Counsel, JAG may order the covered attorney to show cause why he or she should not face interim suspension, pending completion of a professional responsibility investigation. The covered attorney shall have 10 calendar days in which to respond. Notice of the show cause order shall be provided as outlined in § 776.81(b) of this part.

(c) If an order to show cause has been issued under paragraph (b) of this section, and the period for response has passed without a response, or after consideration of any response and finding sufficient evidence demonstrating probable cause to believe that the covered attorney is guilty of misconduct and poses a substantial threat of irreparable harm to his or her client or the orderly administration of military justice, the JAG may direct an interim suspension of the covered attorney's certification under Articles 26(b) or 27(b), UCMJ, or R.C.M. 502(d)(3), or the authority to provide legal assistance, pending the results of the investigation and final action under this part. Notice of such action shall be provided as outlined in § 776.81(b) of this part.

(d) Within 10 days of the JAG's decision to impose an interim suspension, the covered attorney may request an opportunity to be heard before an impartial officer designated by the JAG. Where so requested, that opportunity will be scheduled within 10 calendar days of the request. The designated officer shall receive any information that the covered attorney chooses to submit on the limited issue of whether to continue the interim suspension. The designated officer shall submit a recommendation to the JAG within 5 calendar days of conclusion.

(e) A covered attorney may, based upon a claim of changed circumstances or newly discovered evidence, petition for dissolution or amendment of the JAG's imposition of interim suspension.

(f) Any professional responsibility investigation involving a covered attorney who has been suspended pursuant to subpart B of this part shall proceed and be concluded without appreciable delay. However, the JAG may determine it necessary to await completion of a related criminal investigation or proceeding, or completion of a professional responsibility action initiated by other licensing authorities. In such cases, the JAG shall cause the Rules Counsel to so notify the covered attorney under interim suspension as well as those officials outlined in § 776.81(b) of this part. Where necessary, continuation of the interim suspension shall be reviewed by the JAG every 6 months.

#### **§ 776.83 Preliminary inquiry.**

(a) The purpose of the preliminary inquiry is to determine whether, in the opinion of the officer appointed to conduct the preliminary inquiry (PIO), the questioned conduct occurred and, if so, whether the preponderance of the evidence demonstrates that such

conduct constitutes a violation of subpart B of this part or the Code of Judicial Conduct. The PIO is to recommend appropriate action in cases of substantiated violations.

(b) Upon receipt of the complaint, the PIO shall promptly investigate the allegations, generally following the format and procedures set forth in the Manual of the Judge Advocate General (JAGMAN) for the conduct of command investigations. Reports of relevant investigations by other authorities including, but not limited to, the command, the Inspector General, and State licensing authorities should be used. The PIO should also:

(1) Identify and obtain sworn affidavits or statements from all relevant and material witnesses to the extent practicable;

(2) Identify, gather, and preserve all other relevant and material evidence; and

(3) Provide the covered attorney concerned an opportunity to review all evidence, affidavits, and statements collected and a reasonable period of time (normally not exceeding 10 calendar days) to submit a written statement or any other written material that the covered attorney wishes considered.

(c) The PIO may appoint and use such assistants as may be necessary to conduct the preliminary inquiry.

(d) The PIO shall personally review the results of the preliminary inquiry to determine whether, by a preponderance of the evidence, a violation of subpart B of this part or of the Code of Judicial Conduct has occurred.

(1) If the PIO determines that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the PIO determines by a preponderance of the evidence that a violation did occur, and that corrective action greater than counseling may be warranted, he or she shall:

(i) Draft a list of substantiated violations of these Rules of Professional Conduct or the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the preliminary inquiry to the Rules Counsel, providing copies to the covered attorney concerned and the supervisory attorney.

(e) The Rules Counsel shall review all preliminary inquiries. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the PIO, or to another inquiry officer, for further or

supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the PIO recommendation or through the Rules Counsel's own review of the report, that a violation of this part has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that a violation of subpart B of this part has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file.

(i) The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(ii) The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that further professional discipline or corrective action may be warranted, the Rules Counsel shall notify the JAG and take the following action:

(i) In cases involving a military trial judge, if practicable, forward the recommendation to a covered attorney with experience as a military trial judge (normally senior to and of the same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of reference (b));

(ii) In cases involving a military appellate judge, forward the recommendation to a covered attorney with experience as a military appellate judge (normally senior to and of the

same Service (Navy or Marine Corps) as the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of reference (b)); or

(iii) In all other cases, assign a covered attorney (normally senior to the covered attorney complained of and not previously involved in the case) to conduct an ethics investigation.

#### **§ 776.84 Ethics investigation.**

(a) When an ethics investigation is initiated, the covered attorney concerned shall be so notified, in writing, by the Rules Counsel. Notice of such action shall also be provided as outlined in § 776.81(b) of this part.

(b) The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

(1) To request a hearing before the investigating officer (IO);

(2) To inspect all evidence gathered;

(3) To present written or oral statements or materials for consideration;

(4) To call witnesses at his or her own expense (local military witnesses should be made available at no cost);

(5) To be assisted by counsel (see paragraph (c) of this section);

(6) To challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and

(7) To waive any or all of these rights. Failure to affirmatively elect any of the rights included in this section shall be deemed a waiver by the covered attorney.

(c) If a hearing is requested, the covered attorney may be represented by counsel at the hearing. Such counsel may be:

(1) A civilian attorney retained at no expense to the Government; or,

(2) In the case of a covered USG attorney, another USG attorney:

(i) Detailed by the cognizant Naval Legal Service Office (NLSO), (or Defense Services Office (DSO), effective October 1, 2012), Law Center, or Legal Service Support Section (LSSS); or

(ii) Requested by the covered attorney concerned, if such counsel is deemed reasonably available in accordance with the provisions regarding individual military counsel set forth in Chapter I of the JAGMAN. There is no right to detailed counsel if requested counsel is made available.

(d) If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned.

(1) The hearing will not be unreasonably delayed. The hearing is

not adversarial in nature and there is no right to subpoena witnesses.

(2) Rules of evidence do not apply.

(3) The covered attorney concerned or his or her counsel may question witnesses that appear.

(4) The proceedings shall be recorded but no transcript of the hearing need be made.

(5) Evidence gathered during, or subsequent to, the preliminary inquiry and such additional evidence as may be offered by the covered attorney shall be considered.

(e) The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

(f) The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or, by clear and convincing evidence, that the violation has occurred but the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes by clear and convincing evidence that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall:

(i) Modify, as necessary, the list of substantiated violations of this part or, in the case of a military trial or appellate judge, the Code of Judicial Conduct;

(ii) Recommend appropriate action; and

(iii) Forward the ethics investigation to the Rules Counsel with a copy to the attorney investigated.

(g) The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of subpart B of this part or Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint. OJAG (Code 05), OJAG (Code 13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the

investigation, that a violation of this part or Code of Judicial Conduct has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG.

(i) In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.

(ii) The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(iii) The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own review of the inquiry report, that professional disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to the JAG. (In cases relating to Marine judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.)

#### **§ 776.85 Effect of separate proceeding.**

(a) For purposes of this section, the term "separate proceeding" includes, but is not limited to, court-martial, non-judicial punishment, administrative board, or similar civilian or military proceeding.

(b) In cases in which a covered attorney is determined, at a separate proceeding determined by the Rules Counsel to afford procedural protection equal to that provided by a preliminary inquiry under this part, to have committed misconduct that forms the basis for ethics charges under this part, the Rules Counsel may dispense with the preliminary inquiry and proceed directly with an ethics investigation.

(c) In those cases in which a covered attorney is determined to have committed misconduct at a separate

proceeding which the Rules Counsel determines has afforded procedural protection equal to that provided by an ethics investigation under this part, the previous determination regarding the underlying misconduct is res judicata with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the covered attorney a hearing into whether the underlying misconduct constitutes a violation of subpart B of this part, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

(d) Notwithstanding paragraphs (b) and (c) in this section, the Rules Counsel may dispense with the preliminary inquiry and ethics investigation and, after affording the covered attorney concerned written notice and an opportunity to be heard in writing, recommend to the JAG that the covered attorney concerned be disciplined under this part when the covered attorney has been:

(1) Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the JAG or Chief Counsel of another Military Department;

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

(3) Convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court that, in the opinion of the Rules Counsel, renders the attorney unqualified or incapable of properly or ethically representing the DoN or a client when the Rules Counsel has determined that the attorney was afforded procedural protection equal to that provided by an ethics investigation under this part.

#### **§ 776.86 Action by the Judge Advocate General.**

(a) The JAG is not bound by the recommendation rendered by the Rules Counsel, IO, PIO, or any other interested party, but will base any action on the record as a whole. Nothing in this part limits the JAG's authority to suspend from the practice of law in DoN matters any covered attorney alleged or found to have committed professional misconduct or violated subpart B of this part, either in DoN or civilian proceedings, as detailed in this part.

(b) The JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of

subpart B of this part or its application to the facts of a particular case.

(c) Upon receipt of the ethics investigation, and any requested advisory opinion, the JAG will take such action as the JAG considers appropriate in the JAG's sole discretion. The JAG may, for example:

(1) Direct further inquiry into specified areas.

(2) Determine the allegations are unfounded, or that no further action is warranted, and direct the Rules Counsel to make appropriate file entries and notify the complainant, covered attorney concerned, and all officials previously notified of the complaint.

(3) Determine the allegations are supported by clear and convincing evidence, and take appropriate corrective action including, but not limited to:

(i) Limiting the covered attorney to practice under direct supervision of a supervisory attorney;

(ii) Limiting the covered attorney to practice in certain areas or forbidding him or her from practice in certain areas;

(iii) Suspending or revoking, for a specified or indefinite period, the covered attorney's authority to provide legal assistance;

(iv) Finding that the misconduct so adversely affects the covered attorney's ability to practice law in the naval service or so prejudices the reputation of the DoN legal community, the administration of military justice, the practice of law under the cognizance of the JAG, or the armed services as a whole, that certification under Article 27(b), UCMJ, or R.C.M. 502(d)(3), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or permanently revoked;

(v) In the case of a judge, finding that the misconduct so prejudices the reputation of military trial and/or appellate judges that certification under Article 26(b), UCMJ (10 U.S.C. 826(b)), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or to be permanently revoked; and

(vi) Directing the Rules Counsel to contact appropriate authorities such as the Chief of Naval Personnel or the Commandant of the Marine Corps so that pertinent entries in appropriate DoN records may be made; notifying the complainant, covered attorney concerned, and any officials previously provided copies of the complaint; and notifying appropriate tribunals and authorities of any action taken to

suspend, decertify, or limit the practice of a covered attorney as counsel before courts-martial or the U.S. Navy-Marine Corps Court of Criminal Appeals, administrative boards, as a legal assistance attorney, or in any other legal proceeding or matter conducted under JAG cognizance and supervision.

#### **§ 776.87 Finality.**

Any action taken by the JAG is final.

#### **§ 776.88 Report to licensing authorities.**

Upon determination by the JAG that a violation of subpart B of this part or the Code of Judicial Conduct has occurred, the JAG may cause the Rules Counsel to report that fact to the Federal, State, or local bar or other licensing authority of the covered attorney concerned. If so reported, notice to the covered attorney shall be provided by the Rules Counsel. This decision in no way diminishes a covered attorney's responsibility to report adverse professional disciplinary action as required by the attorney's Federal, State, and local bar or other licensing authority.

#### **Subpart D—Outside Practice of Law by Covered USG Attorneys**

##### **§ 776.89 Background.**

(a) A covered USG attorney's primary professional responsibility is to the DoN, and he or she is expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. Covered USG attorneys engaged in the outside practice of law, including while on terminal leave, must comply with local bar rules governing professional responsibility and conduct and obtain proper authorization from the JAG as required by § 776.57 and § 776.88 of this part.

(b) Outside employment of DoN personnel, both military and civilian, is limited by the UCMJ, MCM, and 10 U.S.C. 1044. A covered USG attorney may not provide compensated legal services, while working in a private capacity, to persons who are eligible for legal assistance, unless specifically authorized by the JAG. See § 776.24. Because of the appearance of misuse of public office for private gain, this prohibition is based upon the status of the proposed client and applies whether or not the services provided are actually available in a DoN/DoD legal assistance office.

(c) Additionally, DoN officers and employees are prohibited by 18 U.S.C. 209 from receiving pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically

authorized by law. Furthermore, 18 U.S.C. 203 and 205 prohibit Federal officers and employees from personally representing or receiving, directly or indirectly, compensation for representing any other person before any Federal agency or court on matters in which the United States is a party or has an interest.

(d) These limitations are particularly significant when applied to covered USG attorneys who intend to engage concurrently in a civilian law practice. In such a situation, the potential is high for actual or apparent conflict arising from the mere opportunity to obtain clients through contacts in the course of official business. Unique conflicts or adverse appearances may also develop because of a covered USG attorney's special ethical responsibilities and loyalties.

#### **§ 776.90 Definition.**

(a) Outside practice of law is defined as any provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant to incident to duties as a covered USG attorney (including while on terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of this instruction.

(b) The requirement to seek permission prior to engaging in the outside practice of law does not apply to non-USG attorneys, or to Reserve or Retired judge advocates unless serving on active duty for more than 30 consecutive days.

#### **§ 776.91 Policy.**

(a) As a general rule, the JAG will not approve requests by covered USG attorneys to practice law in association with attorneys or firms which represent clients with interests adverse to the DoN.

(b) The JAG's approval of a particular request does not constitute DoN certification of the requesting attorney's qualifications to engage in the proposed practice or DoN endorsement of activities undertaken after such practice begins. Moreover, because any outside law practice is necessarily beyond the scope of a covered USG attorney's official duties, the requesting attorney should consider obtaining personal malpractice insurance coverage.

#### **§ 776.92 Action.**

(a) Covered USG attorneys, who contemplate engaging in the outside practice of law, including while on terminal leave, must first obtain approval from the JAG. Requests should be forwarded in the form prescribed in § 776.94 of this part to OJAG (Code 05), JAG (Code 13), or JAR, as appropriate, via the attorney's chain of command.

(b) The requesting attorney's commanding officer may:

(1) Disapprove and return the request if he or she perceives actual or apparent conflicts of interests;

(2) Recommend disapproval of the request and forward it, along with his or her rationale for such a recommendation; or

(3) Forward the request recommending approval and providing such other information as may be relevant.

(c) The JAG will review the request and advise applicants in writing of the decision, and of any conditions and limitations under which a particular practice may be undertaken. Until permission is granted, applicants will not commence any outside law practice.

#### **§ 776.93 Revalidation.**

(a) Covered USG attorneys to whom permission is given to engage in the outside practice of law will notify the JAG in writing, via their chain of command, within 30 days of any material change in:

(1) The nature or scope of the outside practice described in their requests, including termination, or

(2) Their DoN assignment or responsibilities.

(b) Covered USG attorneys to whom permission is given to engage in the outside practice of law will annually resubmit an application to continue the practice, with current information, by October 1 each year.

#### **§ 776.94 Outside Law Practice Questionnaire and Request.**

DATE

From: (Attorney Requesting Outside Practice of Law)

To: Deputy Chief Judge, Navy-Marine Corps Trial Judiciary/Deputy Assistant Judge Advocate General (Administrative Law)/Head, Judge Advocate Research and Civil Law Branch, Judge Advocate Division

Via: (Chain of Command)

Subj: OUTSIDE PRACTICE OF LAW REQUEST ICO (Name of attorney)

##### **1. Background Data**

a. Name, rank/pay grade:

b. Current command and position:

c. Description of duties and responsibilities (including collateral duty assignments):

d. Describe any DoN responsibilities that require you to act officially in any way with respect to any matters in which your anticipated outside employer or clients have interests:

e. Normal DoN working hours:

##### **2. Proposed Outside Practice of Law Information**

a. Mailing address and phone number:

b. Working hours:

c. Number of hours per month:

d. Description of proposed practice (indicate the type of clientele you anticipate serving, as well as the type of work that you will perform):

e. Describe whether you will be a sole practitioner, or collocated, renting from, or otherwise affiliated or associated in any matter with other attorneys:

f. Describe, in detail, any anticipated representation of any client before the United States or in any matter in which the United States has an interest:

g. Describe the manner in which you will be compensated (hourly, by case, fixed salary, and how much of your fees will be related in any way to any representational services before the Federal Government by yourself or by another):

h. Provide a description of any military-related work to which your proposed practice may be applied including, but not limited to, courts-martial, administrative discharge boards, claims against the Department of the Navy, and so forth:

##### **3. Attorneys With Whom Outside Practice is/Will be Affiliated, Collocated, or Otherwise Associated**

a. Identify the type of organization with which you will be affiliated (sole practitioner, partnership, and so forth), the number of attorneys in the firm, and the names of the attorneys with whom you will be working:

b. Identify the attorneys in the firm who are associated in any way with the military legal community (e.g., active, Reserve, or retired judge advocate), and specify their relationship to any of the military services:

c. Identify the nature of your affiliation with the organization with which you intend to be associated (staff attorney, partner, associate, space-sharing, rental arrangement, other):

d. Provide a brief description of the type of legal practice engaged in by the organization with which you intend to affiliate, including a general description of the practice, as well as the clientele:

e. Describe the clientele who are military personnel or their dependents,

and the number and type of cases handled:

f. Describe whether your affiliates will refer clients to you, and the anticipated frequency of referral:

g. Describe

(1) Whether your associates will assist or represent clients with interests adverse to the United States or in matters in which the United States has an interest:

(2) Those clients, matters, and interests in detail:

(3) What support will you provide in such cases:

(4) What compensation, in any form, you will receive related to such cases:

#### 4. Desired Date of Commencement of Outside Practice

a. Identify if this is your first request or an annual submission for re-approval:

b. If this is an annual submission, indicate when your outside practice began:

c. If this is your first request, indicate when you wish to begin your practice:

#### 5. Conflicts of Interest and Professional Conduct (Include the following statement in your request)

"I certify that I have read and understand my obligations under enclosure (3) to JAGINST 5803.1 (series), DOD 5500.7-R, Joint Ethics Regulation, JAGMAN Chapter VII, the Legal Assistance Manual, and Title 18, U.S.C. 203, 205, and 209. I certify that no apparent or actual conflict of interests or professional improprieties are presented by my proposed initiation/continuation of an outside law practice. I also certify that if an apparent conflict of interest or impropriety arises during such outside practice, I will report the circumstances to my supervisory attorney immediately."

6. Privacy Act Statement. I understand that the preceding information is gathered per the Privacy Act as follows:

Authority: Information is solicited per Executive Order 12731 and DOD 5500.7-R.

Primary purpose: To determine whether outside employment presents conflicts of interest with official duties.

Routine use: Information will be treated as sensitive and used to determine propriety of outside employment.

Disclosure: Disclosure is voluntary. Failure to provide the requested information will preclude the Judge Advocate General from approving your outside practice of law request.

Signature

#### Subpart E—Relations With Non-USG Counsel

##### § 776.95 Relations With Non-USG Counsel.

(a) This part applies to non-USG attorneys representing individuals in any matter for which the JAG is charged with supervising the provision of legal services, including but not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(1) Employment of a non-USG attorney by an individual client does not alter the responsibilities of a covered USG attorney to that client.

(2) Although a non-USG attorney is individually responsible for adhering to the contents of this part, the covered USG attorney detailed or otherwise assigned to that client shall take reasonable steps to inform the non-USG attorney:

(i) Of the contents of this part;

(ii) That subpart B of this part apply to civilian counsel practicing before military tribunals, courts, boards, or in any legal matter under the supervision

of the JAG as a condition of such practice; and

(iii) That subpart B of this part take precedence over other rules of professional conduct that might otherwise apply, but that the attorney may still be subject to rules and discipline established by the attorney's Federal, state, or local bar association or other licensing authority.

(b) If an individual client designates a non-USG attorney as chief counsel, the detailed USG attorney must defer to civilian counsel in any conflict over trial tactics. If, however, the attorneys have "co-counsel" status, then conflict in proposed trial tactics requires the client to be consulted to resolve the conflict.

(c) If the non-USG attorney has, in the opinion of the involved covered USG attorney, acted or failed to act in a manner which is contrary to subpart B of this part, the matter should be brought to the attention of the civilian attorney. If the matter is not resolved with the civilian counsel, the covered USG attorney should discuss the situation with the supervisory attorney. If not resolved between counsel, the client must be informed of the matter by the covered USG attorney. If, after being apprised of possible misconduct, the client approves of the questioned conduct, the covered USG attorney shall attempt to withdraw from the case in accordance with § 776.35 of this part. The client shall be informed of such intent to withdraw prior to action by the covered USG attorney.

Dated: April 18, 2013.

**C.K. Chiappetta,**

*Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.*

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