

AIR FORCE RULES OF PROFESSIONAL CONDUCT

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INTRODUCTION TO THE AIR FORCE RULES OF PROFESSIONAL CONDUCT

The *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*), apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in Air Force Judge Advocate General's Corps. This includes host nation lawyers and other host nation personnel employed overseas by the Department of the Air Force, to the extent the *Rules* are not inconsistent with their domestic law and professional standards (see Rule 8.5). The *Rules* also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including, but not limited to, civilian defense counsel (and their assistants) with no connection to the Air Force. Although the AFRPC is not punitive in nature, it establishes the minimum standards of ethical conduct demanded of these individuals. Violations may be addressed administratively, or through actions to withdraw certification or designation.

Beyond establishing minimum standards, the *Rules* are designed to meet three important objectives. They provide workable guidance to Air Force lawyers, they are specific to the problems and needs of our practice, and they are accessible to Air Force lawyers assigned throughout the world. The AFRPC is directly adapted from the *American Bar Association (ABA) Model Rules of Professional Conduct*, with important contributions from *Army Rules of Professional Conduct for Lawyers* and the Navy instruction: *Professional Conduct of Attorneys Practicing Under the Supervision of The Judge Advocate General*.

Where an ABA rule has been altered, the Air Force rule indicates that it was modified. Where material has been added, the new material is so labeled, and the term "substituted" indicates that a rule has been entirely replaced. Simple terminology changes made to conform a rule to Air Force practice, without substantive changes, are not annotated as being modified. Some of the *Rules* contain discussion sections, designed to explain or amplify the rule, place it in context, or provide additional guidance. Discussions are interpretive tools, not binding upon counsel, but helpful in understanding and using the *Rules*. Although the comments to the *ABA Model Rules* have not been incorporated, counsel are encouraged to consult them for guidance and assistance in placing the *Rules* in context. In doing so, counsel must be aware that the AFRPC was specifically adapted to the unique needs and demands of Air Force practice, and not all of the ABA comments will be helpful.

One of the most difficult issues Air Force lawyers may confront is who the client is and where counsel's loyalties belong. Rule 1.13 addresses this question at length and cautions that, under some circumstances, a lawyer may encounter a conflict between his or her obligation to the Air Force as his or her client, and the needs and interests of individual officials, employees, and agents of the Air Force. Another difficult area is the question of client confidentiality (Rule 1.6). Although language was added to recognize Air Force security and mission needs, the Air Force rule very closely follows the ABA rule with respect to confidentiality.

In adapting the *Rules*, a conscious attempt was made to balance Air Force needs with the position of Air Force lawyers as members and leaders in the mainstream of the legal profession in the United States. It is an appropriate balance, but one that carries heavy obligations to the service and the profession. The quality and professionalism of the lawyers in this Corps provide ample assurance that those obligations will be met.

CHAPTER 1

LAWYER-CLIENT RELATIONSHIP

Rule 1.1. COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation.

Rule 1.2. ESTABLISHMENT AND SCOPE OF REPRESENTATION

(a) [Modified] A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive trial by court members, the composition of the court, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's economic, social, or moral views or activities.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

(d) A lawyer will not counsel a client to engage in, or assist a client in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the AFRPC or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

DISCUSSION

Subsection (a) recognizes the balance between a client's ultimate authority within the limits imposed by law and the lawyer's professional responsibilities to determine the purposes to be served by the representation and the lawyer's responsibility for tactical and technical issues and considerations. Some decisions, such as whether to stipulate or proffer a pretrial agreement, must be made jointly by the lawyer and client within the context of applicable regulations, the Uniform Code of Military Justice (UCMJ), and the Manual for Courts-Martial (MCM). The subsection was modified slightly to include the client's sole authority, within the limits prescribed by the Rules for Courts-Martial (R.C.M.) Rule 903, to elect the composition of his or her court-martial. See also, TJAG Policy Memorandum TJS-3, *Air Force Standards for Criminal Justice* (AFSCJ or the *Standards*), Standard 4-5.2 and Standard 4-8.2.

Rule 1.3. DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. COMMUNICATION

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

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

Rule 1.5. FEES

[Omitted as inapplicable to military practice.]

DISCUSSION

Air Force lawyers do not charge or collect fees. Civilian lawyers who do are regulated and may be sanctioned by state or federal bar authorities.

Rule 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) [Modified] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

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

DISCUSSION

Subparagraph (b)(1) was expanded to include substantial impairment to national security and readiness, recognizing the realities of the mission of the United States Air Force. A lawyer's duty to a client is a strong one. If it is possible for the lawyer to act to prevent ongoing or potential criminal misconduct without violating a client confidence, those actions should always be considered first. In the circumstances described in the rule, a lawyer is excused from his fundamental obligation to preserve client confidences. See also Rule 1.13, Rule 5.4, and Standard 4-3.7.

Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

DISCUSSION

Some limitations may be inherent in representation by an Air Force lawyer. Counsel should always ensure that each client is aware of such limitations and how they may specifically affect the representation. See Rule 1.2, Rule 1.4, Rule 1.13, and Standard 4-3.5.

Rule 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not 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 Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) [Modified] A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation.

[(f) Omitted]

(g) [Modified] A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle the claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person the lawyer knows is represented by the other lawyer, except upon consent by the client after consultation regarding the relationship.

[(j) Omitted]

DISCUSSION

Conflicts of interest in the nature of prohibited transactions are specifically prohibited by the *Joint Ethics Regulation* (JER), DoD 5500.7-R. That regulation, the underlying Department of Defense Directive 5500.7, *Standards Of Conduct*, and applicable Federal statutes (see generally 5 U.S.C. Section 7301 and 18 U.S.C. Sections 202 to 209) are an Air Force lawyer's primary authority concerning conflicts of this nature.

Subsection (c) was modified to omit exceptions that are inapplicable to Air Force practice.

Language concerning aggregated pretrial agreements in criminal cases was deleted from subsection (g) as inapplicable to military practice (see R.C.M. 705 and AFI 51-201, *Administration of Military Justice*, Chapter 6).

By adopting the ABA rule, the Air Force rule establishes only ethical parameters. It is doubtful that Air Force lawyers will find it necessary to obtain releases such as the ones described in 1.8(h). See 10 U.S.C. Section 1054 and 28 U.S.C. Sections 1346 (b) and 2672 limiting remedies for malpractice by Air Force lawyers to actions against the United States.

Rule 1.9. CONFLICT OF INTEREST: FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client, except as Rule 1.6 or Rule 3.3 would permit with respect to a client or when the information has become generally known.

Rule 1.10. IMPUTED DISQUALIFICATION [Substituted]

Air Force lawyers who work in the same military law office are not automatically disqualified from representing a client even if other Air Force lawyers in that office would be prohibited from doing so by Rule 1.7, Rule 1.8(c), Rule 1.9, or Rule 2.2.

DISCUSSION

Lawyer associations such as law firms are not directly analogous to military legal offices. The appropriate test is whether an actual conflict exists that directly prejudices the interests of a client. See *United States v. Rushatz*, 31 M.J. 450 (C.M.A. 1990); *United States v. Reynolds*, 24 M.J. 261 (C.M.A. 1987); *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987) and *United States v. Payton*, 23 M.J. 379 (C.M.A. 1987), all dealing generally with conflicts in criminal cases.

Rule 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

[Subsections (a) and (b) are omitted. See the JER and applicable law. See also Discussion, Rule 1.8 supra.]

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment; unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) [Modified] negotiate for private employment with any person or organization who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(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 appropriate government agency.

[(e) Omitted]

Rule 1.12. FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after consultation.

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

[(c) Omitted]

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

Rule 1.13. THE AIR FORCE AS CLIENT

(a) [Modified] Except when authorized to represent an individual client or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

(b) [Modified] If an Air Force lawyer reasonably believes that an official, member, employee, or other person associated with the Air Force is acting, intends to act, or refuses to act in an official matter in a way that is either a violation of the person's legal obligations to the Air Force or a violation of law which reasonably might be imputed to the Air Force, the lawyer shall proceed as is reasonably necessary in the best interest of the Air Force. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the apparent motivation of the person involved, the policies of the Air Force concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

(1) advising the person that, in the lawyer's opinion, the action, planned action, or refusal to act is contrary to law or regulation; advising the person of Air Force policy on the matter concerned; advising the person that his or her personal legal and professional interests are at risk; and asking the person to reconsider the matter;

(2) suggesting that a separate legal opinion on the matter be sought for presentation to the person or other appropriate Air Force authority;

(3) advising that person that the lawyer is ethically obligated to preserve the interests of the Air Force and, as a result, must consider discussing the matter with senior Air Force lawyers in the lawyer's office or at the next level of command and, again, asking the person to reconsider the matter;

(4) consulting with senior Air Force lawyers including, if warranted by the seriousness of the matter, referring the matter to the Air Force lawyer who serves as counsel to the person's superior in the chain of command.

(c) [Modified] If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the Air Force insists upon action or refusal to act that is clearly a violation of law, the lawyer may consult with senior Air Force lawyers at the same level of command or at higher levels of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid violation of the law by the Air Force and to prevent the lawyer from participating or assisting in a violation of the law. In no event shall the lawyer participate or assist in the illegal activity.

(d) [Modified] In dealing with Air Force officials, members, employees, or other persons associated with the Air Force, a lawyer shall explain that the Air Force is the lawyer's client when it is apparent that the Air Force's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.

(e) [Modified] A lawyer representing the Air Force may also represent any of its officials, members, or employees subject to the provisions of Rule 1.7 and other applicable authority. If the Air Force's consent to representation of such individuals is required by Rule 1.7, the consent shall be given by an appropriate Air Force official other than the individual who is to be represented.

(f) [Added] A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer-client relationship with that individual.

DISCUSSION

With limited exceptions, an Air Force lawyer represents the Department of the Air Force as it acts through its authorized representatives. Exceptions include, but are not limited to, lawyers assigned to represent individuals under subsection (f), trial counsel who represent the government of the United States, and counsel assigned to perform special duties such as assignment to the Department of Defense or Department of the Air Force Office of the General Counsel, or as an Assistant United States Attorney. In representing the Air Force, counsel serves his or her client by interacting with Air Force officials, members, and employees. When an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is confidential under Rule 1.6. Under these circumstances, the official, member or employee is, in essence, the Air Force.

If a lawyer knows that the Air Force may be substantially injured by an action of an official, member, or employee and the action is in violation of law, it may be necessary for the lawyer to take steps to have the matter reviewed by higher Air Force authority.

Air Force lawyers are required to act in a manner consistent with these rules. As discussed in the *Rules*, loyalty and confidentiality are ethical obligations owed to the Air Force and cannot be compromised.

As professional military officers and trusted counsel, it is also essential for Air Force lawyers to be personally loyal to the commanders, officials, and other individuals whom the lawyers advise. Loyalty and confidentiality are professional traits that are virtues only when they are consistent with a lawyer's ethical obligations to the client: the Air Force.

Determining whether to reveal otherwise confidential communications with a commander to higher Air Force authority requires mature judgment and common sense. If a lawyer perceives a conflict between his or her professional commitments to the commander and his or her ethical obligations to the Air Force, he or she may consult with a supervisory Air Force lawyer (see Rule 5.1 and Rule 5.2). If the situation cannot be resolved at that level, the senior lawyer should consult with appropriate Air Force lawyers at the next level of command. In extreme cases it may be necessary to refer the matter to The Judge Advocate General.

Conflicts of Interest. When Air Force interests are or become adverse to those of an individual authorized to act on behalf of the Air Force, the lawyer must advise the individual concerning the conflict. In such circumstances, the advice should explain that the lawyer cannot represent the individual, and that the individual may wish to obtain independent representation by an Air Force lawyer authorized to provide such representation or by other counsel. Care must be taken to ensure that the individual understands that when interests conflict, the Air Force lawyer represents the Air Force, not the individual, and discussions between the lawyer and the individual may not be privileged. The specific facts of each case will determine whether such a warning should be given by an Air Force lawyer to any official, member, or employee (see Rule 1.6 and Rule 5.4).

Rule 1.14. CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Rule 1.15. SAFEKEEPING PROPERTY

(a) [Substituted] Air Force lawyers will hold the property of clients or other persons only when doing so is necessary to further the representation of the client. When it is necessary for a lawyer to hold property, the lawyer must exercise the care of a fiduciary. Such property shall be clearly labeled or otherwise identified, held apart from the lawyer's personal property or from government property, and counsel should exercise substantial care to ensure the safety of the property. Property should be promptly returned when it is no longer necessary for the lawyer to retain it in order to further representation.

(b) [Substituted] When property of a client or third party is admitted into evidence or otherwise included in the record of an administrative or criminal proceeding, the lawyer should take reasonable action to ensure its prompt return.

DISCUSSION

Legal assistance lawyers and area defense counsel will often need to receive documents and other items from clients in order to properly investigate, research, and complete legal matters. This rule sets very basic, minimum standards for safeguarding such property. Subsection (b) requires counsel to take reasonable steps to secure the return of evidence to its owner, bearing in mind that return may not be possible until appellate review is completed.

In very rare circumstances, counsel may find it necessary to hold money or securities for a client or interested party. Counsel should be guided by existing Air Force instructions and policy as well as ABA

Rule 1.15, which requires, inter alia, depositing funds or securities in an appropriate, separate trust account or safety deposit box. The same general rule applies in situations involving money. Such property should only be accepted and held by a lawyer when doing so is necessary to further the client's representation.

Rule 1.16. DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the AFRPC or the law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) [Modified] the lawyer is discharged by the client.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if 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 lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (2) the client has used the lawyer's services to perpetrate a crime or fraud;
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- [(5) Omitted]
- (6) or other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) [Modified] Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, and surrendering papers and property to which the client is entitled. The lawyer may retain papers relating to the client to the extent permitted by other law.

DISCUSSION

Addition of the language "and other competent authority" in subsection (c) recognizes that Air Force lawyers are not always free to withdraw from representation. Competent authority may be supervising lawyers, or in some cases, counsel's superiors within his or her chain of command. Specific facts will govern each case. Subsection (b)(5) was omitted because Air Force lawyers will rarely, if ever, be exposed to unreasonable financial burdens related to representation. Finally, since Air Force lawyers will not receive advance payments or fees, reference to such payments was deleted from subsection (d).

CHAPTER 2
COUNSELOR

Rule 2.1. ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Rule 2.2. INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and disadvantages and risks involved, and the effect on the lawyer-client privilege, and obtains each client's consent to the common representation.

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with each client's best interests, that each client 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 clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant to making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any one of the clients so requests, or if any one of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients that were the subject of the intermediation.

Rule 2.3. EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

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

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

CHAPTER 3

ADVOCATE

Rule 3.1. MERITORIOUS CLAIMS AND CONTENTIONS

(a) A lawyer 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 lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or discharge, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) [Added] A lawyer does not violate this rule by raising issues in good faith reliance upon court precedent.

DISCUSSION

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

Rule 3.2. EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule 3.3. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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

DISCUSSION

Subsections (a)(2) and (a)(4) emphasize that lawyers must not help clients commit perjury, even by remaining silent when the lawyer knows that the client has offered false testimony. Counsel must do everything in their power to dissuade a client from lying, including seeking leave to withdraw from representation (see Rule 1.16), advising the client that the lawyer cannot argue or otherwise use the false testimony, and that the lawyer is obligated to disclose the perjury. See *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988 (1986). This rule must be distinguished from Rule 1.6, which addresses a lawyer's duty to preserve client confidences. By committing perjury, a client may be said to waive confidentiality as to the false testimony. As the Court pointed out in *Whiteside*, supra, although a client may have the right to testify,

that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *Nix v. Scurr*, 744 F.2d 1323,1328 (8th Cir. 1984), rev'd on other grounds, *Nix v. Whiteside*, supra. See *United States v Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

The term "legal authority in the controlling jurisdiction" in (a)(3) refers to Air Force or Department of Defense regulations or directives, the MCM, opinions by military appellate courts, or similar authorities.

Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

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

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

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

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

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

DISCUSSION

Rule 3.4(f) permits Air Force lawyers to advise officials, members, and employees of the Air Force to refrain from giving information to another party, especially when the individual's interests coincide with those of the Air Force. (See Rule 1.13 and Rule 4.2.)

Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) [Modified] seek to influence a judge, court or board member, prospective court or board member, or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

DISCUSSION

Terminology was modified to be consistent with Air Force practice.

Rule 3.6. PUBLICITY. (See Standard 3-1.3, Standard 4-1.3, Standard 8-1.1 and Standard 8-2.2.)

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto; or

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) and (6):

(i) the identity, residence, occupation, and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time, and place of arrest; and

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

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate or correct information that is the subject of recent publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

DISCUSSION

Air Force members must comply with applicable laws and regulations in making public statements of any kind. See, for example, AFI 51-201, Chapters 7 and 12; *The Freedom of Information Act (FOIA)*, 5 U.S.C. 552; DoD 5400.7-R/AF Supplement, *DoD Freedom of Information Act Program*; *The Privacy Act*, 5 U.S.C. 552a; AFI 33-332, *Air Force Privacy Act Program*; and *The Victim and Witness Protection Act*, 42 U.S.C. 10601-10605. Defense counsel, both military and civilian, must refer not only to Rule 3.6, but also to Standard 4-1.3 and Standard 8-1.1. Air Force prosecuting lawyers must refer not only to Rule 3.6, but also to Standard 3-1.3 and Standard 8-1.1. Other court personnel must refer to Rule 3.6 and Standard 8-2.2.

Rule 3.7. LAWYER AS WITNESS

(a) [Modified] A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's office is likely to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

DISCUSSION

See *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Cook*, 27 M.J. 212 (C.M.A. 1988).

Rule 3.8. SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL [Modified]

The trial counsel in a criminal case shall:

(a) [Substituted] recommend that the convening authority withdraw any charge or specification not warranted by the evidence;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a pretrial investigation under Article 32, UCMJ;

(d) at sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel in a criminal case from making an extrajudicial statement that the trial counsel would be prohibited from making under Rule 3.6.

DISCUSSION

This rule was modified to conform to military practice. In addition, the term "trial counsel" was substituted for "prosecutor"; however, the rule should be read to include other persons involved in a prosecution such as, for example, the Staff Judge Advocate and Chief of Military Justice. See also Rules 5.1 to 5.3.

Rule 3.9. ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rule 3.3(a) to (c), Rule 3.4(a) to (c), and Rule 3.5.

CHAPTER 4

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client, a lawyer shall not knowingly:

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

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

DISCUSSION

Communication with an officer, employee, or member of an organization represented by counsel is also included under this rule (see Rule 1.13 and Rule 3.4). A lawyer may not contact such persons without the other lawyer's consent or unless otherwise authorized by law.

Rule 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

DISCUSSION

The circumstances described in this rule can readily arise in the context of the judge advocate claims function. Claims officers and assistant claims officers who are lawyers should ensure that their written and oral communications comply with this rule.

Rule 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

CHAPTER 5

THE JUDGE ADVOCATE GENERAL'S CORPS

Rule 5.1. RESPONSIBILITIES OF A SUPERVISORY LAWYER [Modified]

(a) The Judge Advocate General shall make reasonable efforts to ensure that the Corps has in effect measures giving reasonable assurance that Air Force lawyers conform to the AFRPC.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the *Rules*.

(c) A lawyer shall be responsible for another lawyer's violation of the *Rules* if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

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

DISCUSSION

This rule was modified slightly in order to conform to military practice and recognize The Judge Advocate General's specific authority under Article 6, UCMJ, and R.C.M. Rule 109. See also AFI 51-102, *The Judge Advocate General's Department*.

Rule 5.2. RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by these rules notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a paralegal or other nonlawyer employed or retained by, associated with, or supervised by a lawyer:

(a) [Modified] the senior Air Force lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the conduct of all subordinate lawyers and nonlawyers is compatible with their professional obligations;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

DISCUSSION

Subsections (a) and (c) were modified slightly in order to conform with Air Force practice.

Rule 5.4. PROFESSIONAL INDEPENDENCE OF A LAWYER

[Substituted] Notwithstanding a judge advocate's status as a commissioned officer, or a civilian Air Force lawyer's responsibilities to higher authorities, an Air Force lawyer detailed or assigned to represent an individual is expected to exercise unfettered loyalty to the individual client. The lawyer shall exercise professional independence during the course of the representation consistent with the *Rules*, and is ultimately responsible for acting in the best interest of the individual client.

DISCUSSION

The substituted language was adapted from the Army and Navy rules (see page 1, *supra*), with two specific differences. First, language that an Air Force lawyer should exercise "unfettered loyalty and professional independence...to the same extent as required by a lawyer in private practice" was omitted as unnecessary. If anything, an Air Force lawyer representing an individual client, free from fee and other financial considerations, realistically may enjoy greater freedom and independence than those in private practice. The rule itself sets a clear standard that all lawyers are obligated to meet. See also Rules 1.6 and 1.13(f).

Rule 5.5. UNAUTHORIZED PRACTICE OF LAW [Modified]

Except as authorized by Air Force Instructions or other directives, a lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

DISCUSSION

An Air Force lawyer's performance of legal duties pursuant to military authorization is a federal function not subject to state regulation. Thus, an Air Force lawyer may perform legal assistance even though the lawyer is not licensed in the state where his or her duty station is located. Air Force lawyers may also provide professional advice and instruction to nonlawyers whose employment requires knowledge of law (for example, claims adjusters, social workers, and other persons employed in government agencies). In addition, the comment to the ABA rule specifically permits lawyers to counsel nonlawyers who wish to proceed pro se, a situation which often arises during legal assistance counseling.

Rule 5.6. RESTRICTIONS ON RIGHT TO PRACTICE

[Omitted as inapplicable to military practice.]

Rule 5.7. RESPONSIBILITIES REGARDING JUDGE ADVOCATE NON-LAW DUTIES

A judge advocate shall also be subject to the *Rules* with respect to non-legal, but official, duties performed as an officer.

DISCUSSION

This Rule is derived from ABA Model Rule 5.7, *Responsibilities regarding Law-Related Services*. The judge advocate practice of law is similar to a corporate practice in that an attorney performs a combination of non-law, law-related, and purely legal activities for a single employer. The non-law duties

performed by a judge advocate meet the definition of “law-related services” found in paragraph (b) of Model Rule 5.7. These duties are commingled within the judge advocate practice and are not otherwise independent, separate, or distinguishable.

CHAPTER 6
PUBLIC SERVICE

Rule 6.1. PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

DISCUSSION

Apart from the Air Force Legal Assistance Program, Air Force lawyers may render the service described through, e.g., participation on committees or activities whose aim is to improve the law and delivery of legal services, or by supporting organizations that provide legal services to persons of limited means. See also the JER and TJAG Policy Memorandum TJS-7, *Off-Duty Employment of Judge Advocates*.

Rule 6.2. ACCEPTING APPOINTMENTS [Omitted]

Rule 6.3. MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS [Modified]

A lawyer may serve as a director, officer, or member of a legal services organization, apart from the Air Force, notwithstanding that the organization serves persons having interests adverse to the Air Force. The lawyer shall not knowingly participate in a decision or action of an organization if such participation would be incompatible with the lawyer's obligations to the Air Force.

DISCUSSION

Rule 6.3, as modified, recognizes that Air Force lawyers may join legal services (i.e., professional) organizations. A lawyer's participation in such organizations must be consistent with the direction and guidance of the JER. For example, JER Section 3, paragraph 3-300b provides guidance on personal participation in non-federal entities, including professional associations and learned societies. See also Rule 1.7 and Rule 6.1. The second sentence recognizes that participation in certain of an organization's activities may not be permissible for Air Force lawyers. Some activities are, by their nature, contrary to Air Force interests. See JER Section 3, paragraph 3-300b.

Rule 6.4. LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS [Modified]

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration, notwithstanding that the reform may affect the interests of the Air Force.

DISCUSSION

See the JER, Rule 1.7, and Rule 6.3.

CHAPTER 7

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the AFRPC or the law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.2. ADVERTISING [Omitted]

Rule 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS [Omitted]

Rule 7.4. COMMUNICATION OF FIELDS OF PRACTICE [Omitted]

Rule 7.5. FIRM NAMES AND LETTERHEADS [Omitted]

CHAPTER 8

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. BAR ADMISSIONS AND DISCIPLINARY MATTERS [Modified]

An applicant for admission to a bar; or a lawyer in connection with a bar admission application; appointment as a lawyer in The Judge Advocate General's Corps, USAF; or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.2. JUDICIAL AND LEGAL OFFICIALS

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

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the *Air Force Uniform Code of Judicial Conduct*.

DISCUSSION

See AFI 51-201, paragraph 1.3.

Rule 8.3. REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the AFRPC that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer 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 inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule 8.4. MISCONDUCT

It is unprofessional conduct for a lawyer to:

(a) violate or attempt to violate these rules, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official;

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

Rule 8.5. JURISDICTION

[Substituted] Applies to all military and civilian lawyers, paralegals and nonlawyer assistants in the Air Force Judge Advocate General's Corps. This includes host nation lawyers, paralegals, and other host nation personnel employed overseas by the Department of the Air Force, to the extent the *Rules* are not inconsistent with their domestic law and professional standards. Jurisdiction also applies to all lawyers, paralegals, and non-lawyer assistants who practice in Air Force courts and other proceedings, including, but not limited to, civilian defense counsel (and their assistants) with no connection to the Air Force.