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Judge Advocate General of the Navy
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To the Judge Advocate of the Navy:

This correspondence is a public comment to the Notice of Proposed Rulemaking updating 32 CFR Part 776 (Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General) that was published in the Federal Register on May 1, 2013 (Docket ID: USN-2013-0011). This comment is respectfully submitted in four parts: disclaimer, comments regarding the judicial function (§ 776.5), comments regarding the prosecution function (§ 776.47), and comments regarding the complaint processing procedures (Subpart C; §776.76-88).

Disclaimer.
This comment is respectfully submitted in the correspondent's personal capacity. This comment does not speak for, and should not be imputed to, any organization, agency, or entity. Nothing in this correspondence reflects any policy or position of any military service, the Department of Defense, or the U.S. Government. All parts of this correspondence are the personal views and respectful suggestions of the correspondent alone.

Comments regarding the judicial function.
Section 776.5 applies the American Bar Association's Code of Judicial Conduct to all military and appellate judges and to any other covered attorney performing judicial functions under the supervision of the Judge Advocate General. The proposed rulemaking does not modify the existing regulatory language. It is respectfully suggested that the unique potential for the improper influence of rank in the military justice system in the Department of the Navy compels additional rulemaking in order to ensure that the conduct of covered attorneys performing judicial functions conforms to the principles outlined in the Code of Judicial Conduct.

In particular, the Rules should explicitly acknowledge that "military judges do not have any 'inherent judicial authority separate from a court-martial to which they have been detailed. When they act, they do so as a court-martial, not as a military judge. Until detailed to a specific court-martial, they have no more authority than any other military officer of the same grade and rank.'" *Weiss v. United States*, 510 U.S. 163, 175 (1994) (*quoting United States v. Weiss*, 36 M.J. 224, 228 (C.M.A. 1992). Additionally, the Rules should discuss the application, in the military environment, of the requirement of Rule 2.8 of the Code of Judicial Conduct that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court

officials, and others with whom the judge deal in an official capacity." While judge advocates performing judicial functions clearly retain their military rank and are entitled to the respect due their commissions, the Rules should articulate the requirement that covered attorneys performing judicial functions scrupulously avoid even the appearance that their rank might improperly influence judicial proceedings.

Additional rulemaking that reminds covered attorneys who perform judicial functions of their limited judicial authority, and directs their diligent attention to the influence that their rank, demeanor, and temperament may have on proceedings in the military environment will serve two important goals. First, it will ensure the faithful application of the principles discussed in the other Rules, such as Section 776.44 (Rule 3.5: Impartiality and Decorum of the Tribunal) and Section 776.56 (Rule 5.4: Professional Independence of a Covered USG Attorney). Second, it will promote public confidence in the impartiality, integrity, and independence of the military justice process.

Conversely, the lack of such additional rulemaking may cast doubt upon the fairness and efficacy of the military justice process, as "[q]uestions of judicial appearance may be particularly important in the military justice system where trial judges wear government green and blue and not just judicial black." *United States v. Butcher*, 56 M.J. 87, 94 (C.A.A.F. 2001) (Baker, J. concurring).

Comments regarding the prosecution function.
Section 776.47 addresses the special responsibilities of a trial counsel. The proposed language includes numerous changes to the existing regulatory text. However, it is respectfully suggested that the proposed language perpetuates a misconception regarding the relationship between a trial counsel and a convening authority. A trial counsel represents the United States in a court-martial; a trial counsel does not represent a convening authority, and a trial counsel does not have a duty of loyalty to, or an attorney-client relationship with, a convening authority.

A trial counsel "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). However, a convening authority is "both quasi-judicial decision maker and as commander, the custodian of good order and discipline." *United States v. Nealy*, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J. concurring). While a convening authority's duty to preserve good order and discipline is not necessarily inconsistent with the obligation of the United States to govern impartially, that duty is also not necessarily aligned with that obligation. If a convening authority's actions in the pursuit of good order and discipline run afoul of an established legal principle, then a trial counsel's duty is to be faithful to the legal principle, not to the convening authority's interpretation of the principle.

The proposed rule lacks a clear explanation of the relationship between a trial counsel and a convening authority, and in certain respects increases confusion of this issue. For example, Subsection (c)(iii) addresses a trial counsel's duty to disclose to the tribunal the existence of a situation where a charge lacks sufficient evidence to support a conviction. However, the language of this subsection suggests that such disclosure should occur only after consultation

with the convening authority. If a trial counsel believes that the evidence is insufficient to prove an allegation and the interests of justice require disclosure of this fact to the tribunal, and this belief is confirmed though consultation with a supervisory attorney, then the trial counsel should not first consult with a third-party whose interests are not necessarily aligned with those of the United States before the trial counsel makes the required disclosure to the tribunal. Rather, the Rule should require that the trial counsel disclose the insufficiency to the tribunal and also recommend that the convening authority withdraw the affected charge.

Additionally, the Rule should clearly establish that there is no attorney-client privilege between a trial counsel and a convening authority. These moderate provisions would strengthen existing procedural safeguards (such as Rule for Courts-Martial 601(c)) that ensure that the convening and prosecutorial functions remain separate and distinct.

Comments regarding the complaint processing procedures.
Sections 776.76 through 776.88 establish procedures for the processing of complaints of professional misconduct by covered attorneys. The proposed language retains the existing provisions that do not require that the attorney appointed to conduct a preliminary inquiry or an ethics investigation be neutral and disinterested, and that allow a Rules Counsel and the Judge Advocate General to summarily make adverse determinations that are contrary to the findings and recommendations of both the attorney appointed to conduct the preliminary inquiry and the attorney assigned to conduct the ethics investigation. It is respectfully suggested that these provisions should be revised to provide additional procedural protections for a covered attorney accused of professional misconduct.

Section 776.81 requires Rules Counsel to appoint a covered attorney with appropriate experience to conduct a preliminary inquiry in cases where the Rules Counsel determines there is probable cause to believe that a violation of the Rues occurred. However, there is no explicit requirement that the attorney appointed be neutral or disinterested, and the Section only requires that the attorney be "normally . . . not previously involved in the case." Similar language is used in Section 776.83 for the appointment of an attorney to conduct an ethics investigation. Both a preliminary inquiry and an ethics investigation should be conducted by neutral and disinterested attorneys in order to ensure that the covered attorney receives a fair and objective examination of the facts and circumstances of the allegation of misconduct.

Accordingly, it is respectfully recommended that the Rules require the appointment of a neutral and disinterested attorney to conduct a preliminary inquiry or an ethics investigation, and require that the attorney who conducts the ethics investigation be different from the attorney who conducted the preliminary inquiry.

Section 776.83 permits Rules Counsel to determine, through the Rules Counsel's own review of the report of the preliminary inquiry and independent of the findings and recommendations of the inquiry, that further action is warranted in a particular case. Similar language is used in Section 776.84 regarding the Rules Counsel's determination after reviewing the ethics investigation. Additionally, Section 776.86 states that the Judge Advocate General "is not bound" by the results of the preliminary inquiry or the ethics investigation, or the recommendations of the Rules Counsel in a particular case. While the exercise of discretion and independent judgment by Rules

Counsel and by the Judge Advocate General is both appropriate and desirable, these officials should not summarily overrule the investigative process in a manner that is adverse to the covered attorney concerned, absent compelling reasons or extraordinary circumstances, notice, and an opportunity to respond.

Accordingly, it is respectfully recommended that additional rulemaking establish that the Rules Counsel or the Judge Advocate General will make a determination that is adverse to the covered attorney concerned and contrary to the findings and recommendations of the preliminary inquiry or ethics investigation only where a compelling reason or extraordinary circumstance justifies such a contrary determination. Further, the Rules should require notice to the covered attorney concerned of that finding and the specific basis therefor, and an opportunity for the covered attorney to respond in writing.

These additional procedures will ensure that a covered attorney accused of professional misconduct is afforded a full and fair evaluation of the facts and circumstances.

Respectfully submitted,

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