

Department of the Navy, DoD

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following are among the factors to be weighed by the command:

- (a) The magnitude of the environmental considerations associated with the proposed action;
- (b) The extent of anticipated public interest; and
- (c) Any relevant questions of national security and classification.

**§ 775.12 Action.**

The Chief of Naval Operations and the Commandant of the Marine Corps shall, each, as appropriate:

- (a) Provide guidelines and procedures for administrative direction and implementation of this part and CEQ regulations; and
- (b) Maintain a focal point for the coordination of the preparation of environmental assessments and impact statements.

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

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AUTHORITY: 10 U.S.C. 826, 827; Manual for Courts-Martial, United States, 1984; Secretary of the Navy Instruction 5430.27A, Responsibility of the Judge Advocate General for Supervision of Certain Legal Services; U.S. Navy Regulations, 1990.

SOURCE: 59 FR 45214, Sept. 1, 1994, unless otherwise noted.

**Subpart A—General, Preamble and Premises**

**§ 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 (Administrative Law Division), 200 Stovall Street, Alexandria, VA 22332-2400], which require the Judge Advocate General (JAG) to supervise the performance of legal services under his cognizance throughout the Department of the Navy (DON), this part is promulgated—

(a) To establish Rules of Professional Conduct for DON civilian and military attorneys practicing under the supervision of JAG;

(b) To promulgate procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of JAG, or certified by JAG under articles 26(b) or 27(b) of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 826(b), 827(b)); and

(c) To prescribe limitations on, and procedures for, processing requests to engage in the part-time outside practice of law by DON judge advocates or civilian attorneys under the supervision of JAG.

**§ 776.2 Applicability.**

(a) This part defines the professional ethical obligations of, and applies to:

- (1) Attorneys;

(i) Certified by JAG under the provisions of article 27(b), UCMJ, 10 U.S.C. 827(b);

(ii) Designated by JAG as legal assistance attorneys;

(iii) Who practice within DON and who are certified under article 27(b), UCMJ, 10 U.S.C. 827(b), or who are designated as a legal assistance attorney by the Judge Advocate General/Chief Counsel of another armed force, or both; and

(2) Who are not certified in accordance with article 27(b), UCMJ, 10 U.S.C. 827(b), or designated as a legal assistance attorney, but who practice under the supervision of JAG.

(3) Military trial and appellate judges who practice or perform legal services under the cognizance of JAG.

(4) Reserve judge advocates of the Navy or Marine Corps on active duty, extended active duty, active duty for training, inactive duty for training, or when performing duties subject to the supervision of JAG. Subpart D of this part, however, does not apply to Reserve judge advocates unless they serve on active duty for more than 30 consecutive days.

(5) DON civilian counsel practicing under the supervision of JAG.

(6) Civilian counsel representing individual members of the naval service in any matter for which JAG is charged with supervising the provision of legal services including, but not limited to, courts-martial, administrative boards, and disability evaluation proceedings. Subpart D of this part, however, does not apply to such counsel.

(b) Although subpart B of this part does not apply to nonlawyers, the rules in that subpart do define the type of ethical conduct that the public and the military community have a right to expect not only of lawyers but also of their nonlawyer employees and associates in all matters pertaining to professional conduct. Accordingly, subpart B shall serve as models of ethical conduct for the following personnel when involved with the delivery of legal services under the purview of JAG—

- (1) Navy legalmen and Marine Corps legal administrative officers and legal service specialists;
- (2) Limited duty officers (law);
- (3) Legal interns; and

(4) Civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court-reporters, and others holding similar positions. Attorneys who supervise non-lawyer employees are responsible for their ethical conduct to the extent provided for in § 776.54.

**§ 776.3 Policy.**

(a) DON judge advocates and civilian attorneys to whom this part applies shall maintain the highest standards of professional ethical conduct. Loyalty and fidelity to the United States, to the law, to clients both institutional and individual, and to 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 and related procedures set forth herein concern matters solely under the purview of JAG. Whether conduct or failure to act constitutes a violation of the duties imposed by this part is a matter within the sole discretion of JAG or officials authorized to act for JAG. The subpart B rules are not substitutes for, and do not take the place of, other rules and standards governing DON personnel such as the Government rules of ethical conduct, the Code of Conduct, the Uniform Code of Military Justice, and the general precepts of ethical conduct to which all officers of the Navy and Marine Corps are expected to adhere. Similarly, action taken pursuant to this part is not supplanted or barred by, and does not supplant or bar, the following action from being taken by authorized officials, even if the underlying misconduct is the same—

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

(2) Administrative action under the Manual For Courts-Martial or U.S. Navy Regulations, 1990, or under other applicable authority.

**§ 776.4 Attorney-client relationships.**

(a) The executive agency to which assigned (DON in most cases) is the client served by each DON civilian attorney or judge advocate unless detailed to represent another client by competent authority. Specific guidelines are contained in § 776.32.

(b) DON judge advocates and civilian attorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority.

(c) Employment of non-DON civilian counsel by an individual client does not alter the responsibilities of a DON judge advocate or civilian attorney to that client. Specific guidance is set forth in § 776.95.

**§ 776.5 Judicial conduct.**

To the extent that it does not conflict with statutes, subpart B of this part, or regulations of the sort mentioned in § 776.3(b), the American Bar Association's Code of Judicial Conduct applies to all military and appellate judges and to all judge advocates and other attorneys performing judicial functions under JAG supervision within the Department of the Navy.

**§ 776.6 Conflict.**

To the extent that a conflict exists between subpart B of this part and the rules of other jurisdictions that regulate the professional conduct of attorneys, subpart B of this part will govern the conduct of attorneys engaged in legal functions under JAG supervision.

**§ 776.7 Reporting requirements.**

Individuals subject to this part shall promptly report to the Rules Council (see § 776.9) discipline by another jurisdiction upon himself, herself, or another individual subject to 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 Principal Deputy Assistant Judge Advocate General (PDAJAG) (Operations & Management); the Chief Judge, Navy-Marine Corps Trial Judiciary; and in cases involving Marine Corps judge advocates, the Deputy Director, Judge Advocate Division, HQMC; and such other personnel as JAG from time-to-time may appoint. A majority of the members constitutes a quorum. The Chairman of

the Committee shall be PDAJAG (Operations & Management). The Chairman may excuse members disqualified for cause, illness, or exigencies of military service, and may request JAG to appoint additional or alternative members on a temporary or permanent basis.

(b) *Purpose.* (1) When requested by JAG or by the Rules Counsel, the Committee will provide formal advisory opinions to 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 will also provide formal advisory opinions to individuals subject to this part 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 is not violative of subpart B of this part, then no adverse action under this part may be taken against an individual who acts consistent with the Committee's advice.

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

#### § 776.9 Rules Counsel.

Appointed by JAG to act as a special assistant for the administration of subpart B of this part, the Rules Counsel derives authority from JAG and, with respect to administrative matters under this part, has "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) In cases involving Marine Corps judge advocates, Director, Judge Advocate Division; and

(b) In all other cases, Assistant Judge Advocate General (Civil Law).

#### § 776.10 Informal ethics advice.

(a) *Advisors.* Judge advocates may seek informal ethics advice either from the OJAG officers named below or from their supervisory judge advocates in the field. Within the Office of the JAG, the following officials are designated to respond to informal, oral inquiries concerning this part in the areas of practice indicated—

(1) Head, Military Affairs/Personnel Law Branch, Administrative Law Division: administrative boards and related matters;

(2) Deputy Director, Criminal Law Division: military justice matters;

(3) Deputy Director, Legal Assistance Division: legal assistance matters; and

(4) Head, Standards of Conduct/Government Ethics Branch, Administrative Law Division: all others.

(b) *Informal advice.* Informal ethics advice will not be provided by OJAG advisors concerning matters currently in litigation.

(c) *Written advice.* A request for informal advice does not relieve the requestor of the obligation to comply with subpart B of this part. Although DON judge advocates and civilian attorneys are encouraged to seek advice when in doubt as to their responsibilities, they remain personally responsible for their professional conduct. If, however, a subordinate judge advocate acts in accordance with a supervisory judge advocate's written and reasonable resolution of an arguable question, then no adverse action under this part may be taken against the subordinate judge advocate. JAG is not bound by unwritten advice or by advice provided by nonsupervisors.

#### § 776.11 Outside part-time practice of law.

A DON attorney's primary professional responsibility is to the executive agency to which assigned, and he or she is expected to devote the required amount of effort and time to satisfactorily accomplish assigned duties. The outside practice of law, therefore, must be carefully monitored. Attorneys to whom this section applies who wish to engage in the part-time, outside practice of law must first obtain permission from JAG. Details are contained in Subpart D of this part.

**§ 776.12 Maintenance of files.**

Ethics complaint records and outside, part-time law practice request files shall be maintained by the Administrative Law Division, Office of the Judge Advocate General.

(a) Files shall be labeled with the name of the individual against whom complaints are made, or who request permission to engage in the part-time outside practice of law, and will contain the request, complaint, reports of investigation, related correspondence, and allied papers.

(b) Requests for access to such records should be referred to DAJAG (Administrative Law Division), Office of the Judge Advocate General, 200 Stovall Street, Alexandria, Virginia 22332-2400.

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

**§ 776.13 Preamble.**

(a) *Rules of Professional Conduct.* (1) A judge advocate in the naval service is a representative of clients, an officer of the legal system, a commissioned officer, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the Department of the Navy and to individual clients. The Rules of Professional Conduct set out in subpart B of this part govern the ethical conduct of naval judge advocates practicing under the Uniform Code of Military Justice, the Manual for Courts-Martial, 10 U.S.C. 1044 (Legal Assistance), other laws of the United States, and regulations of the Department of the Navy.

(2) The rules in subpart B of this part are specifically addressed to the conduct of judge advocates but apply to all other lawyers who practice under the supervision of the Judge Advocate General of the Navy. (Use of the term “judge advocate” in subpart B applies to all lawyers unless otherwise indicated.)

(b) [Reserved]

**§ 776.14 Premises.**

(a) The rules in subpart B of this part are based on the premises that follow.

The interpretation of subpart B of this part should flow from their common meaning and the comments. To the extent that any ambiguity or conflict exists, subpart B of this part should be interpreted consistent with this hierarchy of premises.

(1) Judge advocates must obey the law and military regulations, and counsel clients to do so.

(2) Ethical rules must be followed.

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

(4) A judge advocate must protect the legal rights and interests of clients, organizational and individual.

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

(6) A judge advocate must be honest and truthful in all dealings.

(7) A judge advocate shall not derive personal gain, other than from the U.S. Government, from the performance of official duties.

(8) A judge advocate shall maintain the integrity of the legal and military professions.

(b) [Reserved]

**Subpart B—Rules****§ 776.20 Competence.**

(a) *Competence.* A judge advocate shall provide competent, diligent, and prompt representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and expeditious preparation reasonably necessary for representation. Initial determinations as to competence of a judge advocate for a particular assignment shall be made by a supervising judge advocate before case or issue assignments; however, assigned judge advocates 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.* (1) Formation of attorney-client relationships by judge advocates with, and representation of, clients is permissible only when the judge advocate

is authorized to do so by competent authority.

(2) The subject matter scope of a judge advocate's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A judge advocate shall inform clients at the earliest opportunity of any limitations of representation and professional responsibilities of the judge advocate towards the client.

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

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

(5) A judge advocate shall not counsel or assist a client to engage in conduct that the judge advocate knows is criminal or fraudulent, but a judge advocate 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.

(b) [Reserved]

#### § 776.22 Diligence.

(a) *Diligence.* A judge advocate shall act with reasonable diligence and promptness in representing a client, and in every case 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.* (1) A judge advocate shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

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

(b) [Reserved]

#### § 776.24 Fees.

In this section, the term "judge advocate" refers only to judge advocates and other attorneys employed by the Department of the Navy. The term "lawyer" refers to all other lawyers subject to this subpart B.

(a) *Fees.* (1) A judge advocate 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 judge advocate's government duties or employment.

(2) A judge advocate shall not accept any salary or other payments as compensation for legal services rendered, by that judge advocate in a private capacity, to a client who is eligible for assistance under the Department of the Navy Legal Assistance Program, unless so authorized by the Judge Advocate General. This paragraph (a)(2) does not apply to Reserve judge advocates not serving on extended active duty.

(3) A Reserve 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 judge advocate'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 authorized by the Judge Advocate General to do so.

(4) A judge advocate shall not accept any payments or benefits, actual or constructive, directly or indirectly, for making a referral of a client.

(5) Lawyers not employed by the Federal Government may charge fees. Fees shall be reasonable. Factors considered in determining the reasonableness of a fee include the following:

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

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

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

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(iv) The amount involved and the results obtained;

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

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

(vii) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(viii) Whether the fee is fixed or contingent.

(6) When the lawyer 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 in representation.

(7) 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)(8) 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 lawyer 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 lawyer 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.

(8) A lawyer shall not enter into an arrangement for, charge, or collect:

(i) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, or

(ii) A contingent fee for representing an accused in a criminal case.

(9) A division of fee between lawyers who are not in the same firm may be made only if:

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

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

(iii) The total fee is reasonable.

(b) [Reserved]

**§ 776.25 Confidentiality of information.**

(a) *Confidentiality of information.* (1) A judge advocate shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (a)(2) and (a)(3) of this section.

(2) A judge advocate shall reveal such information to the extent the judge advocate reasonably believes necessary to prevent the client from committing a criminal act that the judge advocate believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(3) A judge advocate may reveal such information to the extent the judge advocate reasonably believes necessary to establish a claim or defense on behalf of the judge advocate in a controversy between the judge advocate and the client, to establish a defense to a criminal charge or civil claim against the judge advocate based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the judge advocate's representation of the client.

(b) [Reserved]

**§ 776.26 Conflict of interests: General rule.**

(a) *Conflict of Interests: General rule.* (1) A judge advocate shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(i) The judge advocate reasonably believes the representation will not adversely affect the relationship with the other client; and

(ii) Each client consents after consultation.

(2) A judge advocate shall not represent a client if the representation of that client may be materially limited by the judge advocate's responsibilities

to another client or to a third person, or by the judge advocate's own interests, unless:

(i) The judge advocate reasonably believes the representation will not be adversely affected; and,

(ii) 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.

(b) [Reserved]

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

(a) *Conflict of interests: Prohibited transactions.* (1) Judge advocates shall strictly adhere to current Department of the Navy Standards of Conduct Regulations and shall not:

(i) Knowingly enter into any business transactions on behalf of, or adverse to, a client's interest which directly or indirectly relate to or result from the attorney-client relationship, or otherwise profit, directly or indirectly, through knowledge acquired during the course of the judge advocate's official duties;

(ii) Accept compensation or gifts in any form from a client or other person or entity, other than the U.S. Government, for the performance of official duties;

(iii) 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;

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

(v) Represent a client whose interests are materially adverse to the interests of a former client, unless the former client consents, or use information from the former representation to the disadvantage of that former client, except as permitted or required under § 776.26 or when the information has become otherwise generally known;

(vi) make any referrals of legal or other business to any non-governmental lawyer or enterprise with whom the judge advocate has any present or

expected direct or indirect personal interest; any referrals must be made strictly without regard to personal interests of the judge advocate, and special care shall be taken not to give preferential treatment to Reserve judge advocates or other government attorneys in their private capacities;

(vii) Make or negotiate an agreement giving the judge advocate literary or media rights for a portrayal or account based in substantial part on information relating to representation of a client; or,

(viii) Represent a client in a matter directly adverse to a person who the judge advocate knows is represented by another lawyer who is related as parent, child, sibling or spouse to the judge advocate, except upon consent by the client after consultation regarding the relationship.

(2) [Reserved]

(b) [Reserved]

**§ 776.28 Conflict of interests: Former client.**

(a) *Conflict of interests: Former client.*

(1) A judge advocate who has represented a client in a matter shall not thereafter:

(i) Represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or,

(ii) Use information relating to the representation to the disadvantage of the former client or to the judge advocate's own advantage, except as § 776.25 would permit with respect to a client or when the information has become generally known.

(2) [Reserved]

(b) [Reserved]

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

Judge advocates 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 § 776.37.

**§ 776.30 Successive government and private employment.**

(a) *Successive government and private employment.* (1) Except as the law or regulations may otherwise expressly permit, a former judge advocate shall not represent a private client in connection with a matter in which the judge advocate participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. If a former judge advocate in a firm with which that judge advocate is associated knows that the firm or anyone associated with the firm is undertaking or continuing representation in such a matter:

(i) The disqualified former judge advocate 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,

(ii) Must provide written notice promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this section.

(2) Except as the law or regulations may otherwise expressly permit, a former judge advocate who has information known to be confidential government information about a person which was acquired when the former judge advocate was a public officer 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 judge advocate may continue association with the firm only if the disqualified judge advocate is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

(3) Except as the law or regulations may otherwise expressly permit, a judge advocate shall not:

(i) Participate in a matter in which the judge advocate 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 judge advocate's stead in the matter; or,

(ii) 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 judge advocate is participating personally and substantially.

(4) As used in this section, the term "matter" includes:

(i) 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,

(ii) Any other matter covered by the conflict of interest rules of the appropriate government agency.

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

(b) [Reserved]

**§ 776.31 Former judge or arbitrator.**

(a) *Former judge or arbitrator.* (1) Except as stated in paragraph (a)(3) of this section, a judge advocate shall not represent anyone in connection with a matter in which the judge advocate 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 disclosure.

(2) A judge advocate 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 judge advocate is participating personally and substantially as a judge or other adjudicative officer. A judge advocate 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 judge advocate has notified the judge, other adjudicative officer, or arbitrator.

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

(b) [Reserved]

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

(a) *Department of the Navy as client.*

(1) Except when representing an individual client pursuant to paragraph (a)(6) of this section, a judge advocate for the naval service represents the Department of the Navy (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 judge advocate for the naval service is assigned to such an organizational element and designated to provide legal services to the head of the organization, a lawyer-client relationship exists between the judge advocate and the Department of the Navy 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 lawyer-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 Department of the Navy. In invoking either the lawyer-client privilege or lawyer-client confidentiality on behalf of the Department of the Navy, the head of the organization is subject to being overruled by higher authority.

(2) If a judge advocate 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 Department of the Navy or a violation of law which reasonably might be imputed to the Department, the judge advocate shall proceed as is reasonably necessary in the best interest of the naval service. In determining how to proceed, the judge advocate shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the judge advocate's representation, the re-

sponsibility 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 among others:

(i) Advising the head of the organization 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 interests for the judge advocate, and the judge advocate's responsibility is to the organization;

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

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

(iv) Referring the matter to, or seeking guidance from, higher authority in the technical chain-of-command including, if warranted by the seriousness of the matter, referral to the staff judge advocate assigned to the staff of the acting official's next superior in the technical chain-of-command.

(3) If, despite the judge advocate's efforts pursuant to paragraph (a)(2) 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 judge advocate may terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

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

(5) A judge advocate representing the naval service may also represent any of its officers, employees, or members, subject to the provisions of § 776.26 and other applicable authority. If the Department of the Navy's consent to dual representation is required by § 776.26,

the consent shall be given by an appropriate official of the Department of the Navy other than the individual who is to be represented.

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

(b) [Reserved]

**§ 776.33 Client under a disability.**

(a) *Client under a disability.* (1) 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 judge advocate shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

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

(b) [Reserved]

**§ 776.34 Safekeeping property.**

Judge advocates shall not normally hold or safeguard property of a client or third persons in connection with representational duties under § 776.27(a)(1)(iii).

**§ 776.35 Declining or terminating representation.**

(a) *Declining or terminating representation.* (1) Except as stated in paragraph (a)(3) of this section, a judge advocate shall not represent a client or, when representation has commenced, shall seek to withdraw from the representation of a client, if:

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

(ii) The judge advocate's physical or mental condition materially impairs his or her ability to represent the client; or

(iii) The judge advocate is dismissed by the client.

(2) Except as stated in paragraph (a)(3) of this section, a judge advocate 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:

(i) The client persists in a course of action involving the judge advocate's services that the judge advocate reasonably believes is criminal or fraudulent;

(ii) The client has used the judge advocate's services to perpetrate a crime or fraud;

(iii) The client insists upon pursuing an objective that the judge advocate considers repugnant or imprudent; or,

(iv) Other good cause for withdrawal exists.

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

(4) Upon termination of representation, a judge advocate 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, if a civilian lawyer is involved, refunding any advance payment of fee that has not been earned. The judge advocate may retain papers relating to the client to the extent permitted by law.

(b) [Reserved]

**§ 776.36 Advisor.**

In representing a client, a judge advocate shall exercise independent professional judgment and render candid advice. In rendering advice, a judge advocate should 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.

**§ 776.37 Mediation.**

(a) *Mediation.* (1) A judge advocate may act as a mediator between individuals or clients if:

(i) The judge advocate 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;

(ii) The judge advocate 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,

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

(2) While acting as a mediator, the judge advocate 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.

(3) A judge advocate shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a) of this section is no longer satisfied. Upon withdrawal, the judge advocate shall not continue to mediate among any of the individuals in the matter that was the subject of the mediation unless each individual consents.

(b) [Reserved]

**§ 776.38 Evaluation for use by third persons.**

(a) *Evaluation for use by third persons.*

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

(i) The judge advocate reasonably believes that making the evaluation is compatible with other aspects of the judge advocate's relationship with the client; and

(ii) The client consents after consultation.

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

(b) [Reserved]

**§ 776.39 Meritorious claims and contentions.**

A judge advocate 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, or which includes a good-faith argument for an extension, modification, or reversal of existing law. A judge advocate 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 to ensure that every element of the case is established.

**§ 776.40 Expediting litigation.**

A judge advocate shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client and the judge advocate's responsibilities to tribunals.

**§ 776.41 Candor and obligations toward the tribunal.**

(a) *Candor and obligations toward the tribunal.* (1) A judge advocate shall not knowingly:

(i) Make a false statement of material fact or law to a tribunal;

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

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

(iv) Offer evidence that the judge advocate knows to be false (if a judge advocate has offered material evidence and comes to know of its falsity, the judge advocate shall take reasonable remedial measures); or

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

(2) 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.

(3) A judge advocate may refuse to offer evidence that the judge advocate reasonably believes is false.

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

(b) [Reserved]

**§ 776.42 Fairness to opposing party and counsel.**

(a) *Fairness to opposing party and counsel.* (1) A judge advocate shall not:

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

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

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

(iv) In trial, allude to any matter that the judge advocate 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

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

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

(B) The judge advocate reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(2) [Reserved]

(b) [Reserved]

**§ 776.43 Impartiality and decorum of the tribunal.**

(a) *Impartiality and decorum the tribunal.* (1) A judge advocate shall not:

(i) 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;

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

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

(2) [Reserved]

(b) [Reserved]

**§ 776.44 Extra-tribunal statements.**

(a) *Extra-tribunal statements.* (1) A judge advocate 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 judge advocate knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(2) 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 or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

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

(ii) 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;

(iii) The performance or results of any 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;

(iv) 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;

(v) Information the judge advocate 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;

(vi) 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

(vii) The credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.

(3) Notwithstanding paragraphs (a)(1) and (a)(2) (i) through (v) of this section, a judge advocate involved in the investigation or litigation of a matter may state without elaboration:

(i) The general nature of the claim or defense;

(ii) The information contained in a public record;

(iii) 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, the identity of the persons involved;

(iv) The scheduling or result of any step in litigation;

(v) A request for assistance in obtaining evidence and information necessary thereto;

(vi) 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

(vii) In a criminal case:

(A) The identity, duty station, occupation, and family status of the accused;

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

(C) The fact, time, and place of apprehension; and

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

(4) The protection and release of information in matters pertaining to the Department of the Navy 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.

(b) [Reserved]

#### § 776.45 Judge advocate as witness.

(a) *Judge advocate as witness.* (1) A judge advocate shall not act as advocate at a trial in which the judge advocate is likely to be a necessary witness except when:

(i) The testimony relates to an uncontested issue;

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

(iii) Disqualification of the judge advocate would work substantial hardship on the client.

(2) A judge advocate may act as advocate in a trial in which another judge advocate or lawyer in the judge advocate's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28.

(b) [Reserved]

#### § 776.46 Special responsibilities of a trial counsel.

(a) *Special responsibilities of a trial counsel.* (1) A trial counsel shall:

(i) Recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;

(ii) 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;

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

(iv) Make timely disclosure to the defense of all evidence or information known to the judge advocate 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 judge advocate, except when the judge advocate is relieved of this responsibility by a protective order or regulation; and

(v) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the judge advocate in a criminal case from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.44.

(2) [Reserved]

(b) [Reserved]

**§ 776.47 Advocate in nonadjudicative proceedings.**

A judge advocate 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 § 776.41, § 776.42, and § 776.43.

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

(a) *Truthfulness in statements to others.* In the course of representing a client a judge advocate 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.

(b) [Reserved]

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

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

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

When dealing on behalf of a client with a person who is not represented by counsel, a judge advocate shall not

state or imply that the judge advocate is disinterested. When the judge advocate knows or reasonably should know that the unrepresented person misunderstands the judge advocate's role in the matter, the judge advocate shall make reasonable efforts to correct the misunderstanding.

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

In representing a client, a judge advocate 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.

**§ 776.52 Responsibilities of the Judge Advocate General and supervisory judge advocates.**

(a) *Responsibilities of the Judge Advocate General and supervisory judge advocates.* (1) The Judge Advocate General and supervisory judge advocates shall make reasonable efforts to ensure that all judge advocates conform to this subpart.

(2) A judge advocate having direct supervisory authority over another judge advocate shall make reasonable efforts to ensure that the other judge advocate conforms to this subpart.

(3) A supervisory judge advocate shall be responsible for another subordinate judge advocate's violation of this subpart if:

(i) The supervisory judge advocate orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

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

(4) A supervisory judge advocate is responsible for ensuring that the subordinate judge advocate is properly trained and is competent to perform the duties to which the subordinate judge advocate is assigned.

(b) [Reserved]

**§ 776.53 Responsibilities of a subordinate judge advocate.**

(a) *Responsibilities of a subordinate judge advocate.* (1) A judge advocate is bound by this subpart notwithstanding that the judge advocate acted at the direction of another person.

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

(3) A subordinate judge advocate does not violate this subpart if that judge advocate acts in accordance with a supervisory judge advocate's written and reasonable resolution of an arguable question of professional duty.

(b) [Reserved]

**§ 776.54 Responsibilities regarding nonlawyer assistants.**

(a) *Responsibilities regarding nonlawyer assistants*

(1) With respect to a nonlawyer under the authority, supervision, or direction of a judge advocate:

(i) The senior supervisory judge advocate in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the judge advocate;

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

(iii) A judge advocate shall be responsible for conduct of such a person that would be a violation of this subpart B if engaged in by a judge advocate if:

(A) The judge advocate orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) The judge advocate 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.

(2) [Reserved]

(b) [Reserved]

**§ 776.55 Professional independence of a judge advocate.**

(a) *Professional independence of a judge advocate.* (1) 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 Department of the Navy is expected to exercise unfettered loyalty and professional independence during the representation consistent with this subpart and remains ultimately responsible for acting in the best interest of the individual client.

(2) The exercise of professional judgment in accordance with paragraph (a)(1) of this section shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

(b) [Reserved]

**§ 776.56 Unauthorized practice of law.**

(a) *Unauthorized practice of law.* (1) A judge advocate shall not:

(i) 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

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

(2) [Reserved]

(b) [Reserved]

**§§ 776.57–776.65 [Reserved]****§ 776.66 Bar admission and disciplinary matters.**

(a) *Bar admission and disciplinary matters.* (1) A judge advocate in connection with a bar admission application, application for appointment or for active duty as a judge advocate, certification by the Judge Advocate General, or a disciplinary matter, shall not:

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

(ii) 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,

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except that this section does not require disclosure of information otherwise protected by § 776.25.

- (2) [Reserved]
- (b) [Reserved]

**§ 776.67 Judicial and legal officials.**

A judge advocate shall not make a statement that the judge advocate 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.

**§ 776.68 Reporting professional misconduct.**

(a) *Reporting professional misconduct.*

(1) A judge advocate having knowledge that another judge advocate has committed a violation of this subpart that raises a substantial question as to that judge advocate's honesty, trustworthiness, or fitness as a judge advocate in other respects, shall report such a violation pursuant to regulations promulgated by the Judge Advocate General.

(2) A judge advocate 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 a violation pursuant to regulations promulgated by the Judge Advocate General.

(3) This section does not require disclosure of information otherwise protected by § 776.25.

- (b) [Reserved]

**§ 776.69 Misconduct.**

(a) *Misconduct.* (1) It is professional misconduct for a judge advocate to:

- (i) Violate or attempt to violate this subpart, knowingly assist or induce another to do so, or do so through the acts of another;
- (ii) Commit a criminal act that reflects adversely on the judge advocate's honesty, trustworthiness, or fitness as a judge advocate in other respects;
- (iii) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

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

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

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

- (2) [Reserved]
- (b) [Reserved]

**§ 776.70 Jurisdiction.**

Judge advocates shall be governed by this part.

**§§ 776.71–776.75 [Reserved]**

**Subpart C—Complaint Processing Procedures**

**§ 776.76 Policy.**

(a) It is JAG's policy to expeditiously and fairly investigate and resolve all allegations of professional impropriety lodged against attorneys under JAG supervision. (As used hereinafter, the term "judge advocates" refers to all attorneys under JAG supervision.)

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

**§ 776.77 Related investigations and actions.**

Acts or omissions may constitute professional misconduct, criminal misconduct, or poor performance of duty. Care must be taken to distinguish among the different aspects of a judge advocate's conduct to determine who may take official action.

(a) Legal ethics and questions involving the professional misconduct of judge advocates are within the exclusive province of JAG. Ethical or professional misconduct will not be attributed to any judge advocate in any official record without a final JAG determination, made under this part, that such misconduct has occurred.

(b) Poor performance is properly addressed by the judge advocate's reporting senior through a variety of administrative actions, including fitness reports. Criminal misconduct is properly addressed by the judge advocate's commander through disciplinary action under the UCMJ or through referral to appropriate civil authority.

(c) Prior JAG approval is not required to investigate allegations of criminal conduct or poor performance of duty involving judge advocates.

(d) 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) Inquiries into professional misconduct allegations will normally be held in abeyance until related criminal investigations are completed.

**§ 776.78 Informal complaints.**

Informal, anonymous, or "hot line" type complaints alleging professional misconduct must be referred to appropriate authority (such as the JAG Inspector General or the concerned commander) for appropriate inquiry. Such complaints are not, by themselves, cognizable under this part but may, if reasonably confirmed upon appropriate inquiry, be the basis of a formal complaint described in § 776.79.

**§ 776.79 The complaint.**

The complaint shall—

(a) Be in writing and signed by the complainant;

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

(1) The judge advocate concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity or a failure to meet the ethical standards of the profession, or both; or

(2) The judge advocate concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(c) Contain a complete, factual statement of the acts or omissions constituting the substance of the complaint, as well as a description of any at-

tempted resolution with the attorney concerned. Supporting statements, if any, should be attached to the complaint.

**§ 776.80 Initial screening and Rules Counsel.**

(a) The complaint shall be forwarded to the Judge Advocate General (Administrative Law Division) with a copy to the judge advocate concerned. The complaint shall be logged and then forwarded to the Rules Counsel.

(1) In cases involving Marine Corps judge advocates, the Director, Judge Advocate Division shall act as Rules Counsel.

(2) In all other cases, the Assistant Judge Advocate General (Civil Law) shall act as Rules Counsel.

(b) The Rules Counsel shall review the complaint to determine whether, if true,—

(1) It alleges ineffective assistance of counsel, or other violations of subpart B of this part, as a matter of defense in a court-martial, administrative board, or nonjudicial punishment proceeding and, if so, the Rules Counsel shall forward it to the proper appellate authority for appropriate action and return;

(2) In other cases, it establishes probable cause to believe that a violation of subpart B of this part or of the Code of Judicial Conduct has occurred.

(c) The Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe that a violation has occurred. The Rules Counsel shall notify the judge advocate concerned that the file has been closed.

**§ 776.81 Charges.**

(a) If the Rules Counsel determines that probable cause is established, he or she shall draft charges alleging violations of subpart B of this part or of the Code of Judicial Conduct and forward the charges, together with the original complaint and any allied papers—

(1) In cases involving Marine Corps judge advocates not serving as defense counsel or attached to Navy units, to the officer exercising general court-martial jurisdiction (OEGCMJ) over the concerned judge advocate, and request, on behalf of JAG, that the

OEGCMJ appoint a judge advocate (normally the concerned officer's supervisor) to conduct a preliminary inquiry into the matter;

(2) In all other cases, to the supervisory judge advocate in the charged judge advocate's chain of command (or such other officer as JAG may designate), and direct, on behalf of JAG, the supervisory judge advocate to conduct a preliminary inquiry into the matter.

(b) The Rules Counsel shall provide a copy of the charges, complaint, and any allied papers to the judge advocate against whom the complaint is made and notify him or her that a preliminary inquiry will be conducted.

(c) The Rules Counsel shall also provide a copy of the charges to the commanding officer, or equivalent, of the judge advocate concerned if the complaint involves a judge advocate on active duty and the commanding officer is not the officer appointed to conduct the preliminary inquiry.

(d) The Rules Counsel shall also forward a copy of the charges:

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

(2) In cases involving Navy judge advocates serving in Marine Corps units, or involving Marine Corps judge advocates serving in Navy units to the Commandant of the Marine Corps (Attn: JA);

(3) In cases involving members of the Navy-Marine Corps trial judiciary, to the Trial Judiciary Chief Judge; and

(4) To the appropriate attorney discipline section if the complaint involves judge advocates certified by the Judge Advocates General/Chief Counsel of the other uniformed services.

**§ 776.82 Preliminary inquiry.**

(a) The purpose of the preliminary inquiry is to determine whether questioned conduct may constitute a violation of subpart B of this part or the Code of Judicial Conduct. The preliminary inquiry is not an "ethical investigation" that State licensing authorities might require lawyers to report.

(b) Upon receipt of the complaint and charges, the officer appointed to con-

duct the preliminary inquiry (PIO) shall promptly investigate the charges following generally the procedures set forth in the Manual of the Judge Advocate General [available from Office of the Judge Advocate General, Administrative Law Division, 200 Stovall Street, Alexandria, VA 22332-2400] for the conduct of fact-finding bodies not required to conduct a hearing. Reports of investigation by other authorities such as state bar associations may 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;

(3) Provide the judge advocate concerned an opportunity to review all evidence, affidavits, and statements collected and a reasonable period of time (normally not exceeding 7 days) to submit a written statement or any other written material that the judge advocate 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, and shall take one of the following actions:

(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 shall forward (via the OEGCMJ in appropriate Marine Corps cases) the results of the preliminary inquiry to the Rules Counsel together with his or her recommendation that the file be closed, providing copies to all parties to whom the charges were previously sent.

(2) If the PIO determines by a preponderance of the evidence that a violation did occur, and that corrective action other than counseling may be warranted, he or she shall forward (via the OEGCMJ in appropriate Marine Corps cases) the results of the preliminary inquiry to the Rules Counsel together with all related materials and his or her recommendations. The PIO will

provide copies of the materials forwarded to all parties to whom the charges were sent.

(e) The Rules Counsel shall review all reports of preliminary inquiries forwarded pursuant to paragraph (d) of this section.

(1) If the Rules Counsel determines that no further action is warranted, he or she shall close the file and notify the judge advocate concerned, his or her commanding officer, and all officials previously provided copies of the complaint. This action does not prevent command authority from taking appropriate disciplinary or administrative action.

(2) If the Rules Counsel determines that further action is warranted, he or she shall—

(i) In cases involving Marine Corps judge advocates not serving as defense counsel or attached to Navy units, request, on behalf of JAG, that the OEGCMJ appoint a disinterested judge advocate (normally senior to the concerned judge advocate and not previously involved in the case) to initiate an ethics investigation into the matter;

(ii) In all other cases, appoint, on behalf of JAG, a disinterested judge advocate (normally senior to the individual whose conduct is being investigated and not previously involved in the case) to initiate an ethics investigation; and

(iii) Notify all interested command officials.

**§ 776.83 Ethics investigation.**

(a) Whenever an ethics investigation is initiated, the concerned judge advocate will be so notified in writing by the Rules Counsel.

(b) The concerned judge advocate will also be provided written notice of his or her right to request a hearing before the investigating officer; to inspect all evidence gathered; to present written or oral statements or materials for consideration; to call witnesses at his or her own expense (local military witnesses should be made available at no cost); to be assisted by counsel (paragraph (c) of this section); to challenge the investigating officer for cause (such challenges must be made in writing and sent to the Rules Counsel via

the challenged officer); and to waive any or all of these rights.

(c) The respondent 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 military respondent, military counsel—

(i) Detailed by the cognizant naval legal service office, law center, or legal service support section; or

(ii) Requested by the respondent, if such counsel is attached to the cognizant naval legal service office, legal service support section, law center, or to a Navy or Marine Corps activity located within 100 miles of the hearing site at the time of the scheduled hearing, and if such counsel is reasonably available as determined by the requested counsel's reporting senior in his or her sole discretion. There is no right to detailed counsel if requested counsel is unavailable.

(d) If a hearing is requested, the investigating officer will conduct it after reasonable notice to the judge advocate concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Rules of evidence do not apply. The concerned judge advocate or his or her counsel may question witnesses that may appear. The proceedings shall be recorded but no transcript of the hearing need be made. Evidence gathered during, or subsequent to, the preliminary inquiry and such additional evidence as may be offered by the concerned judge advocate shall be considered.

(e) After completing the hearing, the investigating officer shall prepare a summary of the evidence and forward it together with his or her recommendations to the Rules Counsel via—

(1) In cases involving Navy or Marine Corps judge advocates serving with Naval Legal Service Command units, Commander, Naval Legal Service Command;

(2) In cases involving Navy judge advocates serving with Marine Corps units, the Commandant of the Marine Corps (Attn: JA);

(3) In cases involving Navy or Marine Corps judge advocates serving in subordinate Navy fleet or staff billets, the fleet or staff judge advocate attached to the appropriate second-echelon commander;

(4) In cases involving members of the Navy-Marine Corps Trial Judiciary, the Trial Judiciary Chief Judge;

(5) In cases involving Marine Corps judge advocates serving in defense billets, via the Marine Corps defense service chain of command;

(6) In cases involving Marine Corps judge advocates not serving in defense counsel billets or in Navy units, via the OEGCMJ over the concerned judge advocate; and

(7) The appropriate attorney discipline section if the complaint involves judge advocates certified by the Judge Advocates General/Chief Counsel of the other uniformed services.

(f) A copy of the report shall be provided to the concerned judge advocate and to all authorities previously provided copies of the charges who are not via addressees.

(g) The Rules Counsel shall review the report and either forward it to JAG together with his or her recommendations or return it, via the appropriate chain, to the investigating officer for further inquiry into specified areas.

#### § 776.84 Action by JAG.

(a) JAG is not bound by the Rules Counsel's or investigating officer's recommendations, but will base his action on the record as a whole.

(b) JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of the rules in subpart B of this part or their application to the facts of a particular case.

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

(1) Return the report for further inquiry into specified areas;

(2) If JAG considers the allegations to be unfounded, or that no further action is warranted, JAG will direct the Rules Counsel to make the appropriate file entries and to notify all interested parties accordingly;

(3) If JAG considers the allegations to be supported by clear and convincing evidence, JAG may take appropriate corrective action including, but not limited to:

(i) Limiting the concerned judge advocate to practice under direct supervision of a superior judge advocate;

(ii) Limiting the concerned judge advocate to practicing in certain areas or forbidding him or her from practicing in certain areas;

(iii) Suspending or revoking the concerned judge advocate's authority to provide legal assistance;

(iv) If JAG finds that the misconduct so adversely affects the judge advocate's continuing ability to practice law in the naval service that certification under article 27(b), UCMJ, 10 U.S.C. 827(b), should be suspended, JAG may direct such certification to be suspended for a prescribed period;

(v) If JAG finds that the misconduct so prejudices the reputation of the judge advocate community, the administration of military justice, the practice of law under the cognizance of JAG, or the armed services as a whole, that certification under article 27(b), UCMJ, 10 U.S.C. 827(b), is no longer appropriate, JAG may direct such certification to be removed; or

(vi) In the case of a judge, if JAG finds that the misconduct so prejudices the reputation of military trial and appellate judges that certification under article 26(b), UCMJ, 10 U.S.C. 826(b), is no longer appropriate, direct such certification to be removed; and

(vii) Direct 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; to make entries in and to close the file; to notify the individual concerned as well as any officials previously provided copies of the complaint; and notify appropriate tribunals and authorities of any action taken to suspend, decertify, or limit the practice of an attorney as counsel before courts-martial or the Navy-Marine Corps Court of Military Review, administrative boards, or as a legal assistance attorney.

**§ 776.85 Finality.**

Any action taken by JAG is final subject to any remedies afforded by Navy Regulations to the concerned counsel.

**§ 776.86 Report to bar.**

Upon determination by JAG that a violation of subpart B of this part or the Code of Judicial Conduct has occurred, JAG may cause the Rules Counsel to report that fact to the licensing authorities of the attorney concerned. If so reported, notice to the concerned attorney shall be provided by the Rules Counsel.

**§§ 776.90 [Reserved]****Subpart D—Outside Part-Time Law Practice of Naval Service Attorneys****§ 776.90 Background.**

(a) A DON attorney's primary professional responsibility is to DON, and he or she is expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. In addition to the obligations of an attorney engaged in the outside practice of law to comply with local bar rules governing professional responsibility and conduct, DON attorneys remain bound by subpart B of this part.

(b) Outside employment of DON personnel, both military and civilian, is limited by Executive Order 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306, and Secretary of the Navy Instruction 5370.2J, Standards of Conduct [available on request from the Office of the Judge Advocate General, Administrative Law Division, 200 Stovall Street, Alexandria, VA 22332-2400]. Additionally, section 0710 of the Manual of the Judge Advocate General prohibits active duty judge advocates and civilian attorneys under the supervision of JAG from accepting or receiving, directly or indirectly, any fee or compensation of any nature for legal services rendered to those persons eligible for legal assistance under article 0706 of the Manual of the Judge Advocate General, whether or not the service is rendered during duty hours, or is part of official duties.

(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 DON 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 DON attorney's special ethical responsibilities and loyalties.

**§ 776.91 Definition.**

Outside part-time law practice is defined as any regular provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to duties as a naval service attorney. Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition. 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 part.

**§ 776.92 Policy.**

(a) As a general rule, JAG will not approve requests to practice law part-time in association with lawyers or firms which represent clients with interests adverse to DON.

(b) 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. Furthermore, because any outside law practice is necessarily beyond the scope of a DON attorney's official duties, the requesting attorney

should consider obtaining personal malpractice insurance coverage.

**§ 776.93 Action.**

(a) DON attorneys to whom this enclosure applies who contemplate engaging in an outside part-time law practice must first obtain approval from JAG. Requests should be forwarded in the form provided in Judge Advocate General Instruction 5803.1A [the form is available on request from the Administrative Law Division] to the Administrative Law Division, via the attorney's chain of command. Marine Corps attorneys will also include Commandant of the Marine Corps (JAR) as a via addressee.

(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; or

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

(c) 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.

**§ 776.94 Revalidation.**

(a) Attorneys to whom permission is given to engage in the outside part-time practice of law will notify 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) Attorneys to whom permission is given to engage in the outside practice of law will annually resubmit an appli-

cation to continue the practice with current information by 1 October each year.

**§ 776.95 Relations with non-DON civilian counsel.**

Employment of non-DON civilian counsel by an individual client alters no responsibilities of a DON attorney to that client.

(a) When civilian counsel is retained by an individual client, the DON attorney assigned to that client shall inform civilian counsel—

(1) Of the contents of this part;

(2) That subpart B of this part applies to civilian counsel practicing before military tribunals, courts, or boards as a condition of such practice; and

(3) That subpart B of this part takes precedence over other rules of professional conduct that might otherwise apply.

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

(c) If civilian counsel has, in the opinion of the DON attorney, acted contrary to the requirements of subpart B of this part, the matter should first be discussed with civilian counsel. If not resolved between counsel, the client must be informed of the matter by the DON attorney. If, after being apprised of possible misconduct, the client approves of the questioned conduct, the judge advocate shall attempt to withdraw from the case in accordance with § 776.35. The client shall be informed of such intent to withdraw prior to action by the judge advocate.

**PARTS 777-799 [RESERVED]**