



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

January 13, 2012

MEMORANDUM FOR THE OFFICE OF THE CHIEF DEFENSE COUNSEL

Subject: Professional Responsibility Guidance on the JTF-GTMO-CDR Orders Governing Written Communications Management for Detainees Involved in Military Commissions of 27 December 2011 and Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions of 27 December 2011

1. On January 8, 2012, I issued an ethics instruction via electronic mail to all military commission defense counsel regarding compliance with the subject named orders. This Memorandum supplements that guidance.

2. Background

- a. Commander, JTF-GTMO recently promulgated "Order Governing Written Communications Management for Detainees Involved in Military Commissions of 27 December 2011" and "Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions of 27 December 2011" [hereinafter Orders].
- b. The Orders impose a pre-screening regime on any correspondence between counsel and their clients and any materials counsel seek to bring into our out of attorney-client meetings. Case-related written material, including material containing privileged and confidential information, is expressly included in this pre-screening regime.
- c. The pre-screening regime requires that written material be reviewed by a "Military Commission Privilege Team" [hereinafter Privilege Team]. The Privilege Team, which works for Commander, JTF-GTMO, is composed of one or more lawyers and one or more intelligence or law enforcement personnel. None of the Privilege Team members are members of any defense team, nor do any Privilege Team members share in any attorney-client relationship.
- d. The Orders contemplate that in some circumstances, the Privilege Team will review the content of attorney-client privileged and confidential case-related material. The Privilege Team is affirmatively obligated to disclose to Commander, JTF-GTMO, the information learned in such review. Broader dissemination of any information received from the Privilege Team is at the exclusive discretion of Commander, JTF-GTMO.
- e. The Privilege Team is obligated to preserve only "lawyer-client and other related legally-recognized privileges," and it must preserve those privileges only "to the fullest extent possible in a manner consistent with [these] Order[s]."

- f. The Orders also impose a requirement that counsel acknowledge that they will comply with the Orders. Counsel must make this acknowledgement in order to be allowed to meet with their client, even if they do not intend to bring written material into that meeting.

3. Authority

- a. Regulation for Trial by Military Commission (2011 Edition) [hereinafter RTMC], paragraph 9.1(a)(2) states, "The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C., ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel (OCDC), and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A."
- b. RTMC paragraph 9.1(a)(3) states, "the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities [the M.C.A., the M.M.C., this Regulation, all Supplementary Regulations and Instructions issued in accordance therewith, and the orders of the commission] as well as subordinate instructions and regulations."
- c. RTMC paragraph 9.1(a)(9) states, "The Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian) and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest."

4. Applicable Rules and Regulations

- a. Air Force Rules of Professional Conduct (AFRPC of 17 Aug 2005) FRPC 5.2(b) states "[a] subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."
- b. JAGINST 5803.1C, Subj: Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General of 9 Nov 2004: Rule 5.2(b), which guides Navy and Marine Corps judge advocates, is identical to the Air Force Rule, with the added requirement that the supervisor's resolution must be in writing. Paragraph 12a of the Navy rules authorizes a covered attorney to seek written informal ethics advice from "supervisory attorneys in the field."
- c. Army Regulation 27-26 (Rules of Professional Conduct for Lawyers of 1 May 1992) Rule 5.2(b) is identical to the Air Force and Navy/Marine Corps rule.

- d. Rule 5.2(b) of the Model Rule of Professional Conduct [hereinafter Model Rule] is identical to each of the Service rules.
- e. AFRPC Rule 1.6(a), and JAGINST 5803.1C Rule 1.6(a) provide that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation."
- f. Army Regulation 27-26 Rule 1.6(a), and Model Rule 1.6(a) impose the same obligation of confidentiality as the Army and Navy, with the addition that disclosure is permitted when required or authorized by law.
- g. Rules for Military Commissions [hereinafter RMC], Rule 502(d)(7), Discussion, provides that "Defense counsel must: guard the interests of the accused zealously within the bounds of the law . . . and may not disclose the accused's secrets or confidences except as the accused may authorize (see also Mil. Comm. R. Evid. 502)."
- h. Military Commission Rule of Evidence [hereinafter MCRE], Rule 502(a) provides that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client."
- i. RMC 701(j) states that that "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."

5. Discussion

- a. As the supervisor of all of the attorneys assigned to, and operating under the supervision of, the Office of the Chief Defense Counsel, I may provide written "resolution of an arguable question of professional duty."
- b. Rules of Professional Responsibility impose upon counsel the obligation to safeguard information relating to representation of a client. Counsel are prohibited from disclosing such information except in limited circumstances. I have concluded that compliance with the Orders would require counsel to violate that obligation.
- c. In the case of persons governed by Army Regulation 27-26 or a state code of professional responsibility based upon Model Rule 1.6, I have concluded that the existence of the Orders does not qualify as a legal requirement or authority to disclose confidential information. See American Bar Association Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct*, 6th ed., at 108; Virginia State Legal Ethics Opinion 1811 (2005) (exception to rule of confidentiality to comply with "other law or a court order" is limited to "statutes, judicial rulings, and various types of administrative regulations and rulings . . . [which have been] 'adopted in accordance with the procedural requirements

imposed by Congress.'" ; quoting ABA Formal Op. 95-396)
(available at <http://www.vacle.org/opinions/1811.htm>).

- d. Rules for Military Commission also impose upon counsel the obligation to safeguard client secrets and confidences. Counsel are prohibited from disclosing such information except in limited circumstances. Rule 502(d)(7), Discussion. For those persons representing clients who are subject to the Rules for Military Commission, I have concluded that compliance with the Orders would require counsel to violate that obligation.
- e. Rules for Military Commission provide that a party may not impose upon another party unreasonable requirements to obtain access to witnesses or evidence. RMC 701(j). I have concluded that the Orders impede a client's access to witnesses and evidence in ways that are inconsistent with the MCA and the MMC, and thus are unreasonable. I have further concluded that counsel's compliance with the Orders would amount to an improper forfeiting of the client's rights under that RMC provision.
- f. Military Commission Rules of Evidence recognize that a client may prevent other persons from disclosing confidential communications. Counsel have an obligation to comply with a client's exercise of this privilege. MCRE 502(a). For those persons representing clients who are subject to the provisions of the Military Commission Rules of Evidence, I have concluded that, absent the client's express waiver of the privilege, compliance with the Orders would require counsel to violate their obligation to follow the client's exercise of his rights.
- g. The Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions of 27 December 2011 requires that counsel agree to comply with the pre-screening process to gain access to the client even in the absence of written material. I have concluded that agreeing to comply with the pre-screening process, without the client's express consent, violates counsel's obligation to the client. See e.g. *United States v. Reid*, 214 F.Supp.2d 84, 94 (D.Mass. 2002) (requirement of counsel's signature on form agreeing to abide by terms of Special Administrative Measures "as a condition of the free exercise of Reid's Sixth Amendment right to consult with his attorneys fundamentally and impermissibly intrudes on the proper role of defense counsel").

6. Guidance

- a. Counsel are advised not to submit attorney-client privileged materials for review to the Privilege Team established by the Order Governing Written Communications Management for Detainees Involved in Military Commissions of 27 December 2011.
- b. Counsel are advised not to execute/sign the Acknowledgement found as Attachment A to JTF-GTMO-CDR Order Governing Written

Communications Management for Detainees Involved in Military Commissions of 27 December 2011.

- c. Counsel are advised not to execute/sign the Acknowledgement found as Attachment A to JTF-GTMO-CDR Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions of 27 December 2011.
 - d. Counsel are advised that to the extent that any attorney has previously executed either Acknowledgement addressed in "b" or "c" above, that Acknowledgement must be withdrawn immediately.
 - e. Military counsel will forward this Memorandum to any retained military commissions pool counsel in your respective cases immediately.
7. The guidance in this Memorandum will continue in force unless superseded by me or other competent authority.



J.P. COLWELL
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Chief Defense Counsel