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| UNITED STATES OF AMERICA<br><br>v.<br><br>DAVID MATTHEW HICKS | **Defense Motion**<br>for Appropriate Relief<br><br>Prosecutorial Misconduct<br><br>19 Mar 2007 |

1. **Timeliness**: This motion is filed within the timeframe established by R.M.C. 905.

2. **Relief Sought**: Mr. Hicks requests this Court to Disqualify Colonel ("Col") Morris Davis, Chief Prosecutor, Military Commissions, from exercising any prosecutorial or supervisory responsibilities with respect to Mr. Hicks' case.

3. **Overview**: The Chief Prosecutor violated Section 949b(a)(2)(C) of the Military Commissions Act and Rule 3.4 of the Air Force Rules of Professional Conduct by attempting to "coerce or, by any unauthorized means, influence . . . the exercise of" Major ("Maj") Mori's "professional judgment" in the representation of his client. The Chief Prosecutor did so by alleging to a newspaper reporter and later to the Convening Authority that Maj Mori committed misconduct amounting to a violation of Article 88 of the Uniform Code of Military Justice and Department of Defense regulations. This conduct violates a "legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon" and is, therefore, prosecutorial misconduct.

4. **Burden of Proof**: The Defense, as the moving party, bears the burden of proof for factual issues by a preponderance of the evidence. Rule for Military Commissions ("R.M.C.") 905(c)(2).

5. **Facts**:

a. On 3 March 2007, an Australian newspaper reported that Col Davis, Chief Prosecutor for the military commissions, accused Maj Mori of violating Article 88 of the Uniform Code of

Military Justice ("UCMJ") in the course of Maj Mori's defense of Mr. Hicks.[1] To support this allegation, Col Davis told reporters:

> "Certainly in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was any of my prosecutors, they would be held accountable." [2]

> "Go back and look at some of the things he (Major Mori) has said. He's on the defence side and he doesn't seem to be held to the same standards of his brother officers." [3]

b. The article also reported that "Col Davis said it would be up to the US Marine Corps to decide if charges should be laid."[4] Another newspaper reported that Col Davis said "Major Mori was not playing by the rules and criticized his regular trips to Australia. He said he would not tolerate such behavior from his own prosecutors."[5]

c. Two days later, on 5 March, Col Davis denied threatening Maj Mori with charges, incorrectly stating he did not have the power to charge Maj Mori.[6] At the same time, he implied Maj Mori had violated rules, stating "I would expect that of [Major Mori] or any defence counsel, to fight as hard as possible but I expect the fight to be within the rules." The next day, "Col Davis stood by his allegation that Maj Mori had gone 'too far' in his campaign to free

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[1] *See, e.g.*, David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007 *available at*: http://www.news.com.au/story/0,23599,21315542-2,00.html (attachment A).

[2] *Id*.

[3] *Id.*

[4] *Id.*

[5] Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007, *available at:* http://www.theage.com.au/articles/2007/03/04/1172943276209.html (attachment B).

[6] Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007, *available at*: http://moora.yourguide.com.au/detail.asp?class=national%20news&subclass=general&story_id=562995&category=General&m=&y= (attachment C); RULE FOR COURTS-MARTIAL 307, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) ("Any person subject to the code may prefer charges.").

Hicks . . . 'I certainly wouldn't permit that from my folks,' Col Davis said. 'But, he's not one of my folks.'"[7]

d. More than a week later, on 13 March 2007, Col Davis wrote a detailed email to the convening authority arguing that Maj Mori has repeatedly violated Article 88, UCMJ, and Department of Defense Directive 1325.6 since at least 19 November 2005.[8] Col Davis provided a dozen quotes from newspapers, which either quoted Maj Mori or attributed statements to him, that Col Davis claims violate Article 88.[9]

6. **Law and Argument**:

A unanimous Court of Appeals for the Armed Forces has found that "[p]rosecutorial misconduct is generally defined as 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'"[10] The Military Commission Act ("MCA") sets forth the following standard: "No person may attempt to coerce or, by any unauthorized means, influence . . . the exercise of professional judgment by trial counsel or defense counsel."[11] Rule 3.4 of the Air Force Rules of Professional Conduct provides that "A lawyer shall not knowingly disobey an obligation under the rules of a tribunal . . ."[12] An Air Force policy memorandum also explains that a lawyer should not "degrade the intelligence, ethics, morals, integrity or personal behavior of others, unless such matters are legitimately at issue in the proceeding."[13] More generally, it is

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[7] *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007, *available at*: http://www.worldnewsaustralia.com.au/region.php?id=135270&region=7 (attachment D).

[8] Email from Col Davis dtd 13 Mar 07 (attachment E).

[9] *Id.*

[10] *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)) (denying relief for claim of prosecutorial misconduct on basis that military judge's curative action "secured the fairness and impartiality of the trial"); *see also Berger v. United States*, 295 U.S. 78, 84 (1935) (explaining prosecutorial misconduct occurs when the "prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense").

[11] 10 U.S.C. § 949b(a)(2)(C).

[12] TSJ-2, AF Rule 3.4 of Professional Conduct (attachment F).

[13] TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005) (attachment G); *cf. United States v.*

the duty of a prosecutor "to refrain from improper methods calculated to produce a wrongful conviction."[14] Accordingly, "[t]he government, which represents us all, should strive to be beyond reproach in the conduct of a prosecution; to expect less damages the sinews of our legal structure."[15]

Col Davis has committed prosecutorial misconduct by violating the legal standard set forth in Section 949b(a)(2)(C) of the MCA. He attempted "to coerce or, by any unauthorized means, influence" Major Mori's "exercise of professional judgment" in representing Mr. Hicks.[16] Col Davis did so by repeatedly accusing Maj Mori in the media of violating applicable rules.[17] He also attempted to exert command influence on Major Mori by suggesting the Marine Corps would decide whether Maj Mori would be court-martialed and by raising his allegations with the Convening Authority.

Furthermore, the curious timing of Col Davis' initial accusations – the day after charges were referred – is revealing, particularly given that Col Davis alleges misconduct going back as far as November 2005. It suggests Col Davis made the allegations to chill and hinder Maj Mori's representation of Mr. Hicks and to derail the defense shortly before the arraignment. These allegations diverted the defense team from preparing for Mr. Hicks' trial, forcing them to focus instead on assessing the potential conflict of interest between Maj Mori and Mr. Hicks. They also required Maj Mori to refrain from making public comments on behalf of Mr. Hicks until he could obtain legal advice on the issue.

Col Davis' conduct is even more appalling when one examines the merits of his claims. For example, "[i]f not personally contemptuous, adverse criticism of one of the officials or legislatures named in . . . [A]rticle [88] in the course of a political discussion, even though

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*Fletcher*, 62 M.J. 175, 181 (C.A.A.F. 2005) (finding prosecutorial misconduct where trial counsel made disparaging remarks regarding defense counsel in front of the members).

[14] *Berger v. United States*, 295 U.S. 78, 88 (1935).

[15] *United States v. Horn*, 811 F. Supp. 739, 750 (D.N.H. 1992) (quoting *United States v. Ariza-Ibarra*, 651 F.2d 2, 17 (1st Cir. 1981)).

[16] *See* 10 U.S.C. § 949b(a)(2)(C).

[17] *Cf. United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998) (concluding it may be prosecutorial misconduct if "the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify").

emphatically expressed, may not be charged as a violation of the article."[18] Nothing Maj Mori said was personally contemptuous – not to mention otherwise contemptuous – of the President, Vice President or the Secretary of Defense. And Maj Mori's statements are consistent with his obligation to exercise judgment "solely for the benefit of the client and free of compromising influences and loyalties."[19] Col Davis doesn't come close to alleging conduct that violates Article 88.[20] Additionally, the "particular facts" of Maj Mori's mission and conduct show that he did not violate Department of Defense Directive 1325.6 as Col Davis alleges.[21]

One of Col Davis' statements to the Convening Authority reveals his motivation for attempting to quiet Maj Mori and it relates to the effectiveness of his representation, rather than the words he spoke: "MAJ Mori's campaign is having a direct impact on the elected government of one of our closest allies in an election year and while they are supporting us in a war. An article in today's Sydney Morning Herald notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor."[22] Obviously, the effectiveness of Maj Mori's representation of Mr. Hicks prompted Col Davis' attempt to chill that representation.

In addressing prosecutorial misconduct courts have considered disqualifying the prosecutor among other sanctions.[23] To remedy Col Davis' prosecutorial misconduct, this Court should relieve him of all prosecutorial and supervisory responsibilities with respect to Mr. Hicks' case. Mr. Hicks should not be punished by (1) having to waive any conflict of interest that Col Davis created between Mr. Hicks and Maj Mori and proceed with Col Davis still involved in and

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[18] Manual for Courts-Martial, United States, Pt. IV, ¶12.c (2005 ed.).

[19] JAGINST 5803.1C, Rule 5.4(d) (comment), 9 Nov 04 (attachment H).

[20] *Cf. United States v. Howe*, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) (affirming conviction of contempt where the accused carries a sign at a demonstration calling the President a "facist" was personally contemptuous).

[21] DoDD 1325.6 ¶ 1 (1 Oct 96).

[22] App. E at 2-3.

[23] *See, e.g., United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) ("Courts faced with prosecutorial misconduct or violations of discovery rules have considered sanctions including granting a continuance, granting a new trial, disqualifying the prosecutor, imposing disciplinary sanctions on the offender, holding the offender in contempt, publicly chastising the offender and excluding evidence.") (citations omitted).

having influence over the process,[24] or (2) by having Maj Mori, who has represented Mr. Hicks for approximately three years, replaced with a brand new military counsel within months of trial whose representation may also be chilled by Col Davis' allegations regarding Maj Mori. "[J]ustice must satisfy the appearance of justice."[25] Any lesser remedy will deprive Mr. Hicks' trial of the appearance of fairness.

7. **Request for Oral Argument**: The defense requests oral argument. Oral argument is necessary to analyze the facts elicited from the witnesses requested. Furthermore, as provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."

8. **Request for Witnesses**: The defense requests the following witnesses:

Col Morris Davis, Chief Prosecutor, Military Commissions

David Nason

[24] *Cf. United States v. Ramos*, 350 F. Supp. 2d 413 (S.D.N.Y. 2004) (disqualifying defense counsel where the conflict was of the attorney's own making as opposed to prosecutorial misconduct).

[25] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

9. **Attachments**:

A) David Nason, *Mori charges could be laid after trial*, THE AUSTRALIAN, Mar. 3, 2007

B) Tom Allard, *Hicks trial at risk if Mori taken off case*, THE AGE, Mar. 5, 2007

C) Peter Veness, *Hicks facing another possible delay to trial*, AUSTRALIAN AP, Mar. 5, 2007

D) *Mori won't be charged: Davis*, AUSTRALIAN AP, Mar. 6, 2007

E) Email from Col Morris Davis dated 13 March 2007\

F) TSJ-2, AF Rule 3.4 of Professional Conduct

G) TJAG Policy Memorandum, TJAGD Standards – 2, Air Force Rules of Professional Conduct and Standards for Civility, attachment 2, para. 28 (Aug. 17, 2005)

H) JAGINST 5803.1C, Rule 5.4(d) (comment)

By: _____

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# Mori charges could be laid after trial

**By David Nason**
March 03, 2007 12:00am

Article fro... THE AUSTRALIAN

**THE chief prosecutor of the US military has warned David Hicks's military lawyer, Michael Mori, that "politicking" on behalf of his client could result in charges under the Uniform Code of Military Justice.**

"I don't know what Major Mori's plans are right now but if he wants to come back home and represent his client, that would be helpful," Colonel Moe Davis said.

"Certainly in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing to see that happening in Australia and if that was any of my prosecutors, they would be held accountable."

Colonel Davis said it would be up to the US Marine Corps to decide if charges should be laid.

He cited Article 88 of the code, which prohibits the use of contemptuous language against the President, Vice-President, Secretary of Defence and Congress.

"Go back and look at some of the things he (Major Mori) has said. He's on the defence side and he doesn't seem to be held to the same standards of his brother officers," Colonel Davis said.

Major Mori would not discuss his comments regarding the military commission.

But he said the dropping of all original charges against Hicks was an admission by the US he had been held without justification for five years.

"The material support charge has never existed in the laws of war," Major Mori said.

"It was created in October 2006 and the US is applying this offence to David retrospectively, even though Australian ministers have said that is inappropriate.

"After five years, the US has not charged David with a single war crime. David has no hope of facing a fair trial, which would have been provided to an American a long time ago."



Attachment A

# Hicks trial at risk if Mori taken off case

Tom Allard
March 5, 2007

MAJOR Michael Mori, the defence lawyer for terror suspect David Hicks, could be removed from the case after threats from the chief US prosecutor to charge him under the Uniform Code of Military Justice.

The intervention may derail Hicks' trial and possibly prompt his return to Australia.

It would take months for a new lawyer to get to grips with the case and the new military commission process.

Prime Minister John Howard has told Washington that any action leading to further delays would be unacceptable and would prompt him to demand the return of Hicks, 31, after being held for five years at the US base at Guantanamo Bay.

Colonel Morris Davis has accused Major Mori of breaching article 88 of the US military code, which relates to using contemptuous language towards the President, Vice-President or Secretary of Defence.

Penalties for breaching the code include jail and the loss of employment and entitlements.

Mori: Accused of breaching military rules.
Photo: *Craig Abraham*

Major Mori denied he had done anything improper, but said the accusations left him with an inherent conflict of interest.

"It can't help but raise an issue of whether any further representation of David and his wellbeing could be tainted by a concern for my own legal wellbeing," Major Mori told *The Age*. "David Hicks needs counsel who is not tainted by these allegations."

Major Mori, who has been to Australia seven times, will seek legal advice.

The issue will also have to be raised with Hicks when his legal team next sees him.

The Federal Government has highlighted Major Mori's work as proof of the fairness of the much-criticised US military commission system.

However, Colonel Davis said Major Mori was not playing by the rules and criticised his regular trips to Australia. He said he would not tolerate such behaviour from his own prosecutors.

"Certainly, in the US it would not be tolerated having a US marine in uniform actively inserting himself into the political process. It is very disappointing," he reportedly said.

"He doesn't seem to be held to the same standards as his brother officers."

Hicks' lead defence counsel, Joshua Dratel, a New York attorney, said Colonel Davis' threats were the latest

Attachment B

example of the "corrupt" system that will try Hicks.

Mr Dratel pointed to the former senior Pentagon official in charge of detainee affairs, Cully Stimson, who resigned last month after urging businesses not to hire law firms that had worked for Guantanamo prisoners.

US prosecutors are under intense pressure to offer Hicks, a former kangaroo skinner and father of two, a plea bargain deal by the end of the month.

Senior Australian Government members want Hicks to come home a free man, provided he agrees to a pre-trial plea of guilty.

Amid rising public anger in Australia about Hicks' long wait for justice and alleged mistreatment, any Hicks trial risks becoming a public relations disaster. He is to be the first person to appear before a military commission.

The world's media will be focused on the case, including al-Jazeera and other Middle Eastern outlets.

They will hear graphic testimony of abuses and torture by US guards and interrogators. It will involve a man, Hicks, whose alleged offence pales alongside the serious accusations made against alleged senior al-Qaeda leaders at Guantanamo Bay.

Prosecutors have dropped three charges against Hicks — attempted murder, aiding the enemy and conspiracy to commit war crimes. There is now only the lesser charge of providing material support to a terrorist group. That charge did not exist for non-US citizens when Hicks was arrested.



Attachment B

Print | Close

Monday, 5 March 2007

# Hicks faces another possible trial delay

By Peter Veness

Australian terror suspect David Hicks faces the prospect of yet another delay to his trial because his US lawyer has been threatened with court martial.

Last week Hicks was formally charged by the US with providing material support for terrorism and is due to face trial before a US military commission within four months.

But Hicks' outspoken military lawyer Major Michael Mori has said he could be pulled from the case for being too political and that could cause a further delay.

The chief US prosecutor, Colonel Morris Davis, has accused Major Mori of breaching Article 88 of the US military code by actively inserting himself into the political process.

That section relates to using contemptuous language towards the US president, vice-president, and secretary of defence.

Labor has called on the government to defend Major Mori or face the possibility of Hicks' trial being delayed again.

"If the Howard government does not intervene at this point, we face the prospect that Major Mori will not be able to continue to represent David Hicks in future," opposition legal affairs spokesman Kelvin Thomson told reporters.

"This will simply damage the defence case and the search for a replacement lawyer will add more delays to a situation where David Hicks has already been at Guantanamo Bay for over five years without a trial."

Prime Minister John Howard said any delay would be unacceptable.

"We would not regard a further significant delay as being acceptable," Mr Howard told the Nine Network.

However, Mr Howard refused to comment on the threat to Major Mori.

In the past, Attorney-General Philip Ruddock has strongly backed the vigorous defence of Hicks offered by Major Mori as proof the military commission system the US is using to prosecute suspected terrorists is appropriate.

"Extensive safeguards are in place for a fair trial, and of course, Major Mori is part of that process," Mr Ruddock said.

"I presume that other members of that process will bring the same diligent approach to their roles as Major Mori."

The Adelaide-born Hicks has been held in the US prison at Guantanamo Bay for five years without trial since his capture in Afghanistan in late 2001.

The Australian Lawyers Alliance said any charges against Major Mori would delay a trial.

"News that ... Major Mori could face charges ... for inserting himself into the political process would do nothing but create further delays for Hicks," alliance president Simon Morrison said.

Brought to you by AAP



Attachment C

CENTRAL MIDLANDS & COASTAL ADVOCATE
ADVOCATE

## Mori won’t be charged: Davis

6.3.2007. 15:00:32

The US chief military prosector has denied reports he is moving to charge David Hicks’ defence lawyer, Major Michael Mori, for being outspoken.

Colonel Morris Davis says he would be "dumbfounded" if the Australian terror suspect's lawyer was court-martialled for his comments.

Col Davis said he had no power to charge him for contemptuous comments made against US President George W Bush, the US Secretary of Defence or Congress.

RELATED LINKS
- PM won't comment on Mori delay
- Hicks' trial possibly delayed
- Father may incriminate Hicks

The prosecutor also said he was not aware of any moves by US officials with that power to bring charges against Maj Mori.

There were fears that if he was court-martialled it would delay Hicks' long-awaited military commission trial.

"I'm not aware of anybody, anywhere that has any intention of charging Maj Mori with anything," Col Davis said.

Col Davis created headlines on the weekend when he suggested Maj Mori may have breached Article 88 of the US Uniform Code of Military Justice (UCMJ).

Article 88 prohibits military officers from using "contemptuous words" against the president, vice president, US secretary of defence or Congress.

Maj Mori, during numerous trips to Australia and in interviews in the US, has been a staunch critic of the military commission system to prosecute Hicks and other Guantanamo Bay inmates.

**Mori has gone ‘too far’**

Col Davis stood by his allegation that Maj Mori had gone "too far" in his campaign to free Hicks, including attending rallies dressed in US military uniform.

"I certainly wouldn't permit that from my folks," Col Davis said.

"But, he's not one of my folks."

Asked if he believed Maj Mori should be court-martialled for breaching Article 88 of the UCMJ, Col Davis said "it's not my decision".

"He's not in my chain of command," Col Davis continued.

"I have no authority over him.

"I'm in the Air Force, he's in the Marine Corps.

"I'm not responsible for Major Mori."

Col Davis said the origin of Article 88 can be traced back more than 200 years to the British Articles of War of 1769.

He said it was extremely rare for a military officer to be prosecuted for an alleged Article 88 violation.

Attachment D

"You can count the number of court martials for Article 88 violations on one hand," Col Davis said.

"They are very uncommon.

"I would be absolutely dumbfounded if this kind of thing rose to that level."

Adelaide-born Hicks, 31, was charged last Thursday with providing material support for terrorism.

It is expected he will make his first appearance before the military commission at the US naval base at Guantanamo Bay, Cuba, in late March.

Hicks has been in US custody for more than five years after being picked up on the Afghanistan battlefield in December, 2001.

It is alleged Hicks trained and fought with al-Qaeda against US and coalition troops in Afghanistan.

**SOURCE:** AAP

http://www.worldnewsaustralia.com.au/region.php?id=135270&region=7

Attachment D

From: Davis, Morris, COL, DoD OGC <davism@dodgc.osd.mil>
To: Crawford, Susan, Hon, DoD OGC <crawfors@dodgc.osd.mil>
CC: Hemingway, Thomas, BG, DoD OGC <hemingwt@dodgc.osd.mil>; Sullivan, Dwight, COL, DoD OGC <sullivad@dodgc.osd.mil>
Sent: Tue Mar 13 10:25:59 2007
Subject: Criticism of Statements Made by Colonel Morris Davis

Ms Crawford,

I do not want to prolong this, but now is as good a time as any to bring some clarity to this area of confusion. Let me also state that it is not now, nor has it been in the past, my intent to seek disciplinary action against any member of the defense team. My intent is to ensure we all understand what the law is and that we all abide by the law. This is admittedly a confusing area and my sole intent is to seek clarification.

I believe MAJ Mori's words and actions exceed what the law allows. Specifically, Article 88 of the UCMJ prohibits using contemptuous language against certain civilian officials and DoDD 1325.6 prohibits service members from participating in demonstrations while on duty, in uniform, or in a foreign country. There are no defense counsel exemptions in either case and I believe COL Sullivan's reliance on the Rules of Professional Conduct to absolve MAJ Mori's conduct is misplaced.

Taking those points in reverse order. The underlying principles upon which the Rules of Professional Conduct are based (set out on page 12 of Navy JAGINST 5803.1B, which apply to COL Sullivan and MAJ Mori) state: "Ethical rules should be consistent with the law. If law and ethics conflict, the law prevails unless an ethical rule is constitutionally based."

The law, as expressed by statute in Article 88, is that officers may not use contemptuous language against the President, Secretary of Defense, the Congress, and others. The military judge's benchbook defines contemptuous language as language that is insulting, rude, or disrespectfully attributes qualities of meanness, disreputableness, or worthlessness. The truth or falsity of the language is immaterial. The basis for the law is that permitting officers to disparage the civilian leadership erodes good order and discipline, and promotes insubordination. That is particularly true when, as now, we have troops engaged in armed conflict. I will not list every instance where I believe MAJ Mori's language exceeds what the law allows, but here is a sampling:

"The military commissions have been set up by the civilian administration to deliver political verdicts to justify their prior actions in Afghanistan and their PR statements that they have war criminals at Guantanamo." (Audio available at: http://www.theage.com.au/multimedia/hicks/interviews.html)

"This is a process designed by the President and the Vice-President and the imperative is to get convictions," (Mori) says. "This process is nothing like a court martial, nothing like it. I'm still not an expert on international law, but I know enough to know this is not justice." (Sydney Morning Herald, November 19, 2005)

"It was a political stunt. The Administration clearly didn't know anything about military law or the laws of war. I think they were clueless that there was a U.C.M.J. and a Manual for Courts-Martial! The fundamental problem is that the rules were constructed by people with a vested interest in convictions." (The New Yorker, July 3, 2006, Vol. 82, No. 20, at Pg. 44)

They don't want the Supreme Court coming in and finding this new system illegal before this administration can be out of office. (Australian Broadcasting Corp. Transcript, January 19, 2007)

Still, the biggest problem for Mori - and for Hicks - is that the US administration simply can't afford to back down. "They need concrete results to prove what they did was right." Mori said. It isn't an option for Hicks to be found not guilty, Mori said, which is exactly why the US is reluctant to give the Australian his day in court. "The US doesn't care how long the litigation takes," he said.

Although there is now limited dissent in Congress, where legislation for the new military commission is currently being discussed, the majority view amongst congressmen is that no matter the system, Hicks must be convicted, Mori said. The military commission system was the administration's attempt to achieve guaranteed results without risking judicial scrutiny in the form of a properly constituted court or court-martial, Mori said.

When asked, Mori said that he doesn't "believe in conspiracy from the [US] government unless you first rule out incompetence."
(Lawyers Weekly, August 25, 2006)

Major Mori said he was now waiting for US Defense Secretary Donald Rumsfeld to "write the rules" of the new commissions, which he believed would be a "rigged system." (Australian Associated Press, November 3, 2006)

"Because right now [Hicks' has] been a victim of a war crime far greater than he's ever done to anybody else. ... There would be a cause of action to prosecute the people who participated in the unlawful system." (Transcript of Enough Rope with Andrew Denton, August 14, 2006)

Hicks faces new military commissions set up in the US that Major Mori said are rigged for convictions only. (Australian Associated Press, August 13, 2006)

Michael Mori: "The system has to be written by the Secretary of Defence for the United States, which is another serious problem, that all the power sits in the Secretary of Defense's hands, and they need, the Secretary of Defence needs, a system that will guarantee convictions to justify what they've done to David [Hicks]." (Australian Broadcasting Corp. Transcripts, December 14, 2006)

"The reality is David Hicks is being left to be done over in another unfair system that is not good enough for anyone else so politicians don't have to admit they made mistakes." (Mori editorial, The Age, January 14, 2007)

I wholeheartedly support the right of defense counsel to forcefully and publicly criticize alleged defects in military commissions, but to go well beyond arguing where the system is flawed and attribute bad motives or incompetence as the basis for a deliberate design by the President, Vice President, Secretary of Defense, and Congress to justify their alleged mistakes is, in my opinion, the type of language Article 88 prohibits. (See U.S. v. Howe, 37 C.M.R. 165, USCMA 1967).

Additionally, DoDD 1325.6 prohibits service members from participating in demonstration on duty, in uniform, or in a foreign country, and it contains no exceptions for judge advocates. The photograph linked above shows MAJ Mori at a demonstration in Adelaide, Australia, last August doing all three: in uniform (minus hat), on orders (I believe), and in a foreign country. Below is a link to a video of the event. The event ended with a march in the streets to the foreign ministry office.
http://www.youtube.com/watch?v=1MJMp9ZKpts The prohibitions in the DoDD balance free expression against military effectiveness, morale and discipline, and foreign relations. MAJ Mori's campaign is having a direct impact on the elected government of one of our closest allies in an election year and while

they are supporting us in a war. An article in today's Sydney Morning Herald notes that Prime Minister Howard is trailing in the polls and that David Hicks is a factor
http://www.smh.com.au/news/national/qantas-sale-adds-to-voter-turbulence/2007/03/12/1173548109818.html

Again, I support zealous defense representation, but within the bounds of the law. Using contemptuous language against the SECDEF, tampering with evidence, bribing a juror, or kidnapping an adverse witness are all effective and are all in an accused's interest, but all four exceed what the law allows.

Respectfully,

MORRIS D. DAVIS, Colonel, USAF
Chief Prosecutor
Office of Military Commissions
(703) 602-4215, Ext. 115 (DSN 332)




-----Original Message-----
From: Sullivan, Dwight, COL, DoD OGC
Sent: Monday, March 12, 2007 09:33
To: Patterson Mark H Lt Col AF/JAU
Cc: Crawford, Susan, Hon, DoD OGC; Hemingway, Thomas, BG, DoD OGC; Davis, Morris, COL, DoD OGC; Dapper James H LtCol AF/JA
Subject: Re: Criticism of Statements Made by Colonel Morris Davis

Colonel Patterson,

Attachment E

Thank you for sharing your analysis with me. Please note that my reference to the Rules of Professional Conduct was not intended to suggest that the statements attributed to Colonel Davis had run afoul of those rules. Rather, the reference was intended to demonstrate that when assigned to represent an individual client, a judge advocate has unique responsibilities. The statements attributed to Colonel Davis appeared to suggest that Major Mori acted improperly by purportedly making statements that would be impermissible for commission prosecutors or other military officers to make. Rule 5.4 refutes any such suggestion. Thus, my point was not to imply that anyone had violated the rules of professional conduct; rather, my point was that Major Mori had not.

Respectfully.
Dwight Sullivan
Col, USMCR
Chief Defense Counsel
Office of Military Commissions

CAUTION: Information contained in this message may be protected by the attorney/client, attorney work product, deliberative process or other privileges. Do not disseminate further without approval from the Office of the DoD General Counsel.

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Sent from my BlackBerry Wireless Handheld

-----Original Message-----
From: Patterson Mark H Lt Col AF/JAU <Mark.Patterson@pentagon.af.mil>
To: Sullivan, Dwight, COL, DoD OGC <sullivad@dodgc.osd.mil>
CC: Crawford, Susan, Hon, DoD OGC <crawfors@dodgc.osd.mil>; Hemingway, Thomas, BG, DoD OGC <hemingwt@dodgc.osd.mil>; Davis, Morris, COL, DoD OGC <davism@dodgc.osd.mil>; Dapper James H LtCol AF/JA <JamesH.Dapper@pentagon.af.mil>
Sent: Mon Mar 12 08:46:40 2007
Subject: Criticism of Statements Made by Colonel Morris Davis

Col Sullivan-- I am the Chief of Professional Responsibility the Air Force JAG Corps. (We met at last October's Air Force "Keystone Conference" in Orlando, Florida, as I was assisting with travel arrangements.) I recently received a copy of an email you sent to the Appointing Authority for the Office of Military Commissions regarding statements made by Air Force Col Morris Davis, Chief Prosecutor, in connection with the Hicks prosecution. I considered your email under the Air Force Rules of Professional Conduct. Please see the attached letter for my analysis. Thank you for sharing your concerns and please let me know if I can be of any assistance. I will send the original directly.
<<Sullivan Letter - Davis Complaint.pdf>> V/R Mark Patterson

MARK H. PATTERSON, Lt Col, USAF
Chief, Professional Responsibility Division (AF/JAU)
1501 Wilson Blvd., 8th Floor
Arlington VA 22209
703-696-9029 (DSN Prefix: 426)
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that right does not extend to perjury (see also Rule 1.2). Counsel must know his or her client has been untruthful. Suspicion is not enough. See *Nix v. Scurr*, 744 F.2d 1323,1328 (8th Cir. 1984), rev'd on other grounds, *Nix v. Whiteside*, supra. See *United States v Polk*, 32 M.J. 150 (C.M.A. 1991). Situations where a client commits perjury in court are relatively rare. Lawyers should make full use of the hierarchy of methods to dissuade the client from lying before the extreme dilemma of perjury and the obligation to disclose arises. (See Rule 1.16, Standard 4-7.7, and Standard 6-2.5.)

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

**Rule 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL**

A lawyer shall not:

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

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

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

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

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

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

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

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

DISCUSSION

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

**Rule 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

A lawyer shall not:

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

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

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

**TJAG POLICY MEMORANDUM: TJAGC Standards - 2**

OPR: AF/JAU

# Air Force Rules of Professional Conduct and Standards for Civility in Professional Conduct

17 Aug 05

**1. Summary.** This policy memorandum transmits the *Air Force Rules of Professional Conduct* (AFRPC or the *Rules*) and the *Air Force Standards for Civility in Professional Conduct* (*Standards for Civility*).

**2. Background.**

**a. *Air Force Rules of Professional Conduct*.** The *Rules* have been specifically adapted to the unique needs and demands of Air Force legal practice. Although counsel are still obligated to their licensing bar authorities, the *Rules* govern Air Force practice. They were adapted from the *American Bar Association Model Rules of Professional Conduct* in order to minimize inconsistent ethical requirements. However, when there is a difference between state rules and the Air Force *Rules*, the Air Force provisions will control.

**b. *Air Force Standards for Civility in Professional Conduct*.** Along with our obligation to represent clients zealously, we must also fulfill our responsibilities to the administration of justice. Civility—treating others with courtesy, consideration, and mutual respect, regardless of the cause they espouse—enhances the dignity of the profession of law and the satisfaction of all who are affected by it. Incivility to counsel, adverse parties, judges, administrative personnel, and other participants in the legal process, undermines the administration of justice, diminishes respect for the legal profession and for the results of our judicial system, and can delay or deny justice. We are indebted to the Federal Bar Association and the District of Columbia Bar for their work on these standards.

**3. Applicability.** The *Rules* and the *Standards for Civility* apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps (TJAGC). This includes host nation lawyers, paralegals, and other personnel employed overseas by the Department of the Air Force, to the extent the *Rules* and the *Standards for Civility* are not inconsistent with their domestic law and professional standards. They also apply to all lawyers, paralegals and nonlawyer assistants who practice in Air Force courts and other proceedings, including civilian defense counsel (and their assistants) with no other connection to the Air Force. Staff judge advocates and Air Force military defense counsel working with defense counsel from outside the Air Force should ensure outside counsel are aware of the *Rules* and the *Standards for Civility* and have ready access to them.

Approved 17 August 2005 by:

JACK L. RIVES, Major General, USAF
Deputy Judge Advocate General
Performing Duties of The Judge Advocate General
10 U.S.C. §8037

2 Attachments:
1. *Air Force Rules of Professional Conduct*
2. *Air Force Standards for Civility in Professional Conduct*

Attachment G

# AIR FORCE STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT[1]

**17 August 2005**

**PRINCIPLES OF GENERAL APPLICABILITY:**
**LAWYERS' DUTIES TO OTHER COUNSEL, PARTIES, AND THE JUDICIARY**

**General Principles:**

1. In carrying out our professional responsibilities, we will treat all participants in the legal process, including counsel and their staffs, parties, witnesses, judges, court personnel, and other staff, in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. We will refrain from acting upon or manifesting racial, gender, or other bias or prejudice toward any participant in the legal process. We will treat all participants in the legal process with respect.

2. Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor, our clients' ill feelings, if any, towards other participants in the legal process.

3. We will not, even if called upon by a client to do so, engage in offensive conduct directed toward other participants in the legal process; nor will we abuse other such participants in the legal process. Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from directing disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration. We will encourage our clients to act civilly and respectfully to all participants in the legal process.

4. We will not encourage or authorize any person under our control to engage in conduct that would be inappropriate under these standards if we were to engage in such conduct.

5. We will not bring the profession into disrepute by making unfounded accusations of impropriety or making ad hominem attacks on counsel, and, absent good cause, we will not attribute bad motives or improper conduct to other counsel.

6. While we owe our highest loyalty to our clients, we will discharge that obligation in the framework of the judicial system in which we apply our learning, skill, and industry, in accordance with professional norms. In this context, we will strive for orderly, efficient, ethical, fair, and just disposition of litigation, as well as disputed matters that are not, or are not yet, the subject of litigation, and for the efficient, ethical, and fair negotiation and consummation of all transactions.

7. The foregoing General Principles apply to all aspects of legal proceedings, both in the presence and outside the presence of a court or tribunal.

**Scheduling Matters:**

8. We will endeavor to schedule dates for trials, hearings, depositions, meetings, negotiations, conferences, vacations, seminars, and other functions to avoid creating calendar conflicts for other participants in the legal process, provided our clients' interests will not be adversely affected.

9. We will notify other counsel and, if appropriate, the court or other persons, at the earliest possible time when hearings, depositions, meetings, or conferences need to be canceled or postponed. Early notice avoids unnecessary travel and expense and may enable the court and the other participants in the legal process to use the previously reserved time for other matters.

[1] Adapted with the consent of the Federal Bar Association, in conjunction with the District of Columbia Bar, from standards published in 1996

10. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' interests will not be adversely affected.

11. We will not request an extension of time for the purpose of unjustified delay.

**PRINCIPLES PARTICULARLY APPLICABLE TO LITIGATION**

**Procedural Agreements:**

12. We will confer with opposing counsel about procedural issues that arise during the course of litigation, such as requests for extensions of time, discovery matters, pre-trial matters, and the scheduling of meetings, depositions, hearings, and trial. We will seek to resolve by agreement such procedural issues that do not require court order. For those that do, we will seek to reach agreement with opposing counsel before presenting the matter to the court.

13. We accept primary responsibility, after consultation with the client, for making decisions about procedural agreements. We will explain to our clients that cooperation between counsel in such matters is the professional norm and may be in the client's interest. We will explain the nature of the matter at issue in any such proposed agreements and explain how such agreements do not compromise the client's interests.

**Discovery:**

14. We will not use any form of discovery or discovery scheduling to harass, create unjustified delay, increase litigation expenses, or for any other improper purpose.

15. We will make good faith efforts to resolve by agreement any disputes with respect to matters contained in pleadings, discovery requests, and objections.

16. We will not engage in any conduct during a deposition that would not be appropriate if a judge were present. Accordingly, we will not obstruct questioning during a deposition or object to deposition questions, unless permitted by the applicable rules to preserve an objection or privilege, and we will ask only those questions we reasonably believe are appropriate in discovery under the applicable rules.

17. We will carefully craft document production requests so they are limited to those documents we reasonably believe are appropriate under the applicable rules. We will not design production requests for the purpose of placing an undue burden or expense on a party.

18. We will respond to document requests reasonably and in accordance with what the applicable rules require. We will not interpret a request in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents.

19. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are appropriate under the applicable rules, and we will not design them for the purpose of placing an undue burden or expense on a party.

20. We will respond to interrogatories reasonably and in accordance with what the applicable rules require. We will not interpret interrogatories in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information.

21. We will base our discovery objections on a good faith belief in their merit. We will not object solely for the purpose of withholding or delaying the disclosure of properly discoverable information.

22. During discovery, we will not engage in acrimonious conversations or exchanges with opposing counsel, parties, or witnesses. We will advise our clients to conduct themselves in accordance with these provisions. We will not engage in undignified or discourteous conduct that degrades the legal proceeding.

**Sanctions:**

23. We will not seek court sanctions or disqualification of counsel unless reasonably justified by the circumstances determined after conducting a reasonable investigation, which includes attempting to confer with opposing counsel.

**Lawyers' Duties to the Court:**

24. We recognize that the public's perception of our system of justice is influenced by the relationship between lawyers and judges, and that judges perform a symbolic role. At the same time, lawyers have the right and, at times, the duty to be critical of judges and their rulings. Thus, in all communications with the court, we will speak and write civilly. In expressing criticism of the court to any tribunal, we shall use language that is respectful of courts or tribunals, the system of justice, and the symbolism that these represent.

25. We will not engage in conduct that offends the dignity or decorum of judicial or administrative proceedings, brings disorder or disruption to the courtroom or tribunal, or undermines the image of the legal profession.

26. We will advise clients and witnesses to act civilly and respectfully toward the court, educate them about proper courtroom decorum, and, to the best of our ability, prevent them from creating disorder or disruption in the courtroom.

27. We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities and will immediately make any clarifications and corrections as these become known to us.

28. We will not degrade the intelligence, ethics, morals, integrity, or personal behavior of others, unless such matters are legitimately at issue in the proceeding.

29. We will act and speak civilly and respectfully to the judge's staff, the courtroom and tribunal staff, and other court or tribunal personnel, with an awareness that they, too, are an integral part of the judicial system. We will also advise clients and witnesses to act civilly and respectfully toward these participants in the legal process.

30. We recognize that judicial resources are scarce, that court dockets are crowded, and that justice is undermined when cases are delayed and/or disputes remain unresolved. Therefore, we will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.

31. We recognize that tardiness and neglect show disrespect to the court and the judicial system. Therefore, we will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time and proceed efficiently. We will also educate clients and witnesses concerning the need to be punctual and prepared. If delayed, we will promptly notify the court and counsel, if at all possible.

32. Before dates for hearings or trials are set, or, if that is not feasible, immediately after such a date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

33. We will avoid ex parte communications with the court or tribunal, including the judge's staff, on pending matters, in person (whether in social, professional, or other contexts), by telephone, or in letters or other forms of written communication, unless such communications relate solely to scheduling or other non-substantive administrative matters, or are made with the consent of all parties, or are otherwise expressly authorized by law or court rule.

**Judges' Duties to Lawyers and Others:**

34. We will be courteous, respectful, and civil to lawyers, parties, agency personnel, and witnesses. We will maintain control of the proceedings, recognizing that we have both the obligation and the authority to ensure that judicial proceedings are conducted with dignity, decorum, and courtesy.

35. We will not employ hostile, demeaning, or humiliating words in opinions or written or oral communications with lawyers, parties, or witnesses.

36. We will be punctual in convening hearings, meetings, and conferences; if delayed, we will notify counsel as promptly as possible.

37. In scheduling hearings, meetings, and conferences, we will be considerate of time schedules of lawyers, parties, witnesses, and of other courts. We will inform counsel promptly of any rescheduling, postponement, or cancellation of hearings, meetings, or conferences.

38. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice. We will make all reasonable efforts to decide promptly any matters presented to us for decision.

39. We recognize that a lawyer has a right and duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments, to make a complete and accurate record, and to present a case free from unreasonable or unnecessary judicial interruption.

40. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom, or the causes which, a lawyer represents.

41. We will do our best to ensure that court personnel act civilly towards lawyers, parties, and witnesses.

42. At an appropriate time and in an appropriate manner, we will bring to a lawyer’s attention conduct which we observe that is inconsistent with these standards.

**Judges' Duties to Each Other:**

43. We will treat other judges with courtesy and respect.

44. In written opinions and oral remarks, we will refrain from personally attacking, disparaging, or demeaning other judges.

45. We will endeavor to work cooperatively with other judges with respect to the availability of lawyers, witnesses, parties, and court resources.

**OTHER GENERAL PRINCIPLES**

46. We will not knowingly misrepresent or mischaracterize facts or authorities or affirmatively mislead another party or its counsel in negotiations, and will immediately make any clarifications and corrections as these become known to us.

47. We will not engage in personal vilification or other abusive or discourteous conduct in negotiations. We will not engage in acrimonious exchanges with opposing counsel or parties at the negotiating table. We will encourage our clients to conduct themselves in accordance with these principles.

48. We will honor all understandings with, and commitments we have made to, other lawyers. We will stand by proposals we have made in negotiations, unless newly received information or unforeseen circumstances provide a good faith basis for rescinding them, and we will encourage our clients to conduct themselves in accordance with this principle.

49. We will not make changes to written documents under negotiation in a manner calculated to cause the opposing party or counsel to overlook or fail to appreciate the changes. We will clearly and accurately identify for other counsel and parties all changes that we have made in documents submitted to us for review.

50. In memorializing oral agreements the parties have reached, we will do so without making changes in substance and will strive in good faith to state the oral understandings accurately and completely. In drafting proposed agreements based on letters of intent, we will strive to draft documents that fairly reflect the agreements of the parties.

c. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(3) Rule 4.1 Truthfulness in Statements to Others
(4) Rule 4.4 Respect for Rights of Third Persons
(5) Rule 5.5 Unauthorized Practice of Law

4. **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A COVERED USG ATTORNEY**

**a. 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 these Rules and remains ultimately responsible for acting in the best interest of the individual client.**

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

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

d. COMMENT

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

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered

attorney's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

e. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.3 Diligence
(4) Rule 1.7 Conflict of Interest: General Rule
(5) Rule 1.13 Department of the Navy as Client
(6) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys

5. **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

**a. A covered USG attorney shall not:**

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

**(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or**

**(3) engage in the outside practice of law without receiving proper authorization from the Judge Advocate General.**

b. COMMENT.

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