

From: Colwell, Jeffrey Col OSD OMC Defense

Sent: Sunday, January 08, 2012 08:19 PM

To: Acuff, Michael LTC OSD OMC Defense; Alsup, Tracy K LCDR OSD OMC Defense; Barlett, Donna L LTC OSD OMC Defense; Bogucki, Kevin LCDR OSD OMC Defense; Bormann, Cheryl T CIV OSD OMC Defense; Broyles, Bryan Mr OSD OMC Defense; Champ, Theresa J LT OSD OMC Defense; Connell, James G III CIV OSD OMC Defense; Danels, Allison C Maj OSD OMC Defense; Flor, Patrick J CDR OSD OMC Defense; Gleason, Sean M MAJ OSD OMC Defense; Hennessy, William T MAJ OSD OMC Defense; Hill, Karen D CAPT OSD OMC Defense; Jackson, Brian MAJ OSD OMC Defense; Jackson, Jon LTC OSD OMC Defense; Jordan, Amy M Maj OSD OMC Defense; Kannady, Christopher Capt OSD OMC Defense; Lachelier, Suzanne CDR OSD OMC Defense; LaSalle, Daphne M CAPT OSD OMC; McCormick, Katharine CDR OSD OMC Defense; McCormick, Mary R CAPT OSD OMC Defense; Morison, Samuel T CIV OSD OMC Defense; Newell, Katherine Ms OSD OMC Defense; O'Brien, James M LT OSD OMC; Olson, Jahn C MAJ OSD OMC Defense; Paradis, Michel Mr OSD OMC Defense; Pierce, Todd MAJ OSD OMC Defense; Poteet, Derek A MAJ OSD OMC Defense; Prince, Prescott CAPT OSD OMC Defense; Reiter, Richard LtCol OSD OMC Defense; Reyes, Stephen LCDR OSD OMC Defense; Ruiz, Walter B, CDR OSD OMC Defense; Schwartz, Matthew G Maj OSD OMC Defense; Schwartz, Michael A Capt OSD OMC Defense; Sundel, Philip L Mr OSD OMC Defense; Thomas, Sterling R Maj OSD OMC Defense; Thurschwell, Adam Mr OSD OMC Defense; Wingard, Barry LTC OSD OMC Defense; Wright, Jason D CPT OSD OMC Defense

Cc: MLA DD - OMC Defense

Subject: EFFECTIVE IMMEDIATELY: ETHICS INSTRUCTION AGAINST EXECUTION OF EITHER JTF-GTMO-CDR ORDER ACKNOWLEDGEMENT, AND AGAINST ALLOWING LEGAL MAIL TO BE SUBJECTED TO REVIEW BY THE PRIVILEGE TEAM

EFFECTIVE IMMEDIATELY: ETHICS INSTRUCTION AGAINST EXECUTION OF EITHER JTF-GTMO-CDR ORDER ACKNOWLEDGEMENT, AND AGAINST ALLOWING LEGAL MAIL TO BE SUBJECTED TO REVIEW BY THE PRIVILEGE TEAM

To all OCDC attorneys (military, GS civilian, civilian learned counsel, and civilian pool counsel):

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."

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."

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.

Rule 5.2(b) of the Model Rule of Professional Conduct is identical to each of the Service rules.

The Regulation for Trial by Military Commission (2011 Edition)(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."

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."

Accordingly, 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."

It is my opinion that these orders, and the following procedures established by them, do not allow you to adequately safeguard attorney-client privileged communications:

1) Executing/signing 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;

2) Executing/signing 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;

3) Submitting 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;

(4) Furthermore, to the extent that any attorney has previously executed either Acknowledgement addressed in #1 or #2 above, that Acknowledgement must be withdrawn immediately

These orders compel you to unlawfully reveal information related to the representation of a client in violation of Rule for Professional Conduct 1.6(a).

I intend to issue a more formal and detailed written guidance/ethics opinion in the next few days, however in the interim period; this email notification shall guide your conduct if and until superseded by further direction from me, or orders from a superior competent authority.

Military counsel: Please ensure that you forward this to any retained military commissions pool counsel in your respective cases immediately.

****This guidance does NOT apply to any of the attorneys assigned to the al-Nashiri case as they are guided by those orders established by the assigned military judge.**

Semper Fidelis,

J.P. Colwell, Colonel, U.S. Marine Corps
Chief Defense Counsel
Military Commissions