VETERANS' JUSTICE PROJECT
A Service of Metropolitan Public Defenders

Monday, August 28, 2017

Dear Fellow Members of the Military & Veterans Law Section:

This is a Decision Support Memo for the members of the Military and Veterans Law Section (MVLS). At our annual meeting on 10 October 2017, we are going to be debating the following resolution:

> RESOLVED: It is the recommendation of the Military and Veterans Law Section of the Oregon State Bar that the Oregon State Bar issue clarifying guidance to the Department of Defense Standard of Conduct Office that, under the Oregon Rules of Professional Conduct, a "firm" shall include military services' Judge Advocate General's Corps (JAG Corps), inasmuch as such organizations are groups of lawyers under the same ultimate supervisory authority (*e.g.*, the particular military service's Judge Advocate General).

Background on Issuance of Oregon State Bar Position Paper dated 30 June 2014

On 18 October 2013, Secretary of Defense Hagel directed the General Counsel of the Department of Defense (DOD) to convene a Military Justice Review Group (MJRG). As part of the MJRG mission, the MJRG reached out to State Bars to solicit input on issues of military justice. The Oregon State Bar received this solicitation on 14 May 2014.

The state bar tasked the Military and Veterans Law Section (MVLS), an instrumentality of the Oregon State Bar, with formulating a response to the MJRG, with a deadline of 1 July 2014.

The MVLS staffed its consensus opinion to the Oregon State Bar House of Delegates, which unanimously approved the MVLS proposed position paper. The Oregon State Bar's position paper (hereinafter "30 Jun 14 Position Paper") was delivered to the MJRG on 30 June 2014.

The MJRG issued its findings and recommendations[1] on 22 December 2015. The 30 Jun 14 Position Paper was not referenced, nor were the concerns of the Oregon State Bar addressed in any way.

Applicability of Oregon Rules of Professional Conduct to Oregon-licensed Military Attorneys

It is a condition of practice for lawyers engaged in military legal practice – Judge Advocates and DOD civilian attorneys – to be a member of a bar association of a State or of the District of

[1] http://ogc.osd.mil/mjrg.html, last accessed 28 August 2017.

Columbia. Many members of the Oregon State Bar, including the undersigned, practiced law in the U.S. military.

The Oregon Rules of Professional Conduct (RPC) 8.5(a) provides, in part, that a

> **lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.**

Therefore, the Oregon Supreme Court has asserted a direct interest in ensuring Oregon-licensed attorneys who practice in the military comply with Oregon rules of practice precisely because those rules of practice are formulated to impartially and effectively regulate the practice of law, thereby protecting the public interest. The military has never provided any explanation to Oregon as to why our Rules of Professional Conduct are inconsistent with the needs of military legal practice.

Recent Developments Indicate that Conflicts of Interest Continue to Plague Military Legal Practice

On 14 August 2017, the *Washington Times* published an article[2] concerning allegation of Unlawful Command Influence on the part of the Navy Judge Advocate General, Vice Admiral Crawford, in the court-martial of Special Operations (SEAL) Senior Chief Petty Officer (SOCS) Keith E. Barry. *United States v. Barry* revolved around allegations of sexual offenses allegedly committed by Navy SEAL Barry.

Under the Uniform Code of Military Justice (UCMJ), a court-martial is convened by a Commanding Officer, or Court-Martial Convening Authority (CMCA). In this case, the level of disposition was at General Court-Martial, and the GCMCA was Rear Admiral (RADM) Patrick J. Lorge.

Under Article 60 of the UCMJ (10 USC §860),[3] the CMCA has plenary authority to grant relief from any findings or sentence adjudged by a court-martial convened by that Commander. The only limit on the CMCA's authority is that the CMCA cannot *increase* the adverse consequences to the Accused. It is unlawful for any superior authority to interfere with the CMCA's exercise of their discretion under Article 60, although a superior Commander may withhold disposition authority on any case or series of cases.

In *United States v. Barry*, the CMCA elected to not grant any Article 60 relief to SOCS Barry after a bench trial,[4] notwithstanding SOCS Barry's sterling combat record as a Navy SEAL and

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[2] http://www.washingtontimes.com/news/2017/aug/14/sailor-convicted-of-sex-assault-seeks-appeal-lawye/, last accessed 28 August 2017.
[3] https://www.law.cornell.edu/uscode/text/10/860, last accessed 28 August 2017.
[4] All Navy judges are also in the chain of command of VADM Crawford and VADM DeRenzi, including the Judges on the Navy and Marine Court of Criminal Appeals which found no error in

his previously unblemished military record. SOCS Barry's record included nine overseas deployments with SEAL Team 8 and more than 150 combat missions in Fallujah, Iraq.

On 5 May 2014, the now-retired RADM Lorge provided an affidavit[5] to appellate defense counsel in which he asserted that his decision to not grant clemency was caused by pressure to place the "interests of the Navy" over the interests of an accused Sailor whom RADM Lorge believed was innocent.

According to RADM (Ret) Lorge's affidavit in support of SOCS Barry's appeal to the Court of Appeals for the Armed Forces (CAAF),

> [u]pon review of the record [of trial], I had serious misgivings about the evidence supporting this conviction. Specifically, I did not believe the evidence supported the alleged victim's account of events. I was inclined to disapprove the findings.[6]

Continuing his affidavit, RADM Lorge states that his Staff Judge Advocate (SJA), Commander Dominic Jones, and Deputy SJA, Lieutenant Commander Jon Dowling,

> tried to convince me to approve the findings in this case…
>
> At the time, the political climate regarding sexual assault in the military was such that a decision to disapprove findings, regardless of merit, would bring hate and discontent on the Navy from the President, as well as senators…
>
> Upon my review of the record of trial from this case, I did not find that the Government proved the allegation against Senior Chief Barry beyond a reasonable doubt. Absent the pressures described above, I would have disapproved the findings in this case.[7]

After his SJA and Deputy SJA failed to convince him to approve the findings of the court-martial, RADM Lorge was contacted – in person and on the telephone – by VADM Crawford. After that conversation, RADM Lorge changed his mind and approved the findings and sentence of the military judge in SOCS Barry's court-martial.

In his affidavit, RADM (Ret) Lorge concluded with the following paragraph:

> On a person note, I would ask you ["The Honorable Judges of the United States Court of Appeals for the Armed Forces"] to forgive my failure of leadership and right the wrong I

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this case. Naturally, this raises separate RPC 1.8(k) concerns which also informed RADM Lorge's concerns in this case.

[5] Declaration of RADM Patrick J. Lorge, USN (Ret.), dated 5 May 2017. http://www.innocentwarrior.org/uploads/1/2/2/9/12293769/motion__9_-_us_v_barry.pdf, last accessed, 28 August 2017.

[6] *Ibid*.

[7] *Ibid*.

> committed in this case against Senior Chief Barry; ensure justice prevails and when doubt exists, allow a man to remain innocent.[8]

The direct involvement of the Judge Advocate General of the Navy is astonishing, inasmuch as VADM Crawford was the boss of both trial and appellate defense counsel and prosecutors, as well as military judges, of a pending court-martial. By actively involving himself in an ongoing court-martial, VADM Crawford undermined the military's argument that Judge Advocates General – like SJAs – are studiously neutral in military justice matters, only ensuring Commanders at each level are acting "in the best interests of justice"—precisely the basis asserted by the military services to justify allowing Judge Advocates General to supervise defense counsel and prosecutors (and military judges).

The trial and appellate military defense counsel both supplemented RADM (Ret) Lorge's affidavit with affidavits of their own in which they expanded on the contacts between senior Navy brass and RADM Lorge. The defense counsel also observed that Lieutenant Commander Dowling made an ethics complaint through Navy ethics lawyers about VADM Crawford's involvement.

The military services are deeply concerned about political frustration with perceived lackadaisical treatment of sexual crimes in the military, and it appears that senior Navy brass were fearful that such a high-profile grant of clemency would damage the Navy's relationship with Congressional leaders and tarnish the reputation of the Navy in the public's eyes.

On 31 July 2017, SOCS Barry's appellate defense counsel questioned VADM Crawford in support of their Unlawful Command Influence claim. The defense team included Navy Judge Advocates who are subordinate to VADM Crawford, although the lead counsel was a civilian unaffiliated with the Navy, per SOCS Barry's rights under Article 27 and Article 38,[9] UCMJ. Based on the Lorge affidavit, CAAF ordered a Special Master to be appointed to hold an evidentiary hearing. Interestingly, CAAF ordered that the Special Master would have to come from another military service, and an Air Force Judge was placed on the case.

Pursuant to this new hearing, defense counsel – including military appellate counsel – questioned VADM Crawford. The next day, the Navy attempted to remove SOCS Barry's military appellate defense counsel. The defense team objected to the Special Master, who immediately countermanded the Navy's order to dismantle the appellate defense team. The Navy claimed that the attempted removal had nothing to do with the just-completed questioning of VADM Crawford.

<u>This Type of Unlawful Interference Is Not Uncommon</u>

Judicial findings of Unlawful Command Influence have not been isolated to the Navy. As military services have scrambled to respond to Congressional pressure concerning sexual abuse

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[8] *Ibid*.
[9] 10 U.S. Code §§ 827, 838, respectively.

in the military, senior brass has been implicated in interfering in military justice decisions statutorily delegated to subordinate commanders.

In *United States v. Boyce*, 76 M.J. 242 (2017), CAAF set aside Airman (E-2) Boyce's convictions for the rape and battery of his wife based on Unlawful Command Influence by senior Air Force leaders against Air Force Lieutenant General (Lt Gen) Craig Franklin.

These particular cases started with a 2013 sexual assault case, *United States v Wilkerson*. Lt Gen Craig Franklin exercised discretion of exactly the kind denied by RADM Lorge in *United States v Barry*. Lt Gen Franklin exercised his Article 60 relief power in *Wilkerson* and dismissed a finding of guilty. Lt Gen Franklin not only received considerable negative attention in the press, he was also attacked by a member of the Senate Armed Services Committee.[10]

Echoing RADM Lorge's later affidavit, Lt Gen Franklin explained his choice in *Wilkerson* in the following terms

> Obviously it would have been exceedingly less volatile for the Air Force and for me professionally, to have simply approved the finding of guilty. This would have been an act of cowardice on my part and a breach of my integrity. As I have previously stated, after considering all matters in the entire record of trial, I hold a genuine and reasonable doubt that Lt Col Wilkerson committed the crime of sexual assault.

Shortly after Lt Gen Franklin dismissed the charges and specifications in *Wilkerson*, another sex assault case came across Lt Gen Franklin's desk for decision on whether to send to court-martial. *United States v Wright* involved allegations of rape by an Air Force Airman against his wife. Lt Gen Franklin was inclined to not refer that case to court-martial, which would have effectively killed the prosecution. Lt Gen Franklin informed his SJA, Colonel (Col) Bialke of his decision, and Col Bialke passed that information on to the then-Judge Advocate General of the Air Force, Lt Gen Richard Harding.

Col Bialke said that Lt Gen Harding told him:

> the failure to refer the [*Wright*] case to trial would place the Air Force in a difficult position with Congress; absent a 'smoking gun,' victims are to be believed and their cases referred to trial; and dismissing the charges without meeting with the named victim violated an Air Force regulation. *United States v. Wright*, 75 M.J. 501, 503 (A.F. Ct. Crim. App. 2015) (en banc).

In other words, the Judge Advocate General of the Air Force ordered a subordinate, theoretically independent lawyer to presume guilt and let a military jury decide every case, directly contrary to

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[10] As described in CAAF's *Boyce* opinion, "A member of the Senate Armed Services Committee commented on Lt Gen Franklin's decision to set aside the findings and sentence against Wilkerson, saying that commanders need to be held 'accountable' for overturning sexual assault convictions." *Ibid*, at FN2.

the express statutory language of Article 32, UCMJ. It is important to note that, at the exact same moment, Lt Gen Harding was the supervisor of every Air Force trial and appellate defense counsel and military judge, as well as all the prosecutors.

Based on Lt Gen Harding's direction to Col Bialke, Lt Gen Franklin sent the *Wright* case forward, only for Wright to be acquitted by the military panel for the same deficiencies that had disinclined Lt Gen Franklin from allowing the case to proceed.

At this point, Lt Gen Franklin's inability to deliver convictions in sex cases was more than the Air Force was willing to tolerate. Lt Gen Franklin was informed by the Chief of Staff of the Air Force that he could either choose to retire or be removed by President Obama's newly-appointed Secretary of the Air Force. Lt Gen Franklin announced his retirement three hours later. His last official act was sending *United States v. Boyce* to court-martial, the case which CAAF then reversed for Unlawful Command Influence.

Discussion of Proposed Resolution

In its 30 June 14 Position Paper, the Oregon State Bar expressed its concerns with the fact that military defense counsel and prosecutors both report to the same boss, the Judge Advocate General of their particular service. As the *Barry*, *Boyce*, *Wilkerson* and *Wright* cases make clear, military lawyers and Commanders are regularly placed under pressure to act in "the best interests" of their services, which invariably means against the due process interests of their subordinates.

At the time of the 30 June 14 Position Paper, the Oregon State Bar refrained from opining as to whether each military service's Judge Advocate General's Corps was a "firm" for purposes of the Oregon Rules of Professional Conduct. It was decided that it was more prudent to give the MJRG (and, by implication, the military services) a chance to address what appeared to be a glaring conflict of interest in a consultative manner, consistent with Oregon traditions.

Admittedly, the military has reformed the provision of defense services at court-martial over the centuries. As military justice practice evolved,[11] the military services created in-house "Trial Defense Services" and purported them to be "Legal Service Agencies" somehow independent from the larger service. In theory, a truly independent Legal Services Agency would appear to comply with the "separate firm" rubric from the definitions of Oregon Rules of Professional Conduct.

However, in all military services, all assignments – including for military defense counsel – come from the Judge Advocate General of that service. The Judge Advocates General strictly controls the selection, promotion, and assignment of all lawyers in their particular military

[11] Under the Article of War which preceded the Uniform Code of Military Justice, there was no guaranteed right to counsel for military accused. This was found problematic when 13 black troops were tried and quickly executed, without Presidential approval, in the Camp Logan riots of 1917.

service, including all trial and appellate defense counsel and military judges of that particular service.

Furthermore, defense counsel are afforded no statutory or regulatory protections from adverse consequences of "overzealous" representation of their assigned clients. Quite the contrary, the pressure placed on military defense counsel is invariably to "'play team ball,' which means 'fight hard, but not too hard.'"[12] In other words, "Judge Advocates who are temporarily assigned as defense attorneys are expected to fight zealously for their clients against the Services that select, train, employ, evaluate, and promote (or don't promote) these same Judge Advocates."[13]

Terms of assignment for defense counsel in all services are at will and completely within the discretion of the service Judge Advocate General, as is the appointment and removal of the military service Judge Advocate overseeing the respective military service Trial Defense Service.

Although recent developments in court-martial appellate jurisprudence indicate that CAAF[14] is willing to act in cases where there is unambiguous evidence of Unlawful Command Influence brought forward by Generals and Admirals, instances in which officers are willing and able to end their own careers are the exception rather than the rule. Moreover, Generals and Admirals have considerably more protection from reprisal than young Judge Advocates new to the job and completely dependent on the patronage of their service Judge Advocates General, even when that General/Admiral protection only amounts to the ability to retire with a full pension.

The Oregon Supreme Court has fashioned our Conflict of Interest rules to protect the public and prevent inappropriate pressure falling on subordinate lawyers within a firm. The Oregon Supreme Court carefully proscribed any scenario in which a collection of lawyers would be forced to collectively choose between the interests of a large and powerful client versus the interests of a small and powerless one, as it is not impossible to guess which interests would tend to prevail in the face of such a conflict.

Clearly, the military services' malleability to Congressional pressure is essential to civilian control of the military, as well as constituting appropriate deference to Congress' power of the purse. As America's warfighters, our military services must be prepared to trade lives for victory, meaning that individual service members must sometimes be sacrificed for unit objectives.

However, the Oregon Supreme Court cannot completely defer to the military services' judgements concerning inherent conflicts. The foregoing facts indicate that the military services struggle to differentiate between the cruel necessity of sacrificing men and women on the

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[12] Testimony of Daniel Zene Crowe before the Defense Legal Policy Board, 15 February 2013.
[13] *Ibid*.
[14] The CAAF sits over the respective service Courts of Criminal Appeals: ACCA, NMCAA, AFCCA. The five judges who sit on CAAF are appointed "from civilian life," 10 U.S. Code § 942, whereas the service Courts of Criminal Appeals are uniformed Judge Advocates who are named to the bench by their Service Judge Advocates General. 10 U.S. Code § 866

battlefield and the far different sacrifice of individual service members' due process rights. These exact structural defects are what led Congress to carve out substantial due process rights for military members immediately after World War II, beginning with the passage of the Uniform Code of Military Justice and culminating with the 1984 amendments to the UCMJ which finally applied the Bill of Rights to Court-Martial proceedings.

The military services have traditionally taken the position that they should have complete autonomy in resolving conflicts of interest; however, at the same time the military services crave the imprimatur of State Bar membership for attorneys practicing in the military. Unfortunately, the MJRG's refusal to even consider Oregon's concerns indicates that a more forthright expression of Oregon's expectations regarding the behavior of Oregon-licensed attorneys who happen to be engaged in military practice may be necessary.

Conclusion and Recommendation

Based on the foregoing information, it is the recommendation of the Chair that the Military and Veterans Law Section of the Oregon State Bar debate the above-referenced Resolution in order to determine what, if any, recommendations MVLS should make concerning the current state of enforcement of the Oregon Rules of Professional Conduct *vis-à-vis* lawyers working for the U.S. military.

Duty Shall Be Done,

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