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From: Judge Advocate General
To: All Navy and Marine Corps Judge Advocates

Subj: BAR MEMBERSHIP STATUS FOR MEMBERS OF THE JUDGE ADVOCATE
GENERAL'S CORPS, ACTIVE VS. INACTIVE

Ref: (a) JAGINST 5803.1B
(b) ABA Model Rules of Professional Conduct
(c) 10 U.S.C. § 1044

1. Rule 8.6 of the Navy JAG's Rules of Professional Conduct, reference (a), requires all Navy and Marine Judge Advocates, as well as all civil service and contracted civilian attorneys who practice law under the supervision of the Judge Advocate General, to "maintain a status considered '**in good standing**' at all times with the licensing authority admitting the individual to the practice of law before the highest court of at least one State, Territory, Commonwealth, or the District of Columbia." Reference (a) does not require covered attorneys to be active members of their respective bars if they are otherwise members "in good standing."¹

2. Rule 8.5 of reference (a) states that the Rules approved by the Judge Advocate General supersede any conflicting rules applicable in jurisdictions in which covered attorneys are licensed. However, Rule 8.5 also states, that covered attorneys practicing in State or Federal civilian court proceedings "will abide by the rules adopted by the State or Federal civilian court during the proceedings."

3. On 12 August 2002, the American Bar Association (ABA) adopted proposed amendments to Model Rule 5.5 of reference (b). The amendment has received some attention regarding the potential effect on attorneys practicing law under the cognizance and authority of the Judge Advocate General of the Navy. As amended, Model Rule 5.5 supports the multi-jurisdictional practice of law (MJP) by creating "safe harbors" that allow the practice of law outside of the attorney's licensing state, under certain

¹Many jurisdictions offer "inactive" status as an alternate to "active" membership. Some jurisdictions, e.g., Wisconsin, even offer a military status. In some jurisdictions, members in an inactive status remain "in good standing" with their state bars and are subject to the professional responsibility requirements of the jurisdiction. In California, for example, a judge advocate could maintain an inactive bar membership but remain in good standing, thus satisfying the JAGC Rule 8.6 requirement.

Subj: BAR MEMBERSHIP STATUS FOR MEMBERS OF THE JUDGE ADVOCATE
GENERAL'S CORPS, ACTIVE VS. INACTIVE

situations. Specifically, Rule 5.5(d)(2) authorizes MJP for the provision of legal services that the lawyer is authorized to provide by Federal law. However, the comment to the Rule limits its application to lawyers admitted in an active status in their licensing jurisdictions.

4. The Judge Advocates General of the Navy, Army, Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps each requested the ABA's Commission on MJP to amend Model Rule 5.5 to specifically include provisions permitting the MJP of military legal assistance attorneys acting pursuant to 10 U.S.C. § 1044, *et. seq.* The Commission, however, declined to codify express authorization for military legal assistance. The Commission did agree, however, to remove a footnote to the commentary that was published in a draft report. The footnote stated that the Commission is uncertain as to whether military lawyers are legally authorized to represent individuals outside the jurisdictions in which the lawyers are licensed. A copy of the draft report is available at www.abanet.org/cpr/mjp-home.html.

5. I conclude that there is not a need to change Rule 8.6 of reference (a) to impose a blanket active-bar-membership requirement. The Model Rules are not binding and sometimes are at variance with the Rules of the various states that would be binding on our attorneys. Furthermore, the Supremacy Clause of the U.S. Constitution might provide defense to a claim that a legal assistance judge advocate, practicing under reference (c), is engaged in the unauthorized (unlicensed, multijurisdictional) practice of law.² Finally, Title 10 expressly authorizes the Secretary concerned to establish and supervise the legal assistance program and to provide legal assistance to various persons thereunder.

6. It is incumbent upon all judge advocates and civilian attorneys to ensure that they maintain a status considered "in good standing" at all times with their licensing authority in compliance with Rule 8.6 of reference (a). In addition, attorneys who represent clients or the Government in civilian court proceedings (for example, Expanded Legal Assistance Practice (ELAP), Special Assistant United States Attorney (SAUSA),

²Notably, the ABA is advocating an amendment to reference (c) to include the following language: "Counsel providing legal assistance pursuant to this section and sections 1044a-1044d shall be permitted to do so in geographic locations, including states in which they are not licensed, at the direction of the Secretary concerned."

Subj: BAR MEMBERSHIP STATUS FOR MEMBERS OF THE JUDGE ADVOCATE
GENERAL'S CORPS, ACTIVE VS. INACTIVE

Department of Justice (DOJ) Admiralty cases) must be particularly vigilant. They must ensure that they comply with Rule 8.5 of reference (a), which necessitates knowing and observing the applicable State, Federal, or agency rules for the jurisdiction in which they are appearing. For example, a state rule might require active bar status in order to represent a legal assistance client in an ELAP case before a civilian court. Likewise, the Department of Justice requires its attorneys to maintain active bar status and applies its rule to attorneys who are appointed as SAUSAs.

7. A blanket active-bar-membership requirement will not be imposed at this time. I do, though, want all attorneys to understand Rules 8.5 and 8.6 of reference (a), the ABA Model Rule 5.5 of reference (b), and your licensing State's rules. If you have any questions, please contact LCDR Barb Hanna at (703) 604-8280, DSN 664-8280, E-Mail barb.hanna@navy.mil, LT Scotch Perdue at (703) 604-8201, DSN 664-8201, E-Mail scotch.perdue@navy.mil, or LtCol Mike Maher at (703) 614-2510, DSN 224-2510, E-Mail mahermj@hqmc.usmc.mil.

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