



Billing Code

This document is scheduled to be published in the Federal Register on 05/03/2024 and available online at <https://federalregister.gov/d/2024-09257>, and on <https://govinfo.gov>

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 776

[Docket ID: USN-2024-HQ-0002]

RIN 0703-AB19

Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: This rule proposes to remove existing general information about the professional responsibility requirements of attorneys practicing under the cognizance and supervision of the Judge Advocate General (JAG) and includes a new requirement for all non-U.S. Government attorneys to file a notice of appearance before appearing in any matter for which the JAG is charged with supervising the provision of legal services. It also proposes to remove existing content relating to the Rules of Professional Conduct and replaces it with complaint processing procedures.

DATES: Comments will be accepted until **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**

ADDRESSES: You may submit comments, identified by docket number and/or Regulation Identifier Number (RIN) number and title, by any of the following methods:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this document. The general policy is for submissions to be made available for public viewing at <http://www.regulations.gov> without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: CDR Matthew Bailey, Office of the Judge Advocate General (Administrative Law), Department of the Navy, 1322 Patterson Ave., SE, Suite 3000, Washington Navy Yard, DC 20374-5066, telephone: 703-614-4386.

SUPPLEMENTARY INFORMATION:

Background

This rule was promulgated on September 1, 1994; amended on March 21, 2000; and further amended on November 4, 2015.

Changes Proposed in this Rule

DoD/Navy is proposing to remove three of the current part's five subparts which do not affect the public and update two others to bring them into compliance with the current Judge Advocate General (JAG) Instruction pertaining to this subject matter, JAG Instruction 5803.1 (Series), "Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General (JAG)" (available at www.jag.navy.mil).

The three subparts that are proposed to be removed (Subparts C, D, and E) concern internal Navy processes that are currently memorialized in JAG Instruction 5803.1 (series) (https://www.jag.navy.mil/library/instructions/JAGINST_5803-1E.pdf).

The proposed revision of Subpart A (General) removes existing general information about the professional responsibility requirements of attorneys practicing under the cognizance and supervision of the JAG and includes a new requirement for all non-U.S. Government attorneys to file a notice of appearance before appearing in any matter for which the JAG is charged with supervising the provision of legal services.

The proposed revision of Subpart B (Rules of Professional Conduct) removes existing content relating to the Rules of Professional Conduct and replaces it with a revised version of current Subpart C (Complaint Processing Procedures). The proposed revision of Subpart B (Rules) includes new content relating to processing professional responsibility complaints, interim suspensions of attorneys, ethics investigations, effect of separate proceedings, public notice, and requests for reinstatement.

Legal Authority for This Regulatory Action

Title 10 U.S.C. 806 grants the JAG the authority to assign judge advocates for duty and requires the JAG to make frequent inspections in the field in supervision of the administration of military justice. Title 10 U.S.C. 806a provides that the President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of military judges. Title 10 U.S.C. 826 prescribes the qualifications for military judges in the armed forces. Title 10 U.S.C. 827 sets forth the requirements for the detail of trial counsel and defense counsel in the armed forces. Title 10 U.S.C. 1044 authorizes the Secretaries of the military departments to provide legal assistance to servicemembers and their dependents. The Manual for Courts-Martial, United States, 2019, is the official guide to the conduct of courts-martial in the U.S. armed forces (available at

[https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610)). The U.S. Navy Regulations, 1990 is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, authority, distinctions and relationships of various officials, organizations and individuals (available at <https://www.secnav.navy.mil/doni/navyregs.aspx>). Department of Defense Instruction 1442.02 (series), “Personnel Actions Involving Civilian Attorneys” (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/144202p.pdf>), prescribes Department of Defense policy for personnel actions involving civilian attorneys and outside assignments of attorneys from the Department of Defense Office of the General Counsel

and Defense Legal Services Agency. Secretary of the Navy Instruction 5430.27 (series) , “Responsibility Of The Judge Advocate General Of The Navy And The Staff Judge Advocate To The Commandant Of The Marine Corps For Supervision And Provision Of Certain Legal Services” (available at <https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05400%20Organization%20and%20Functional%20Support%20Services/5430.27E.pdf>), prescribes the responsibilities of the Judge Advocate General of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps for the supervision and provision of certain legal services. JAG Instruction 5803.1 (series) establishes rules of professional conduct for attorneys practicing under the cognizance of the Judge Advocate General of the Navy, establishes procedures for filing complaints of professional misconduct, and prescribes procedures for engaging the outside practice of law.

Expected Impact of the Proposed Rule

This rule impacts non-U.S. Government attorneys representing clients in matters under the cognizance of the Judge Advocate General of the Navy. Clients who obtain non-USG attorneys to represent them in matters for which the JAG is charged with supervising the provision of legal services will incur costs relating to the amount of time required for their counsel to prepare and file a notice of appearance. The cost will vary widely depending on the charged rate of the attorney in question and the time required to prepare the notice. For purposes of estimating the costs involved, it is reasonable to use the mean hourly wage for lawyers as informed by the Bureau of Labor and Statistics, \$78.74. Because the Navy does not keep a log of the numbers of civilian attorneys privately hired to represent individual clients in litigation that would be subject to the new notice of appearance requirement, the net cost to the public cannot readily be quantified. Generally, the time required for an attorney to prepare and file a notice of appearance in a case should not exceed one hour. Thus, a reasonable quantifiable cost to attorneys to file such notice should be the cost of one billable hour.

Additionally, the proposed revision will affect members of the public who would benefit from being aware of the professional responsibility complaint procedures that cover attorneys who practice under the cognizance of the Judge Advocate General of the Navy. It is standard practice of most tribunals to require a filing of a notice of appearance for attorneys who are not otherwise certified to practice before such tribunals. Navy believes the removal of Subparts C, D, and E offsets the costs of preparing and filing a notice of appearance by reducing the amount of time required for lawyers to read and understand the requirements.

Regulatory Reviews

Executive Order 12866, “Regulatory Planning and Review,” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 12866, as amended by 14094 (88 FR 21879, April 11, 2023), and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a “significant regulatory action” under Executive Order 12866.

Congressional Review Act

This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Paperwork Reduction Act

This rule does not contain a collection of information requirement subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act.

Regulatory Flexibility Act

The DON certifies that this action is not subject to the relevant provisions of the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)).

Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. This proposed rule does not impose any mandates on small entities.

Executive Order 13132: Federalism

The DON has determined that this action does not contain policies with Federalism or “takings” implications as those terms are defined in Executive Order 13132 and Executive Order 12630, respectively.

List of Subjects in 32 CFR Part 776

Administrative practice and procedure; Conflict of interests; Government employees; Lawyers.

Accordingly, 32 CFR part 776 is proposed to be revised to read as follows:

PART 776—PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL

Sec.

Subpart A—General

776.1 Notice of appearance.

Subpart B—Complaint Processing Procedures

776.2 Policy.

776.3 Related investigations and actions.

776.4 Informal complaints.

776.5 The complaint.

776.6 Initial screening.

776.7 Processing the complaint.

776.8 Interim suspension.

776.9 Ethics investigation.

776.10 Effect of separate proceeding.

776.11 Action by the Judge Advocate General.

776.12 Finality.

776.13 Report to licensing authorities.

776.14 Public notice.

776.15 Requests for reinstatement.

Authority: 10 U.S.C. 806, 806a, 826, 827, 1044.

Subpart A—General

§ 776.1 Notice of appearance.

All non-U.S. Government (USG) attorneys must file a notice of appearance before making any appearance representing an individual in a matter for which the Judge Advocate General (JAG) is charged with supervising the provision of legal services. This notice of appearance must:

- (a) State the jurisdiction(s) in which they are licensed and eligible to practice law,
- (b) Certify that they are in good standing with each jurisdiction,
- (c) Certify that they are not subject to any order disbaring, suspending, or otherwise restricting them in the practice of law, and
- (d) State that they understand they are subject to the provisions of JAG Instruction (JAGINST) 5803.1 (series) (Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General), including those on professional disciplinary action. Each notice of appearance must be maintained in the official record of the proceeding.

Subpart B—Complaint Processing Procedures

§ 776.2 Policy.

- (a) It is the JAG's policy to investigate and resolve, expeditiously and fairly, all allegations of professional impropriety lodged against covered attorneys under JAG supervision.
- (b) Rules Counsel approval will be obtained before conducting any formal investigation into an alleged violation of the Rules of Professional Conduct set forth in JAGINST 5803.1 (series) ("the Rules"), or the American Bar Association (ABA) Model Code of Judicial Conduct

("the Code of Judicial Conduct"). The Rules Counsel (as designated per JAGINST 5803.1 (series)) will notify the JAG prior to the commencement of any investigation. Any investigation into alleged violations of the Rules will be conducted according to the procedures set forth in this enclosure.

§ 776.3 Related investigations and actions.

Acts or omissions by covered attorneys may constitute professional misconduct, criminal misconduct, mismanagement, poor performance of duty, or a combination of all four. Care must be taken to characterize appropriately the nature of a covered attorney's conduct to determine who may and properly should take official action.

(a) Questions of legal ethics and professional misconduct by covered attorneys are within the exclusive province of the JAG. Ethical or professional misconduct will not be attributed to any covered attorney in any official record without a final JAG determination, made in accordance with JAGINST 5803.1 (series), that such misconduct has occurred.

(b) Criminal misconduct is properly addressed by the covered USG attorney's commander through the disciplinary process provided under the Uniform Code of Military Justice (UCMJ) and implementing regulations, or through referral to appropriate civil authority.

(c) Allegations of mismanagement are properly addressed by the covered USG attorney's reporting senior. Mismanagement involves any action or omission, either intentional or negligent, which adversely affects the efficient and effective delivery of legal services, any misuse of government resources (personnel and material), or any activity contrary to operating principles established by Navy regulations or JAG policy memoranda.

(d) Poor performance of duty is properly addressed by the covered USG attorney's reporting senior through a variety of administrative actions, including documentation in fitness reports or employee appraisals.

(e) Prior JAG approval is not required to investigate allegations of criminal conduct, mismanagement, or poor performance of duty involving covered attorneys. When, however,

investigations into criminal conduct, mismanagement, or poor performance reveal conduct that constitutes a violation of JAGINST 5803.1 (series) or of the Code of Judicial Conduct in the case of judges, such conduct shall be reported to the Rules Counsel immediately.

(f) Generally, professional responsibility complaints will be processed in accordance with JAGINST 5803.1 (series) upon receipt. Rules Counsel may, however, on a case-by-case basis, delay such processing to await the outcome of pending related criminal, administrative, or investigative proceedings.

(g) Nothing in this part or JAGINST 5803.1 (series) prevents a military judge or other appropriate official from removing a covered attorney from acting in a particular court-martial or prevents the JAG, the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps (CMC), or the appropriate official from reassigning a covered attorney to different duties prior to, during, or subsequent to proceedings conducted under the provision of JAGINST 5803.1 (series).

§ 776.4 Informal complaints.

Informal, anonymous, or “hot line” type complaints alleging professional misconduct must be referred to the appropriate authority (such as the JAG Inspector General (IG) or the concerned supervisory attorney) for inquiry. Such complaints are not, by themselves, cognizable under JAGINST 5803.1 (series) but may, if reasonably confirmed, be the basis of a formal complaint described in § 776.5.

§ 776.5 The complaint.

(a) The complaint shall:

(1) Be in writing, signed (by hand or electronically), and offered to any superior to the subject of the complaint;

(2) Demonstrate that the complainant has personal knowledge, or has otherwise received reliable information indicating, that:

(i) The covered attorney concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity, that constitutes a violation of the Rules or the Code of Judicial Conduct or a failure to meet the ethical standards of the profession; or

(ii) The covered attorney concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(3) Contain a complete, factual account of the acts or omissions constituting the substance of the complaint, as well as a description of any attempted resolution with the covered attorney concerned. Supporting statements and documentation, if any, should be attached to the complaint.

(b) Forwarding a document that contains the information required in paragraphs (a)(2) and (3) of this section (e.g., a command investigation or non-judicial punishment package) can also serve as a complaint under this part.

(c) A complaint may be initiated by any person.

§ 776.6 Initial screening.

(a) *Receipt of complaint.* Complaints involving conduct of a Navy or Marine Corps trial or appellate judge shall be forwarded to the Office of the Judge Advocate General (OJAG) (Code 05). All other complaints shall be forwarded to OJAG (Code 13) or, in cases involving Marine Corps judge advocates or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of the SJA to CMC, to Research and Civil Law Branch, Judge Advocate Division, Headquarters Marine Corps (JAR). In cases involving Marine Corps judge advocates, including trial and appellate judges, where the SJA to CMC is not the Rules Counsel, the cognizant Rules Counsel (per JAGINST 5803.1 (series)) will notify the SJA to CMC when a complaint is received. OJAG (Code 05), OJAG (Code 13), and JAR shall log all complaints received.

(b) *Review for compliance and sufficiency.* The cognizant Rules Counsel shall initially review the complaint to determine whether it complies with the requirements set forth in § 776.5.

Complaints that do not comply with the requirements may be returned to the complainant for correction or completion, and resubmission to OJAG (Code 05), OJAG (Code 13), or JAR. If the complaint is not corrected or completed and resubmitted within 30 days of the date of its return, the Rules Counsel may close the file without further action. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence relating to the return and resubmission of a complaint.

(1) *Summary dismissal.* Upon initial review of a complaint, the cognizant Rules Counsel may summarily dismiss the complaint if the Rules Counsel determines the JAG does not have jurisdiction or the complaint, on its face, fails to establish probable cause to believe a violation of the Rules or the Code of Judicial Conduct has occurred. A dismissal letter will be sent to the complainant. If, in the judgment of the Rules Counsel, it is deemed necessary, a copy of the dismissal letter and the complaint will be sent to the covered attorney for information purposes. There is no appeal from a summary dismissal. The SJA to the CMC may delegate this authority to the Deputy SJA to the CMC. No other delegations are authorized.

(c) *Initial notice and opportunity to comment.* If Rules Counsel determines that the complaint complies with JAGINST 5803.1 (series) and contains sufficient evidence to believe probable cause to establish a violation of that instruction may exist, the covered attorney shall receive notice and an opportunity to comment. OJAG (Code 05), OJAG (Code 13), and JAR will ensure a copy of the complaint and allied papers are provided to the covered attorney who is the subject of the complaint. Service of the formal complaint and other materials on the covered attorney must be accomplished through personal service, registered/certified mail sent to the covered attorney's last known address reflected in official Navy and Marine Corps records or in the records of the State bar(s) that licensed the attorney to practice law, or email sent in a manner that verifies receipt by the covered attorney. The covered attorney's supervisory attorney must also be provided notice of the complaint. The covered attorney concerned may elect to provide an initial statement, within 10 calendar days from receipt, regarding the complaint for the Rules

Counsel's consideration. The covered attorney will promptly inform OJAG (Code 05), OJAG (Code 13), or JAR if he or she intends not to submit any such statement.

(d) *Rules counsel review.* Complaints, and any statement submitted by the covered attorney concerned, shall be further reviewed by the cognizant Rules Counsel to determine whether the complaint establishes probable cause to believe that a violation of the Rules or the Code of Judicial Conduct has occurred.

(1) The cognizant Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe a violation has occurred. The Rules Counsel shall notify the complainant, the covered attorney concerned, and the supervisory attorney, that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file.

(2) The cognizant Rules Counsel may close the file if there is a determination that the complaint establishes probable cause but the violation is of a minor or technical nature appropriately addressed through corrective counseling. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and the supervisory attorney that the file has been closed. OJAG (Code 05), OJAG (Code 13), and JAR will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, State, or local licensing authority requires reporting of such action.

(3) If the Rules Counsel determines there is probable cause to believe a violation of the Rules or the Code of Judicial Conduct has occurred, and the violation is not of a minor or technical nature, the Rules Counsel shall notify the JAG, forward the complaint as delineated in

§ 776.7, and cause an ethics investigation to be conducted in accordance with § 776.9 of this part. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, the SJA to CMC shall also be notified.)

§ 776.7 Processing the complaint.

(a) The cognizant Rules Counsel shall forward the complaint, a Rules violation sheet describing the specific alleged violations, and any allied papers, as follows:

(1) In cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter;

(2) In cases involving a military appellate judge, if practicable, to a covered attorney with experience as a military appellate judge (normally senior to the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter;

(3) In all other cases, to such covered attorney as the cognizant Rules Counsel may designate (normally senior to the covered attorney complained of and not previously involved in the case), and assign the officer to conduct an ethics investigation into the matter.

(b) The Rules Counsel shall provide notice of the complaint (if not previously informed) as well as notice of the ethics investigation:

(1) To the covered attorney against whom the complaint is made as well as the supervisory attorney;

(2) In cases involving a covered USG attorney on active duty or in civilian Federal service, to the commanding officer, or equivalent, of the covered USG attorney concerned;

(3) In cases involving Navy or Marine Corps judge advocates serving in Naval Legal Service Command (NLSC) units, to Commander, NLSC;

(4) In cases involving Navy attorneys serving in Marine Corps units, involving Marine Corps attorneys serving in Navy units, or involving Marine Corps trial and appellate judges, to the SJA to CMC (Attn: JAR);

(5) In cases involving trial or appellate court judges, to either the Chief Judge, Navy-Marine Corps Trial Judiciary or Chief Judge, Navy-Marine Corps Court of Criminal Appeals, as appropriate; and

(6) In cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other uniformed services, to the appropriate military service attorney discipline section.

§ 776.8 Interim suspension.

(a) Where the Rules Counsel determines there is probable cause to believe that a covered attorney has committed misconduct and poses a substantial threat of irreparable harm to his or her clients or the orderly administration of military justice, the Rules Counsel shall so advise the JAG. Examples of when a covered attorney may pose a “substantial threat of irreparable harm” include, but are not limited to:

(1) When charged with the commission of a crime which involves moral turpitude or reflects adversely upon the covered attorney’s fitness to practice law, and where substantial evidence exists to support the charge;

(2) When engaged in the unauthorized practice of law (e.g., failure to maintain good standing in accordance with JAGINST 5803.1 (series)); or

(3) When unable to represent client interests competently.

(b) Upon receipt of information from the Rules Counsel, the JAG may order the covered attorney to show cause why he or she should not face interim suspension pending completion of an ethics investigation. The covered attorney shall have 10 calendar days in which to respond.

Notice of the show cause order shall be provided as outlined in § 776.7(b) of this part.

(c) If an order to show cause has been issued under paragraph (b) of this section, and the period for response has passed without a response, or after consideration of any response and finding sufficient evidence demonstrating probable cause to believe that the covered attorney is guilty of misconduct and poses a substantial threat of irreparable harm to his or her client or the orderly administration of military justice, the JAG may direct an interim suspension of the covered attorney's certification under Articles 26(b) or 27(b), UCMJ, or Rule for Courts-Martial (R.C.M.) 502(d)(3), or the authority to provide legal assistance, pending the results of the investigation and final action under JAGINST 5803.1 (series). Notice of such action shall be provided as outlined in § 776.7(b).

(d) A covered attorney may, based upon a claim of changed circumstances or newly discovered evidence, petition for dissolution or amendment of the JAG's imposition of interim suspension.

(e) Any ethics investigation involving a covered attorney who has been suspended pursuant to this rule shall proceed and be concluded without appreciable delay. However, the JAG may determine it necessary to await completion of a related criminal investigation or proceeding, or completion of a professional responsibility action initiated by other licensing authorities. In such cases, the JAG shall cause the Rules Counsel to so notify the covered attorney under interim suspension as well as those officials outlined in § 776.7(b). Where necessary, continuation of the interim suspension shall be reviewed by the JAG every 6 months.

§ 776.9 Ethics investigation.

(a) *Investigation.* The purpose of the ethics investigation is to determine whether, by clear and convincing evidence, in the opinion of the officer appointed to conduct the investigation (the investigating officer, or IO), the questioned conduct occurred and, if so, whether clear and convincing evidence demonstrates that such conduct constitutes a violation of the Rules or the Code of Judicial Conduct. The IO is to recommend appropriate action in cases of substantiated violations. Upon receipt of the complaint, the IO shall promptly investigate the allegations,

generally following the format and procedures set forth in the Manual of the Judge Advocate General (JAGMAN) for the conduct of command investigations. Reports of relevant investigations by other authorities including, but not limited to, the command, the Inspector General, and State licensing authorities should be used. The IO should also identify and obtain sworn affidavits or statements from all relevant and material witnesses to the extent practicable, and identify, gather, and preserve all other relevant and material evidence.

(b) *Notice.* When an ethics investigation is initiated, the covered attorney concerned shall be so notified, in writing, by the Rules Counsel as outlined in § 776.7(b). The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

- (1) To request a hearing before the IO;
- (2) To inspect all evidence gathered;
- (3) To present written or oral statements or materials for consideration;
- (4) To call witnesses at his or her own expense (local military witnesses should be made available at no cost);
- (5) To be assisted by counsel (see paragraph (c) of this section);
- (6) To challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and
- (7) To waive any or all of these rights. Failure to affirmatively elect any of the above rights within 10 days of receipt of notice shall be deemed a waiver by the covered attorney.

(c) *Opportunity to be heard.* If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Neither the Federal nor Military Rules of Evidence apply. The covered attorney concerned or his or her counsel may question witnesses that appear. The proceedings shall be recorded but no

transcript of the hearing need be made. The covered attorney may be represented by counsel at the hearing. Such counsel may be:

(1) A civilian attorney retained at no expense to the Government; or

(2) In the case of a covered USG attorney, another USG attorney:

(i) Detailed by the cognizant Defense Services Office (DSO), Law Center, or Legal Service Support Section (LSSS); or

(ii) Requested by the covered attorney concerned, if such counsel is deemed reasonably available in accordance with the provisions regarding individual military counsel set forth in Chapter I of the JAGMAN. There is no right to detailed counsel if requested counsel is made available.

(d) *Assistants.* The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

(e) *Report.* The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or, by clear and convincing evidence, that the violation has occurred but the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes by clear and convincing evidence that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall:

(i) Provide his or her detailed findings of fact and opinions, based on the findings of fact, on which Rules the covered attorney violated;

(ii) Recommend appropriate disciplinary action; and

(iii) Forward the ethics investigation to the Rules Counsel with a copy to the attorney investigated.

(f) *Rules counsel review.* The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another IO, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own independent review of the investigation, that a violation of the Rules or the Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint. OJAG (Code 05), OJAG (Code 13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own independent review of the investigation, that a violation of the Rules or the Code of Judicial Conduct has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.) The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint that the file has been closed. OJAG (Code 05), OJAG (Code 13), and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, State, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own independent review of the investigation, that professional

disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to the JAG. (In cases relating to Marine Corps judge advocates, including trial and appellate judges, in which the SJA to CMC is not the cognizant Rules Counsel, an information copy shall be forwarded to the SJA to CMC.)

§ 776.10 Effect of separate proceeding.

(a) For purposes of this section, the term “separate proceeding” includes, but is not limited to, court-martial or similar civilian proceeding.

(b) In those cases in which a covered attorney is determined to have committed misconduct by clear and convincing evidence, or a higher burden of proof, at a separate proceeding which the Rules Counsel determines has afforded procedural due process rights equal to that provided by an ethics investigation under this part, the previous determination regarding the underlying misconduct is res judicata with respect to that issue during an ethics investigation. A subsequent ethics investigation, in accordance with § 776.9, shall be convened to decide, based on such misconduct, whether the underlying misconduct constitutes a violation of these Rules, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

(c) Notwithstanding paragraph (b) of this section, the Rules Counsel may dispense with the ethics investigation and, after affording the covered attorney concerned written notice and an opportunity to be heard in writing, recommend to the JAG that the covered attorney concerned be disciplined under JAGINST 5803.1 (series) when the covered attorney has been:

(1) Decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Judge Advocate General or Chief Counsel of another Military Department;

(2) Disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals for the Armed Forces or by any Federal, State, or local bar; or

(3) Convicted of a felony (or any offense punishable by 1 year or more of imprisonment) in a civilian or military court that, in the opinion of the Rules Counsel, renders the attorney unqualified or incapable of properly or ethically representing the Department of the Navy or a client when the Rules Counsel has determined that the attorney was afforded procedural protection equal to that provided by an ethics investigation under this part.

§ 776.11 Action by the Judge Advocate General.

(a) The JAG is not bound by the recommendation rendered by the Rules Counsel, IO, or any other party, but will base any action on the entire administrative record as a whole. Nothing in this part or JAGINST 5803.1 (series) limits the JAG's authority to suspend from the practice of law in DON matters any covered attorney alleged or found to have committed professional misconduct or violated the Rules, either in DON or civilian proceedings, as detailed in JAGINST 5803.1 (series).

(b) The JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of the Rules or their application to the facts of a particular case.

(c) Upon receipt of the ethics investigation, and any requested advisory opinion, the JAG will take such action as the JAG considers appropriate in the JAG's sole discretion. The JAG may, for example:

(1) Direct further inquiry into specified areas.

(2) Determine the allegations are unfounded, or that no further action is warranted, and direct the Rules Counsel to make appropriate file entries and notify the complainant, covered attorney concerned, and all officials previously notified of the complaint.

(3) Determine the allegations are supported by clear and convincing evidence, and take appropriate corrective action including, but not limited to:

(i) Limiting the covered attorney to practice under direct supervision of a supervisory attorney;

(ii) Limiting the covered attorney to practice in certain areas or forbidding him or her from practice in certain areas;

(iii) Suspending or revoking, for a specified or indefinite period, the covered attorney's authority to provide legal assistance;

(iv) Finding that the misconduct so adversely affects the covered attorney's ability to practice law in the naval service or so prejudices the reputation of the DON legal community, the administration of military justice, the practice of law under the cognizance of the JAG, or the armed services as a whole, that certification under Article 27(b), UCMJ, or R.C.M. 502(d)(3), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or permanently revoked;

(v) In the case of a judge, finding that the misconduct so prejudices the reputation of military trial and/or appellate judges that certification under Article 26(b), UCMJ, should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or to be permanently revoked; and

(vi) Directing the Rules Counsel to contact appropriate authorities such as the Chief of Naval Personnel or the Commandant of the Marine Corps so that pertinent entries in appropriate DON records may be made; notifying the complainant, covered attorney concerned, and any officials previously notified of the complaint; and notifying appropriate tribunals and authorities of any action taken to suspend, decertify, or limit the practice of a covered attorney as counsel before courts-martial or the U.S. Navy-Marine Corps Court of Criminal Appeals, administrative boards, as a legal assistance attorney, or in any other legal proceeding or matter conducted under JAG cognizance and supervision.

§ 776.12 Finality.

Any action taken by the JAG is final.

§ 776.13 Report to licensing authorities.

Upon determination by the JAG that a violation of the Rules or the Code of Judicial Conduct has occurred, the JAG may cause the Rules Counsel to report that fact to the Federal, State, or local bar or other licensing authority of the covered attorney concerned. If so reported, notice to the covered attorney shall be provided by the Rules Counsel. This decision in no way diminishes a covered attorney's responsibility to report adverse professional disciplinary action as required by the attorney's Federal, State, and local bar or other licensing authority.

§ 776.14 Public notice.

The JAG will periodically publish JAGNOTE 5803, a listing of attorneys whose certification or authority to practice law in any area under the cognizance of the JAG is currently suspended, revoked, or limited.

§ 776.15 Requests for reinstatement.

(a) Attorneys whose certification or authority to practice law in any area under the cognizance of the JAG has been suspended may request reinstatement no earlier than 5 years after the effective date of suspension. Attorneys whose certification or authority to practice law in any area under the cognizance of the JAG has been revoked may not request reinstatement.

(b) Requests for reinstatement must be signed under oath, and must describe with particularity the manner in which he or she meets each of the criteria listed as follows:

(1) The attorney has fully complied with all conditions imposed at the time of the imposition of sanctions;

(2) The attorney has not engaged in or attempted to engage in the unauthorized practice of law within the Department of the Navy during the period of suspension;

(3) If the attorney was suffering under a physical disability or other infirmity at the time of the imposition of sanctions, including alcohol abuse, the attorney must provide independent

evidence that the disability or infirmity has been removed. Attorneys whose disability or infirmity included the possession or use of controlled substances in violation of Article 112a, UCMJ, shall not be reinstated;

(4) The attorney has recognized the wrongfulness and seriousness of the misconduct for which sanctions were imposed;

(5) The attorney has not engaged in other professional or personal misconduct since sanctions were imposed;

(6) Notwithstanding the misconduct that resulted in imposition of sanctions, the attorney has the requisite honesty and integrity to practice before general courts-martial and all other administrative and judicial proceedings under the cognizance of the JAG;

(7) The attorney has kept informed about recent legal developments and is competent to practice before general courts-martial and all other administrative and judicial proceedings under the cognizance of the JAG; and

(8) Sufficient time has elapsed since imposition of sanctions and revocation of sanctions would be appropriate in view of the seriousness of the misconduct that resulted in sanctions and the effect that revocation of sanctions would have on the reputation of the community of covered attorneys who practice under the cognizance and supervision of the JAG.

(c) The decision whether to grant a request for reinstatement is solely within the discretion of the JAG. Although the JAG will consider the factors listed in this section and any additional information provided by the requesting attorney, the JAG has complete discretion to determine whether reinstatement would be appropriate. The JAG's decision is final.

Dated: April 25, 2024.

J. E. Koningisor,

Lieutenant Commander,

Judge Advocate General's Corps,

U.S. Navy,

Federal Register Liaison Officer.

[FR Doc. 2024-09257 Filed: 5/2/2024 8:45 am; Publication Date: 5/3/2024]