

JUDGE ADVOCATES/PROFESSIONAL RESPONSIBILITY

The Air Force as Client

This is in response to a request for guidance on whether advice an active duty judge advocate (JAG) provided to a commander concerning a disciplinary action is confidential and should not be disclosed to an Air Force Inspector General (IG) investigating officer.

Background

In a complaint submitted to the Air Force Inspector General, an Air Force officer alleged that a numbered Air Force (NAF) commander issued him a letter of reprimand (LOR) in contravention of Air Force Instruction (AFI) 36-2907, *Unfavorable Information File (UIF) Program*, 17 June 2005, and without properly considering the matters submitted in response to the LOR. As part of an initial inquiry into the complaint, an investigating officer contacted the NAF commander's staff judge advocate (hereinafter referred to as "the JAG") to determine what, if anything, the JAG knew about the matters set out in the complaint. The JAG confirmed that he provided advice to the NAF commander concerning the LOR. When the investigating officer asked about the specific discussions of the JAG and the NAF commander, the JAG refused to reveal what was discussed, claiming those discussions were confidential communications under the "Air Force Rules of Professional Responsibility" and his state bar rules. The JAG further indicated he would only divulge that information if ordered to do so by the NAF commander, the major command commander, or the Chief of Staff of the Air Force.¹

Analysis

According to TJAG Policy Memorandum: TJAGC Standards – 2 (TJS-2), 17 August 2005, paragraph 3, the Air Force Rules of Professional Conduct (AFRPC), Attachment 1 to TJS-2, "apply to all military and civilian lawyers, paralegals, and nonlawyer assistants in The Judge Advocate General's Corps (TJAGC)."

AFRPC Rule 1.6, Confidentiality of Information, states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

¹ The JAG later agreed to send and did send an e-mail to the investigating officer that the JAG indicated also contained confidential information. It is unclear why the JAG determined it was proper to divulge that communication between the JAG and the NAF commander while asserting that divulging other communications would be a violation of both the Air Force and his state bar rules concerning professional responsibility.

(1) [Modified] to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.

AFRPC Rule 1.13, The Air Force as Client, states in pertinent part:

(a) Except when authorized to represent an individual client or the government of the United States, an Air Force judge advocate or other Air Force lawyer represents the Department of the Air Force acting through its authorized officials.

...

(d) [Modified] In dealing with Air Force officials, members, employees, or other persons associated with the Air Force, a lawyer shall explain that the Air Force is the lawyer's client when it is apparent that the Air Force's interests are adverse to those of the officials, members, or employees with whom the lawyer is dealing.

...

(f) [Added] A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer-client relationship with that individual.

The "Discussion" of AFRPC Rule 1.13 states in pertinent part:

With limited exceptions, an Air Force lawyer represents the Department of the Air Force as it acts through its authorized representatives. Exceptions include, but are not limited to, lawyers assigned to represent individuals under subsection (f), trial counsel who represent the government of the United States, and counsel assigned to perform special duties such as assignment to the Department of Defense or Department of the Air Force Office of the General Counsel, or as an Assistant United States Attorney. In representing the Air Force, counsel serves his or her client by interacting with Air Force officials, members, and employees. When an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is confidential under Rule 1.6. Under these circumstances, the official, member or employee is, in essence, the Air Force. . . . Loyalty and confidentiality are professional traits that are virtues only when they are consistent with a lawyer's

ethical obligations to the client: the Air Force. . . . When Air Force interests are or become adverse to those of an individual authorized to act on behalf of the Air Force, the lawyer must advise the individual concerning the conflict. In such circumstances, the advice should explain that the lawyer cannot represent the individual. . . . Care must be taken to ensure that the individual understands that when interests conflict, the Air Force lawyer represents the Air Force, not the individual, and discussions between the lawyer and the individual may not be privileged.

As the JAG is a military lawyer in TJAGC, the AFRPCs apply to him. Under AFRPC Rule 1.13, the default position is that the Air Force is the JAG's client. The JAG in this case did not assert that he provided advice to the NAF commander in a capacity that excluded him from the general rule that the Air Force is the JAG's client. In fact, the JAG made it clear that he provided the advice to the NAF commander in his role as the NAF staff judge advocate. Therefore, the Air Force is the JAG's client concerning the advice at issue.

The "Discussion" of AFRPC Rule 1.13 states, "When an Air Force official, member, or employee, acting within the scope of his or her official duties, communicates with an Air Force lawyer, the communication is confidential under Rule 1.6." However, when the interests of the official, member, or employee are adverse to the interests of the Air Force, AFRPC Rule 1.6 does not prevent the Air Force lawyer from divulging the communications between the Air Force lawyer and the official, member, or employee to officials, members, or employees of the Air Force. In this case, an IG investigating officer is conducting an inquiry into a complaint that the NAF commander issued an LOR in contravention of AFI 36-2907 and without properly considering the matters submitted in response to the LOR. Thus, the interests of the NAF commander and the Air Force are adverse. Consequently, AFRPC Rule 1.6 does not preclude the JAG from revealing to the IG investigating officer the communications between the JAG and the NAF commander concerning the LOR.²

Conclusion

In providing advice to the NAF commander concerning a disciplinary action, the JAG was not serving in a capacity that would exclude him from the general rule that the Air Force is his client. Accordingly, the Air Force was the JAG's client concerning the JAG's advice to the NAF commander. As the IG investigating officer is reviewing a complaint of alleged wrongdoing against the NAF commander concerning the disciplinary action, the NAF commander's interests are adverse to those of the Air Force, the JAG's client. Under these circumstances, AFRPC Rule 1.6 does not prevent the JAG from divulging to the IG investigating officer the communications between the JAG and the NAF commander concerning the disciplinary action.

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² This conclusion is consistent with OpJAGAF 2012/1, 15 February 2012, *The Air Force as Client for Air National Guard Judge Advocates*, in which it was determined that an IG investigating officer was not barred from learning what advice, if any, an Air National Guard attorney provided to his client concerning personnel actions, because the Air National Guard attorney's client was the Air Force.