

Military Justice Review Group  
Office of the General Counsel  
Room 3B747  
1600 Defense Pentagon  
Washington, DC 20301-1600

Oregon State Bar

June 30, 2014

Dear Chief Judge Efron:

As the Military Justice Review Group (MJRG) conducts its "Comprehensive Review of the Uniform Code of Military Justice," per Secretary Hagel's 18 October 2013 direction, Deputy General Counsel Koffsky has requested the input of the Oregon State Bar (OSB) concerning the administration of military justice.

The mission of the OSB is to serve justice by promoting respect for the rule of law, by improving the quality of legal services, and by increasing access to justice. The OSB was established in 1935 by the Oregon Legislative Assembly to license and discipline lawyers, regulate the practice of law and provide a variety of services to bar members and the public. The bar is a public corporation and an instrumentality of the Oregon Judicial Department.

In furtherance of our mission, we are pleased to address two concerns that we believe should be considered in any comprehensive report on the administration of Military Justice in the U.S. Military.

1. Post-service consequences of military justice and other disciplinary actions.
2. Inherent conflicts of interest in criminal defense representation in courts-martial.

#### **Post-service consequences of military disciplinary actions**

We believe that statutory language should be considered to require military decision makers to consider post-service consequences of military disciplinary actions.

Oregon is proud to contribute citizens of our state to facilitate the important federal Constitutional requirement to provide for the common defense. It is essentially important to all Oregonians that our citizens are provided adequate due process in any military disciplinary proceeding and that adequate resources are provided to care for veterans for as long as they and their loved ones experience the consequences of their service.

But due process only addresses the proceeding itself, and post-service care address problems which have already occurred. We have been unable to locate anything in the Uniform Code of Military Justice, other statutes, Rules for Court-Martial, or in any Service Regulations which directs military authorities to ensure that post-service consequences of military disciplinary decisions are considered.

At court-martial, for example, the sum total of the guidance that military panel members receive about post-service consequences of punitive discharges is this:

The stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities, and social acceptability... This court may adjudge either a dishonorable discharge or a bad-conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. Department of the Army Pamphlet 27-9, para 2-5-22.

Nothing is provided to military panel members which orients them to the consequences of their decisions to larger society as well as to the individual Accused. The interests of the several States, which are left completely responsible for veterans who receive punitive discharges, are not addressed at all.

Similarly, we are unable to locate any guidance concerning Administrative Separations which would assist military decision makers in understanding and incorporating into their decision process the profound post-service consequences of negative characterizations of service.

The applicable Department of Defense Instruction, DODI 1332.14, Enclosure 4, paragraph 1.b., merely directs military decisions makers as follows:

- (4) The following factors may be considered on the issue of retention or separation, depending on the circumstances of the case:
  - (a) The seriousness of the circumstances forming the basis for initiation of separation proceedings, and the effect of the Service member's continued retention on military discipline, good order, and morale.
  - (b) The likelihood of continuation or recurrence of the circumstances forming the basis for initiation of separation proceedings.
  - (c) The likelihood that the Service member will be a disruptive or undesirable influence in present or future duty assignments.
  - (d) The ability of the Service member to perform duties effectively in the present and in the future, including potential for advancement or leadership.
  - (e) The Service member's rehabilitative potential.
  - (f) The Service member's entire military record.

With respect to characterization of service, the DODI merely states, at Enclosure 4, para 3.b(1)

(a) Characterization at separation shall be based upon the quality of the Service member's service, including the reason for separation ... and the time-honored customs and traditions of military service.

(b) ...[C]onduct that is of a nature to bring discredit on the Military Services or is prejudicial to good order and discipline [and] conduct in the civilian community.

(c) The reasons for separation...

(d) [T]he Service member's age, length of service, grade, aptitude, physical and mental condition, and the standards of acceptable conduct and performance of duty.

Guidance on characterization appears to completely disregard the balance of the young Service Members' lives, years when the military has no further use for these former Service Members.

It is our contention that even badly-behaving former Service Members may mature to be productive and law-abiding citizens of the several States; and it is our further contention that the Services should be directed to consider the larger and long-term good of society alongside short-term military efficacy. Because the Services must always maintain an overwhelming focus on fighting and winning our Nation's wars, we believe this issue merits evaluation for statutory repair.

#### **Inherent conflicts of interest in criminal defense representation in courts-martial**

The Oregon State Bar, under the ultimate authority of the Oregon Supreme Court, regulates the practice of law in Oregon for the protection of the public. In its regulatory role, the OSB is responsible for the admission, discipline and reinstatement of lawyers who practice in Oregon, and has tremendous knowledge and experience with attorneys' professional responsibilities, including compliance with their ethical obligations.

Instead of creating and administering a military bar association to license and regulate the practice of law in the military, the DoD has chosen to require military lawyers to have current membership in the bar of one of the several States or the District of Columbia. In other words, the DoD asks the Oregon State Bar to give its *imprimatur* to lawyers practicing in military service but licensed in Oregon, especially as there is no further licensing requirement for military service.

As such, the OSB has an interest in ensuring that Oregon-licensed lawyers are practicing in a manner that does not place them at risk of inadvertently violating our rules of practice. Specifically, Oregon RPC 1.8(k) provides that "[w]hile lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them." What constitutes a "firm" is open to some interpretation, especially in the context of military practice; however, at no time in Oregon have counsel working for the same supervisor been allowed to represent adverse litigants.

As for the applicability of our rules, RPC 8.5(a) provides,

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. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

The Oregon Rules of Professional Conduct require that attorneys must avoid conflicts of interest in the representation of their clients. We are concerned that it appears to be an actual conflict of interest for attorneys in the same legal organization, whether public or private, to simultaneously represent parties with adverse interests. We understand that the military services have criminal defense organizations within their Judge Advocate General's Corps. The judge, the prosecution, and the defense in courts-martial all report to the same ultimate supervisor, the Judge Advocate General of that service.

In formulating our recommendations for the MJRG, we have considered the Group's ability to propose incremental or evolutionary reforms to Secretary Hagel. Our review of the provision of criminal defense services over the history of our Nation shows a steady progression of increasing independence in the provision of criminal defense representation to Service Members. The creation of the Army's Trial Defense Service in the 1980s was a watershed moment in the evolution of due process in military jurisprudence. However, the Services do not appear to have seen any need for further evolution of the defense function in the intervening 34 years. We would like to propose to the MJRG that it consider the obvious conflict of interest the current system embodies.

While we acknowledge that it is better for an Accused Service Member to have an ostensibly independent TDS attorney than a Prosecutor also serving the Defense Counsel function, we are hard-pressed to see what military exigencies compel the DoD to retain the respective Service Trial Defense organizations solely in Service Channels. Instead, we have considered the current arrangements as step on the way to a fully independent Joint Criminal Defense Organization, either within the DoD (if military exigencies demand that compromise) or independent of the entire military chain of command (if possible). The OSB is certainly in no position to presume expertise over those military exigencies, but we are pleased to raise the issue for the MJRG's consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tom Kranovich". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tom Kranovich, President