



NEW YORK STATE BAR ASSOCIATION


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COMMITTEE ON PROFESSIONAL ETHICS

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Re: Inquiry #34-10

Dear :

By e-mail of September 1, 2010, you requested an opinion from this committee regarding your professional obligations under the New York Rules of Professional Conduct. You provided additional factual background to your inquiry by e-mail dated September 2, 2010, and in a telephone call with a committee member on September 3, 2010. The committee considered your inquiry at a series of meetings, including most recently on February 23, 2011.

You have advised that you are a lawyer licensed in New York (and in no other jurisdiction) and that you work as a defense counsel in the Department of Defense (“DoD”), Office of Military Commissions, Office of the Chief Defense Counsel, which is located in Arlington, Virginia. You tell us that you are inquiring on your own behalf as well as on behalf of other New York-admitted lawyers in your office. The responsibilities of your office extend to defending, before a military commission, those detainees currently held at Guantanamo Bay who have been criminally charged. Under the governing statute, your office is within the Department of Defense, but its professional responsibilities are toward the detainees, who are your clients. You recognize that you owe the typical fiduciary duties to your clients, as any lawyer would in a criminal defense matter.

As part of your employment, you and the other lawyers in your office use government-owned information systems, including computers, Internet, email and telephone for communicating with your clients and others, storing files, and creating your work product. You have told us that (a) you work in a secure facility (meaning that only those with a security clearance may enter); (b) e-mail is the principal means of communication with those outside the facility; and (c) filings in your cases are made electronically.

You have further advised – and this is the focus of your inquiry – that DoD has asked lawyers in your office to sign a form (the “OSD Information Systems User Agreement”) seeking your consent to DoD’s interception and monitoring of your electronic files and communications, including data and communications covered by the attorney-client privilege and attorney-client confidentiality. Among other things, the form indicates that the signer “consents to interception/capture and seizure of ALL communications and data for any authorized purpose (including personnel misconduct, law enforcement,

or counterintelligence investigation)" (all caps in original) but that the signer does not consent to the use of "privileged communications or data" for these purposes.

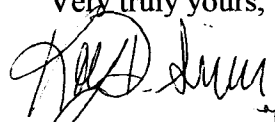
You are uncertain whether DoD would permit you to conduct work from your office electronically without employing the DoD computer system (or, if not, whether a court could or would order DoD to permit you to engage in non-intercepted electronic communications, research, word processing, and other work). You are also uncertain whether currently, even before receiving your consent, DoD is intercepting and reviewing your office's electronic files and data, or reserves the right to do so. You ask whether, under these circumstances, you may provide the requested consent and use your computer for client-related work knowing that DoD may intercept and monitor your work.

We conclude that we lack jurisdiction to resolve your question because the New York Rules of Professional Conduct (the "New York Rules") do not apply to the situation you describe. The jurisdiction of this committee is limited to questions arising under the New York Rules. The committee is charged with interpreting the New York Rules by answering questions of professional conduct that are governed by these rules. In your case, the threshold choice of law question is whether your conduct is governed by the confidentiality provision of the New York Rules (*i.e.*, Rule 1.6), or by the confidentiality provision of some other jurisdiction -- *e.g.*, those of the state in which your office is physically located or the rules, if any, adopted by the military commissions before which you practice. Unless the confidentiality provision of the New York Rules applies to your work, this committee lacks jurisdiction to provide you an answer.

Under Rule 8.5(a) of the New York Rules of Professional Conduct, New York-admitted lawyers are subject to discipline in this state no matter where they practice, but the New York Rules are not invariably the ones that apply to their conduct. Rule 8.5(b)(1) provides: "For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Based on this rule, it appears to us that the conduct in question is governed by the professional conduct rules adopted by the military commission, as interpreted by it, rather than by the New York Rules. Were that not the case, we assume that you would be subject to the professional conduct rules of Virginia, which is the jurisdiction in which you regularly practice and maintain your office. *See* Rule 8.5(b)(2)(ii); *cf.* N.Y. State 815 (2007) (New York lawyer who is lawfully practicing overseas but not formally admitted there is generally subject to the ethics rules in the foreign jurisdiction unless primary effect of her conduct is in New York); N.Y. State 750 (2001) (if conduct of a lawyer licensed in New York clearly has its predominant effect in another jurisdiction in which the lawyer is also licensed to practice, the ethics rules of that jurisdiction apply to the conduct). Because it appears unlikely that the New York Rules govern your conduct, we must decline to resolve your inquiry.

The foregoing is an informal response, not a formal opinion, and is based solely upon the information submitted and the representations set forth in your inquiry. It shall have no effect as a precedent insofar as any other state of facts is concerned.

Very truly yours,



Roy Simon
Chair