

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p>AE 049G</p> <p>ORDER</p> <p>Motion For Leave to File an <i>Ex Parte</i> and Under Seal Notice In Response to Order to Show Cause (AE 049A)</p> <p>14 August 2015</p>
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1. In AE 049A, the Commission ordered LtCol Gleason to “file a pleading through LtCol Jasper and Maj Stirk setting forth his intended schedule to, by no later than 24 August 2015, conference with the Accused and, if necessary, Mr. Hawsawi with a view to resolving potentially conflicting representational duties, OR show cause as to why he is ethically precluded from speaking with the Accused and / or Mr. Hawsawi concerning these matters.” (AE 049A at 2). In AE 049B, LtCol Gleason requested, “As a non-party to this Commission, . . . Leave of the Commission to file an *ex parte* and under seal notice in response to the Order to Show Cause issued in AE 049A.” In AE 049C, the Commission issued an expedited briefing schedule for AE 049B. The Prosecution “[did] not oppose, as a general matter, the request by LtCol Sean M. Gleason, USMC, to file an *ex parte* notice, under seal, in response to the Commission’s Order to Show Cause.” (AE 049D). In AE 049E, the Defense objected to LtCol Gleason’s request, asserting a “continuing objection to the production of any information/documents exchanged between AI Hadi AI Iraqi and LTC Gleason to the extent that such implicate, penetrate, diminish or defeat the Attorney-Client-Privilege.” (AE 049E at 3). LtCol Gleason’s reply to the Defense response argued, “since Mr. Hadi al Iraqi’s counsel have now objected to any disclosures by LtCol Gleason based on the attorney-client privilege, this Commission must first adjudicate any claims of privilege or other objections raised by Mr. Hadi al Iraqi’s counsel before LtCol Gleason can

ethically comply with the Commission's Order in AE 049A." (AE 049F at 1). Oral argument was not requested.

2. In AE 049A, the Commission stated, "All pleadings and notices pursuant to this order may be filed *ex parte* and under seal as necessary to protect any privileged communications." (AE 49A at 3). JAG INSTRUCTION 5803.1D, Rule of Professional Conduct 1.6(c) states, "A covered attorney may reveal such information to the extent the covered attorney reasonably believes necessary: (2) . . . to respond to allegations in any proceeding concerning the attorney's representation of the client; and/or (3) to comply with other law or a court order."¹ The Commission is reluctant to breach the attorney-client privilege, and will attempt to resolve these representational issues without doing so.² Therefore, the Commission orders LtCol Gleason to submit, *ex parte* and under seal, the following documents, if any such documents exist:

- a. Any document terminating LtCol Gleason as Mr. Hadi al Iraqi's detailed defense counsel;
- b. Any document containing a request by the Accused to release LtCol Gleason as his detailed defense counsel;
- c. Any application by LtCol Gleason to withdraw from representation of Mr. Hadi al Iraqi;
- d. Any document terminating LtCol Gleason's attorney-client relationship with Mr. Hadi al Iraqi;

¹ ABA Model Rule for Professional Conduct 1.6(b) provides that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (5) . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

² See Military Commission Rule of Evidence (M.C.R.E.) 502(d)(containing an exception to the attorney-client privilege for statements relevant to a breach of duty by the lawyer but containing no exception for compliance with a court order).

e. Any document LtCol Gleason believes necessary to establish the current status of his attorney-client relationship with Mr. Hadi al Iraqi;

f. Summaries of any oral communications relevant to the above listed matters not otherwise reflected in writing; and,

g. All documents detailing LtCol Gleason to represent Mustafa Ahmed Adam al Hawsawi.

3. The documents in paragraphs a.–d. and g. above are not protected by the attorney-client privilege or client confidentiality.³ To the extent these documents contain communications between LtCol Gleason and Mr. Hadi al Iraqi, the communications were not intended to remain confidential.⁴ The documents in paragraphs e. and f. above likely are not protected by the attorney-client privilege or client confidentiality for the same reasons. If a document in paragraph e. or a communication in paragraph f. contains communications between LtCol Gleason and Mr. Hadi al Iraqi that were intended to remain confidential, the confidential communications will be redacted from the documents or not included in the summary.⁵ Any disclosure of confidential information by LtCol Gleason will be “no greater than [he] reasonably believes necessary to accomplish the purpose [of the disclosure] . . . [and be done] in a manner that limits access to the information to the tribunal or other persons having a need to know it.”⁶

³ While the attorney-client privilege only protects confidential communications between an attorney and his client, the duty of client confidentiality is much broader and protects all information relating to the representation of a client. *See* M.C.R.E. 502(b)(4); JAG INSTRUCTION 5803.1D, Rule of Professional Conduct 1.6(a). A disclosure ordered by a court does not violate client confidentiality. *Id.* at Rule of Professional Conduct 1.6(c)(3).

⁴ *See* M.C.R.E. 502(b)(4); JAG INSTRUCTION 5801.1D, Rule of Professional Conduct 1.6(a) (“A covered attorney shall not reveal information relating to representation of a client unless . . . the disclosure is impliedly authorized in order to carry out the representation.”)

⁵ The Commission will attempt to resolve the issues presented based on the information it receives in response to this order. The Commission reserves the right to issue additional orders if the response to this order is insufficient to resolve the issues presented. If the Commission cannot resolve these issues based on the response to this order, the Commission will consider whether M.C.R.E. 502(d)(3) applies to this situation and issue appropriate orders.

⁶ JAG INSTRUCTION 5803.1D, Rule of Professional Conduct 1.6(d), Comment (6)(k) states, “Paragraphs b and c permit disclosure only to the extent the covered attorney reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable the covered attorney should first seek to persuade the

LtCol Gleason's filing of these documents *ex parte* and under seal limits access to the information. The documents filed by LtCol Gleason pursuant to this order will remain under seal until this Commission or another court of competent jurisdiction directs otherwise.

4. LtCol Gleason's Motion For Leave to File an *Ex Parte* and Under Seal Notice In Response to Order to Show Cause (AE 049A) is **GRANTED**. The documents will be filed not later than 20 August 2015. The 24/25 August 2015 deadlines set forth in AE 049A are no longer in effect; any future deadlines will be set in a subsequent order.

So ORDERED this 14th day of August 2015.

//s//
J. K. WAITS
CAPT, JAGC, USN
Military Judge

client to take suitable action to obviate the need for disclosure. In any event a disclosure adverse to the client's interest should be no greater than the covered attorney reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it. Appropriate protective orders or other arrangements should be sought by the covered attorney to the fullest extent practicable."