Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE AIR FORCE; et al.,

Defendants.

Case No. C06-5195-RBL

DECLARATION OF SARAH DUNNE IN SUPPORT OF MOTION FOR PROTECTIVE ORDER PROHIBITING INTERFERENCE WITH NON-PARTY WITNESSES BY DEFENDANTS

Pursuant to 28 U.S.C. § 1746, I, Sarah Dunne, hereby declare as follows:

1. I am counsel for the plaintiff and have personal knowledge of the facts contained in this Declaration.

2. Attached hereto as Exhibit A is a true and correct copy of a letter dated April 14, 2010, from Peter Phipps to James Lobsenz.

3. Attached hereto as Exhibit B is a true and correct copy of a letter dated April 19, 2010, from Sarah Dunne to Peter Phipps.

4. Attached hereto as Exhibit C is a true and correct copy of a letter dated April 21, 2010, from Bryan Diederich to Sarah Dunne.

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Seattle, Washington 98104-1799
(206) 624-2184

5. Attached hereto as Exhibit D are true and correct copies of excerpts from the deposition of Colonel Mary E. Walker, dated January 8, 2010.

6. Attached hereto as Exhibit E are true and correct copies of excerpts from the deposition of Captain Jill Robinson, dated March 16, 2010.

7. Attached hereto as Exhibit F are true and correct copies of excerpts from the deposition of Master Sergeant Leah Crawford, dated March 17, 2010.

8. Attached hereto as Exhibit G is a true and correct copy of Defendants' Supplemental Objections and Responses to Plaintiff's Interrogatory No. 12.

9. Attached hereto as Exhibit H is a true and correct copy of Informal Ethics Opinion No. 1020, "Advice by Prosecuting Attorneys to Prospective Witnesses."

10. On April 21, 2010, government counsel and I participated in a telephone conference concerning the issue of non-party witness interference. We discussed the issue for almost thirty minutes but were unable to reach a resolution amendable to both parties.

11. I have searched the online lawyer directory for the Washington State Bar Association located at www.wsba.org then follow "Lawyer Directory" hyperlink (http://www.mywsba.org/Default.aspx?tabid=177). As of April 27, 2010, Major Linell Letendre is listed as an active member of the Washington State Bar with bar number, WSBA #31988. I was unable to find Lt. Col. Todi S. Carnes in the Washington State Bar Association Lawyer Directory.

I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on April 27, 2010 in Seattle, Washington.

/s/ Sarah A. Dunne
Sarah A. Dunne, WSBA #34869

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Seattle, Washington 98104-1799
(206) 624-2184

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2010, I electronically filed this Declaration of Sarah Dunne in Support of Motion for a Protective Order Prohibiting Interference with Non-Party Witnesses with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Peter Phipps
peter.phipps@usdoj.gov

Marion J. Mittet
Jamie.Mittet@usdoj.gov

Bryan R. Diederich
bryan.diederich@usdoj.gov

Stephen J. Buckingham
Stephen.Buckingham@usdoj.gov

Attorneys for Defendants

DATED this 27th day of April, 2010.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

By: /s/ Nina Jenkins
Nina Jenkins
Legal Program Assistant
705 Second Avenue, Suite 300
Seattle, WA 98104
Tel. (206) 624-2184
njenkins@aclu-wa.org

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EXHIBIT A

U.S. Department of Justice
Civil Division, Federal Programs Branch

Via U.S. Mail:
P.O. Box 883, Rm. 7136
Washington, DC 20044

Via Special Delivery:
20 Massachusetts Ave., NW
Washington, DC 20001

Peter J. Phipps
Senior Counsel

Telephone: (202) 616-8482
Fax: (202) 616-8470
Email: peter.phipps@usdoj.gov

April 14, 2010

Via First-Class U.S. Mail &
Email (Lobsenz@carneylaw.com)

James E. Lobsenz, Esq.
CARNEY BADLEY SPELLMAN
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

Re: Witt v. U.S. Air Force, No. C06-5195 (W.D. Wash.) (RBL)

Dear Jim,

I understand that you or others working for plaintiff in the above-referenced case continue to contact current or former Air Force employees to obtain information in connection with the above-referenced litigation. I have already explained verbally that such communications are not permitted by DoD and Air Force regulations absent consent by Air Force counsel. Lest there be any doubt as to the basis for my position that such efforts at contacting current and former unit members is inappropriate, I provide you with reference to the Department of Defense ("DoD") and the Air Force policies and procedures pertaining to the release of official information by current and former employees. *See generally* 32 C.F.R. §§ 97.1 -.6; DoD Directive 5405.2; Air Force Instruction ("AFI") 51-301, Chapter 9.

Under these policies, the term "official information" is defined broadly. It includes "all information of any kind . . . [that] was acquired by DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the U.S. Armed Forces." 32 C.F.R § 97.3(d); *see also* DoD Directive 5405.2, ¶ 3.4. The Air Force definition of "official information" specifically extends to "[p]ersonal observations by Air Force personnel of the morale, support, or fitness of any particular Air Force personnel, family member, or contractor." AFI 51-301, ¶ 9.2.6.5.

If an individual desires official information from current and former employees, then that individual must first seek official permission to obtain that information:

> If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to subparagraph (c)(5), DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph 6.1.

See 32 C.F.R. § 97.6(c)(2); *see also* DoD Directive 5405.2, ¶ 6.3.2; AFI 51-301, ¶ 9.5. To summarize, these regulations establish a set of procedures for centralizing decisions regarding the dissemination of official information. In light of these provisions, Air Force counsel has reminded employees of the need to comply with these procedures before official information can be released.

I trust that going forward you and members of your team will comply with these regulations in seeking official information. Nonetheless, please inform me of your intentions regarding compliance with these regulations going-forward.

Sincerely,

Peter J. Phipps

cc: Sarah A. Dunne, Esq. (*via* email)

EXHIBIT B

SARAH DUNNE
LEGAL DIRECTOR

NANCY TALNER
STAFF ATTORNEY

ROSE SPIDELL
STAFF ATTORNEY
FLOYD AND DELORES JONES FAMILY FELLOW

SHER KUNG
PERKINS COIE FELLOW

LINDSEY SOFFES
ROPES & GRAY FELLOW

April 19, 2010

Via E-mail
Peter J. Phipps
Bryan R. Diederich
Stephen J. Buckingham
Civil Division, Federal Programs Branch
U.S. Department of Justice
20 Massachusetts Ave., N.W.
Washington, D.C. 20001

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JESSE WING
BOARD PRESIDENT

KATHLEEN TAYLOR
EXECUTIVE DIRECTOR

Re: *Witt v. Air Force et al.*, No. C06-5195 (W.D. Wash.)

Dear Peter,

I am writing in response to your April 14 letter concerning witness interviews of current and former Air Force employees. You are correct in your understanding that we seek to contact current and former Air Force employees to obtain information and evidence in connection with the above-referenced litigation. We do not agree with your assertion that we must seek official permission from Air Force counsel before contacting current and former unit members.

As you are aware, the regulations and Air Force policy you cite to in your letter, 32 C.F.R. § 97.6, DoD Directive 5405.2, and Air Force Instruction 51-301, chapter 9, rely on 5 U.S.C. § 301 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), as the authority for their requirement that litigants seeking testimony must seek permission from appropriate DoD officials. It is well-established, however, that 5 U.S.C. § 301 is merely a housekeeping statute. It explicitly states that it "does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 301 (2006). Courts in this circuit and elsewhere have repeatedly held that 5 U.S.C. § 301 does not authorize a federal agency to withhold testimony from a federal court. *See, e.g., Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 778 (9th Cir. 1994).

Case law is equally clear that regulations promulgated under *Touhy*, including 32 C.F.R. § 97.6, may apply only in cases where the United States is not a party to the legal proceeding. *Exxon Shipping*, 34 F.3d at 776 n.4; *see also Alexander v. FBI*, 186 F.R.D. at 70 & n.2 (holding that plaintiffs need not rely upon 32 C.F.R. § 97.6 in their efforts to elicit testimony from DoD employees). When the government is a party, it sits in the same position as an ordinary litigant to whom the Federal Rules of Civil Procedure apply. *Mosseller v. United States*, 158 F. 2d 380, 382 (2d. Cir. 1946).

Given that the DoD *Touhy* regulations do not apply to this case, we are troubled by the fact that you and Air Force counsel have instructed fact witnesses in this case not to

speak with counsel for Major Witt unless you are present and have consented to the interview. Your attempt to limit our access to fact witnesses run afoul of Rule 26(b)(1) of the Federal Civil Rules of Procedure and state ethical rules. As you know, this case is being litigated in the Western District of Washington and the Western District has adopted the Washington Rules of Professional Conduct. *See* GR 2(e)(2) at 2. Rule 3.4(a) of the Washington Rules of Professional Conduct prohibit a lawyer from obstructing another lawyer's access to evidence. As attorneys for the Department of Justice litigating a case in the Western District of Washington, you are subject to the local Federal court rules and state ethical rules. 28 U.S.C. § 530B(a).

Accordingly, we ask that you and Air Force counsel immediately remedy your prior instruction to current unit members by affirmatively informing Air Force personnel that they do not need permission from DoD personnel to speak with plaintiff's counsel in this case, that no regulation or law prevents them from speaking with plaintiff's counsel in this case, and that they will not face any adverse employment consequences from speaking with plaintiff's counsel in this case. In the event you refuse to issue such a curative instruction in writing to current unit members, we will seek appropriate relief from the Court.

I look forward to resolving this matter with you tomorrow.

Sincerely,

Sarah A. Dunne

Sarah A. Dunne
Legal Director

cc: James Lobsenz

EXHIBIT C

U.S. Department of Justice
Civil Division, Federal Programs Branch

By U.S. Mail
P.O. Box 883, Rm. 7330
Washington, DC 20530

By Courier
20 Massachusetts Ave NW, Rm. 7330
Washington, DC 20001

Bryan R. Diederich
Trial Attorney
Tel.: (202) 305-0198
Fax: (202) 616-8470
bryan.diederich@usdoj.gov

April 21, 2010

By First Class Mail & Electronic Mail

Sarah Dunne, Esq.
ACLU OF WASHINGTON FOUNDATION
705 Second Avenue, 3rd Floor
Seattle, Washington 98104

Re: ***Witt v. United States Dept. of the Air Force, et al.*, No. C06-5195 (W.D. Wash)**

Dear Ms. Dunne,

I write in response to your letter of April 19, 2010 which responds to Peter Phipps's letter to Jim Lobsenz of April 14, 2010. Mr. Phipps is unavailable and I have therefore been tasked with responding to your letter, which is, in our view, wrong on both the law and the facts.

First, as a factual matter, your claim that members of the 446th Aeromedical Evacuation Squadron ("446th AES") have been instructed not to speak with Plaintiff's counsel is not consistent with our understanding. I can state it no more clearly than Mr. Phipps's letter: "Air Force counsel has reminded employees of the need to comply with these provisions before *official information* can be released." I do not understand from Mr. Phipps's letter that the Air Force has barred members of the 446th AES from talking about any topics with Plaintiff's counsel, just unapproved releases of official information. Further, not only has the Air Force not denied any request to share official information with Plaintiff's counsel, it has not had the opportunity to do so because, to our knowledge, it has never been asked.

Second, *United States ex rel. Touhy*, 340 U.S. 462 (1951) holds that the government can regulate the manner in which official information is released. *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774 (9th Cir. 1984) holds only that the federal government, when it itself is a litigant, may not "withhold documents or testimony from federal courts." 34 F.3d at 778. The Air Force has neither withheld documents nor barred any personnel from testifying, hence *Exxon Shipping*'s holding is inapplicable.

You are correct that when the government participates in litigation, it participates as any other litigant. Accordingly, the government has in this case followed the Federal Rules of Civil Procedure. It has, pursuant to Rule 34, produced more than 25,000 pages of documents in response to document requests. It has also provided interrogatory responses in accord with Rule 33 and produced witnesses for deposition as required under Rule 30. You have identified no rule of Civil Procedure—or any other authority—that requires the government to allow witnesses to release official government information in informal interviews, especially when such a release is directly prohibited by law. *See* DoD Directive 5405.2 § 6.3.1 ("DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in paragraph 6.1."). Rule 26(b)(1), which you do cite, governs only the scope of discovery. There is no Federal Rule of Civil Procedure that either permits or bars informal *ex parte* interviews. *See Benally v. United States*, 216 F.R.D. 478, 480 (D. Ariz. 1993). Accordingly, there is no basis to claim that the Air Force has conducted itself in a way inconsistent with the general rules governing civil litigants.

Finally, your claim that the Air Force's instructions to employees runs afoul of Washington Rule of Professional Conduct 3.4 is incorrect. Rule 3.4 says that a lawyer may not "*unlawfully* obstruct another parties' access to evidence." Here, where the Air Force has instructed its employees in accordance with duly enacted regulations regarding the release of official information, there is nothing unlawful or obstructive, within the meaning of Rule 3.4(a) about such instructions. Moreover, any interpretation of Rule 3.4(a) that would prohibit the Air Force from following its regulations in this situation must fail because, where issues arise in federal court concerning the interpretation of a state Rule of Professional Conduct, such Rule must be interpreted in a manner that is consistent with federal law. *See, e.g., Grievance Comm. for the S. Dist. of New York v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) (declining to follow a local ethics opinion's interpretation of a New York ethics rule, after concluding the interpretation was contrary to federal law and policy); *Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (declining to apply state's interpretation of California ethics rule after finding it inconsistent with duties of attorneys in federal court). Accordingly, we do not agree that the Air Force's instructions to its employees have run afoul of Rule 3.4(a).

Accordingly, the government rejects your request that some form of "curative" instruction be issued by the Air Force and further notes that such an instruction could not be issued by the Department of Justice. I look forward to our telephone conference on this matter later today.

Very truly yours,

Bryan R. Diederich

Enclosures

cc: James E. Lobsenz, Esq. (via electronic mail)

EXHIBIT D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

MAJOR MARGARET WITT, Plaintiff, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., Defendants.	)	No. C06-5195 RBL

DEPOSITION OF COLONEL MARY L. WALKER

* * *

January 8, 2010

1120 N.W. Couch

Portland, Oregon

Cheryl L. Vorhees, CSR, RPR
Court Reporter

Q So between two and three years?

A Yes.

Q And while you were in the 446 AES as the commander and beforehand, was the unit subject to deployment?

A Yes.

Q And where to? Where was it subject to deployment?

A I'm drawing a blank of all the places, but Iraq, Germany, Saudi, I mean just, it was just worldwide. I can't remember. Air evac was always subject to deployment in that sense.

Q And do you know if Major Witt, while she was in the 446 AES, if she was subject to deployment on that worldwide basis?

A Yes.

Q And what was the purpose of these deployments that the 446 went on?

A Air evac would go out as the group or the crew to facilitate transport of patients in the plane, so it would be in-flight care. And so that would apply to all the members that were actually deployed. So the mission always was train to then be able to provided in-flight care when called upon.

Q And while the 446 AES was deployed, do you

know what the living conditions were like during deployment?

A In thinking about Desert Shield/Desert Storm, we were in tents and so it could be tents as well as housing, base housing. And so the tents would be separated out for designated female, designated male.

Q Was there any guarantee about the quality of the living conditions or the bathing conditions that members of the 446 AES would receive when they were on deployment in terms of high quality or that you would go in and get base housing or a tent or your own tent? Were there any guarantees like that made?

A When you were deployed, whatever the housing living conditions were at that point, you pretty much went into that housing. So you couldn't go out and do special requests.

Q And while deployed, do you know if members of the 446 AES worked with other units?

A Yes. There was a lot of integrating of other units.

Q Like what other units?

A There could be air evac, it could be the front line people, the -- let me think of a name -- we called it aeromedical staging units where the patients would come out to the front line, close to the flight

line, and then other members would be on the plane, they would then come and collect the patient, bring them on the plane, and then they will take them to their designated area or facility of care.

Q And while deployed, do you know if members of the 446 either lived with or worked with people in other career fields other than nursing or aeromedical evacuation squadrons?

A Yes.

Q What are some examples of those if you can recall?

A Some examples could be when they, the pilots, you know, they socialize with the pilots, they socialize with the techs from other squadrons. So it was always a mix and match of crew members in any of the deployment areas.

Q And when you say a mix and match, was that a mix and match just among the Air Force personnel or was there interfacing or working with or association with members of other branches of the military?

A In many of the situations we -- from what I recall we were limited to the Air Force, but the compounds also had access to other services. But primarily we worked with Air Force.

Q And as far as when you were deployed, were

you ever seeing patients of other branches of the military? And by you I mean members of the 446.

A Yes. We could bring on other services.

Q Well, from your experience and observation in the 446 AES, do you believe that military society, and also compared with your experience now in civilian society as a member of the Providence Health Care System I believe you testified, do you believe that military society is different than civilian society?

MR. LOBSENZ: Object to the form as leading.

Q (By Mr. Phipps) Are you aware of any differences between military society and civilian society based on your experience and observation?

A Based on my experience and observation, I feel that the military is very stringent, has policies, procedures in writing that really governs the behavior and also actions. Whereas, like in my civilian world, having just starting to work in the private sector, I found that many of the policies and practices that sometimes are communicated are in reference to past practice and many of those policies and procedures that are communicated are not in writing.

And the military I found to have much of whatever the issues related to in writing. So the

EXHIBIT E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

MAJOR MARGARET WITT, Plaintiff, vs. UNITED STATES DEPARTMENT OF THE AIR FORCE; COLONEL MARY L. WALKER, Commander 446th Aeromedical Evacuation Squadron, McChord Air Force Base; and JAMES G. ROCHE, SECRETARY, DEPARTMENT OF THE AIR FORCE, Defendants.	)	C065195RBL

DEPOSITION UPON ORAL EXAMINATION OF JILL ROBINSON

APPEARANCES:

FOR THE PLAINTIFF:
JAMES E. LOBSENZ
CARNEY, BADLEY, SPELLMAN
701 FIFTH AVENUE, SUITE 3600
SEATTLE, WASHINGTON 98104

FOR THE DEFENDANTS:
PETER J. PHIPPS
STEPHEN J. BUCKINGHAM
U.S. DEPARTMENT OF JUSTICE
20 MASSACHUSETTS AVENUE NW
WASHINGTON, DC 20044

MARCH 16, 2010

Q Now change gears. Do you have a civilian job?
A I do.
Q And what is that civilian job?
A I work as a nurse.
Q And where do you work as a nurse?
A In the Emergency Department at Tacoma General in a place called Interventional Radiology.
Q And comparing civilian life to a military life, do you think military life is different than civilian life?
A Sure. Yes.
Q And how?
A I believe the military allows you to do your job with rules and regulations. I believe the civilian allows that but with looser control. I have unions. I still have obligations and policies, I have to follow through them.
Q In your service with the 446th Aero-Medical Evacuation Squadron have you had cause or occasion to work with members of other units?
A Yes.
Q What sorts of other units?
A As far as being deployed integrated with other squadrons, Mac Dill, sent over there as part of the command structure over in Germany in '03 to set up the aero-evac system. So, worked closely with other people.

Q Outside of the 446th?

A Outside of the 446th.

Q Were all the people that you've worked with in the Air Force or did they ever involve other branches of service?

A I think for the most part it's -- we integrated, we've done exercises with other members of the military. We move other people from other branches of service. We have people come on the plane from other branches of service, Generals, escorting General Stone for exercises on the 135 from the Army, so I would agree that I've worked well with other...

Q As far as I know that Mr. Lobsenz brought up a date that was in November 2004. To your knowledge, has there been any turnover in terms of people coming in and out of the 446 AES between November 2004 and present?

A We downsized our squadron based on MANI. We were robust. I forget how many crews, but we had over two hundred or so people when I entered and that got downsized because of MANI and we followed into a critical field shortage for nursing as the kick-up for '03 started.

Q So, between kind of '04 and present, do you have any sense of what percentage of turnover there's been in the unit?

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

MAJOR MARGARET WITT, Plaintiff, vs. UNITED STATES DEPARTMENT OF THE AIR FORCE; COLONEL MARY L. WALKER, Commander 446th Aeromedical Evacuation Squadron, McChord Air Force Base; and JAMES G. ROCHE, SECRETARY, DEPARTMENT OF THE AIR FORCE, Defendants.	)	C065195RBL

DEPOSITION UPON ORAL EXAMINATION OF LEAH CRAWFORD

APPEARANCES:

FOR THE PLAINTIFF: JAMES E. LOBSENZ
CARNEY, BADLEY, SPELLMAN
701 FIFTH AVENUE, SUITE 3600
SEATTLE, WASHINGTON 98104

FOR THE DEFENDANTS: STEPHEN J. BUCKINGHAM
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20 MASSACHUSETTS AVENUE NW
WASHINGTON, DC 20044

MARCH 17, 2010
SEATTLE, WASHINGTON

military service?
A Yes.
Q Does the 446th AES work with other squadrons?
A Yes.
Q How frequently do they work with other squadrons?
A I don't know.
Q You say it's rare?
A No. I would say it's frequent. I'm not there on a day-to-day basis. I'm there one weekend and possibly a couple times during the week. But last UTA we were working with a couple other units.
Q And is it your experience that you,-- the 446th can work with units from all over the country and all over the world, or do you just work with units in Washington state, or what's your experience?
A We work with people all over the world.
Q And do people transfer outside of the 446 into other units?
A Yes.
Q And do people transfer from other units into the 446th?
A Yes.
Q And those people who transfer can transfer, like I said earlier, anywhere in the country or anywhere in the world, no specific area that they're restricted to?
A That's correct.

EXHIBIT G

Judge Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT, Plaintiff, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, et al., Defendants.	No. C06-5195 RBL **DEFENDANTS' SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFF'S INTERROGATORY NO. 12**

Pursuant to Rules 26(e) and 33 of the Federal Rules of Civil Procedure, defendants the Department of the Air Force; Robert M. Gates, the Secretary of Defense; Michael B. Donley, the Secretary of the Air Force; and Colonel Janette Moore-Harbert, the commander of the 446th Aeromedical Evacuation Squadron, McChord Air Force Base, hereby supplement their objections and responses to Interrogatory No. 12.

INTERROGATORY NO. 12

With respect to each person whom you expect to call as an expert witness:

a. The expert's name and address;

b. The subject matter on which the expert will testify;

c. The substance of the facts upon which the expert will testify;

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CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
P.O. Box 883, Ben Franklin Station
Washington, D.C. 20044
(202) 616-8482

d. The opinions to which the expert will testify;

e. Summarize the grounds for each opinion the expert will give.

RESPONSE: Defendants hereby incorporate their previous objections to this request. In addition, defendants object to this interrogatory because it asks five discrete questions and, for that reason, constitutes five separate interrogatories under Rule 33(a).

Subject to and without waiving these objections, defendants respond as follows:

a. Lieutenant General Charles E. Stenner Jr., 155 Richard Ray Blvd, Robins AFB, GA 31098-1635.

b. General Stenner will testify to the need for a uniform personnel policy in the Air Force, as opposed to one that would apply to a specific geographical region. He will also offer testimony on the need for similar rules of conduct for the Reserves as to the regular active duty military.

c. The basis for General Stenner's testimony is his military training and experience, particularly his experience in command and senior leadership positions, which include the following:

- Commander, AFRC, Robins AFB, Ga., and Chief of Air Force Reserve, Headquarters U.S. Air Force, Washington, D.C. (June 2008 - present);
- Assistant Deputy Chief of Staff, Strategic Plans and Programs, Headquarters U. S. Air Force, Washington, D.C. (July 2006 - June 2008);
- Director, Plans and Programs, Headquarters AFRC, Robins AFB, Ga. (July 2003 - July 2006);
- Director, Operations, Headquarters Air Force Reserve Command, Robins AFB, Ga. (July 2003 - September 2003);
- Director, Transformation, USSOUTHCOM, Miami, Fla. (January 2003 - July 2003);
- Director, Strategy, Policy and Plans, USSOUTHCOM, Miami, Fla. (September 2002 - January 2003);
- Deputy Director, Strategy, Policy and Plans, U.S. Southern Command, Miami,

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Fla. (May 2001 - September 2002);

- Commander, 482nd Fighter Wing, Homestead Air Reserve Base, Fla. (December 1998 - May 2001);
- Commander, 442nd Fighter Wing, Whiteman AFB, Mo. (August 1997 - December 1998);
- Commander, 944th Operations Group, Luke AFB, Ariz. (March 1996 - August 1997);
- Special Assistant to the Commander, 944th Fighter Wing, Luke AFB, Ariz. (December 1995 - March 1996);
- Commander, 419th Operations Group, Hill AFB, Utah (July 1994 - December 1995);
- Commander, 930th Operations Group, Grissom AFB, Ind. (November 1992 - July 1994);
- Commander, 442nd Operations Group, Richards-Gebaur AFB, Mo. (April 1992 - November 1992); and
- Deputy Commander, Operations, 442nd Tactical Fighter Wing, Richards-Gebaur AFB, Mo. (February 1991 - April 1992);

d. General Stenner will offer the following opinions:

(1) To further unit cohesion, morale, good order, and discipline, the Air Force, an institution globally organized and globally assigned, needs a uniform personnel policy, not different personnel policies for separate geographical regions. This need for uniformity extends to the homosexual conduct policy; it cannot be applied differently in various geographical regions without disruptions to unit cohesion, morale, good order, and discipline.

(2) Because there must be a seamless integration between the Air Force Reserve and the Regular component, there is a need for parity in their personnel policies, including the homosexual

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conduct policy. It is essential for unit cohesion, morale, good order, and discipline that similar rules of conduct apply to Air Force Reservists and to Regular active duty members.

(3) Major Witt's discharge from the Air Force Reserves furthers basic military functionality as well as unit cohesion, morale, good order, and discipline because if she were not discharged, that would mean that Air Force personnel policies were not uniformly applied across geographical boundaries, which would disrupt unit cohesion, morale, good order, and discipline.

e. General Stenner's opinions are based on thirty-five plus years military service and training, including multiple tours as a commander at the group, wing, and major command levels (as detailed further in response to subsection b).

Dated: April 2, 2010

Respectfully submitted,

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VERIFICATION

I, Sharon A. Shaffer, declare under penalty of perjury that the foregoing responses are true and correct to the best of my knowledge, information, belief, and recollection.

Dated: 2 April 2010

Sharon A. Shaffer

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EXHIBIT H

WSBA

Informal Opinion: 1020
Year Issued: 1986
RPC(s): RPC 3.4(a), 8.4(a), 88-2
Subject: Advice by Prosecuting Attorneys to Prospective Witnesses [Published Informal Opinion 88-2.]

[Formerly published as Published Informal Opinion 88-2. All Informal Opinions are consolidated in this database.]

We have been requested by both defense and prosecuting attorneys to provide guidance as to what advice a prosecutor may ethically offer to witnesses regarding interviews with defense attorneys or investigators. The inquiries raise the issues of whether a prosecutor may advise a witness to refuse to be interviewed by the defense, whether a prosecuting attorney may encourage witnesses not to be interviewed unless a prosecutor is present and whether a witness may be advised of his or her right to be represented by the prosecutor or a person of his or her choice during the defense interview. We offer the following advice.

Question (1):
May a prosecutor discourage witnesses from talking with a defense attorney or investigator?

It is well established that neither the prosecutor nor the defense may obstruct an attempt by opposing counsel or their agent to communicate with a prospective witness. RPC 3.4(a) provides that a lawyer shall not:
"Unlawfully obstruct another party`s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."
A lawyer shall not counsel or assist another person to do any such act. RPC 8.4(a).

Similarly, the American Bar Association`s Standards for Criminal Justice, "The Prosecution Function," explicitly states the prosecutor`s obligation:
"A prosecutor should not obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct to advise any person to decline to give information to the defense."
Section 3.3.1(c), "The Prosecution Function," ABA Standards for Criminal Justice, 2d Ed (1980) at 3-37.

The comments to the ABA Standards enunciate the rationale underlying the standard, and suggest guidelines for prosecutorial conduct in contacting witnesses. Prospective witnesses are nonpartisan; they should be regarded as impartial spokesmen for the facts as they see them. Because witnesses do not "belong" to either party it is improper for a prosecutor, defense counsel, or anyone acting for either to suggest to a witness that he not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case

(except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel or a member of their staffs whether it is proper for a witness to submit to an interview by opposing counsel or whether he is under a duty to do so, the witness should be informed that, although he is not under legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interests of justice that a witness make himself available for interview by counsel.
Standards (Commentary), supra, at 3-38, 39.

We believe this reasoning is sound and conclude that a prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4.

We note that this ethical principle is embodied in CrR 4.7(h), which provides:
(1) Investigations not to be impeded. Except as otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.
While the Committee may not render legal advice, we note that the Washington Supreme Court has held that conduct by the prosecution which interferes with defense counsel's ability to interview alibi witnesses is a violation of a defendant's constitutional rights. In State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) the prosecution held a special inquiry judge hearing and summoned all of the defense alibi witnesses to appear. The prosecutor instructed the alibi witnesses not to discuss their testimony before the inquiry judge with defense counsel. The trial court's order dismissing the case was affirmed. The Supreme Court held:
A defendant is denied his right to counsel (U.S. Const. amend. 6; Const. art 1 §22, (amendment 10)) if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.
Id. at 180.

Question (2):
May a prosecutor encourage witnesses not to be interviewed unless a prosecutor is present?
We believe that encouraging witnesses not to be interviewed unless a prosecutor is present constitutes obstructing access to the witness, which is prohibited by RPC 3.4. The comments to Section 33.1(c) of the ABA Standards state:
Counsel may properly request an opportunity to be present at opposing counsel's interview of the witness, but he may not make his presence a condition of the interview.
Standards (Commentary), supra, at 3-39.
The leading federal case on this issue is Gregory v. United States, 369 F2d 185, 188 (D.C. Cir. 1966), cert. denied, 396 U.S. 865 (1969). The court stated:
...He (the prosecutor) did admit that he advised the witnesses not to talk to anyone unless he, the prosecutor, were present.
We accept the prosecutor's statement as to his advice to the witnesses as true. But we know nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his

presence. Presumably the prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have equal opportunity to determine, through interviews with the witnesses, what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct. "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.
The court held that the prosecutor`s advice to the witnesses that they not talk to anyone unless the prosecutor was present was an impermissible interference with the defense preparation and denied the defendant a fair trial. See also Coppolino v. Helpern, 266 F. Supp. 930, 935-36, (S.D. N.Y 1967).

Ethics Opinion 84-3 of the Alaska Bar Association reached the same conclusion:
A prosecutor or defense counsel may not mail a brochure to his potential witnesses which states that they should refuse to talk to the opposing counsel unless the lawyer or a member of his office is present for the interview and that they should not allow themselves to "be pressured into an on the spot interview." State policy, as evidenced by the statutory and disciplinary rules, is to facilitate the process of interviewing witnesses by requiring cooperation, disclosure and noninterference of both the prosecutor and defense counsel. Crim. R. 16(b)(1); DRs 7-102(A)(3), 7-103(B), 7-109 (3/9/84).
ABA/BNA Lawyers` Manual on Professional Conduct
Sec. 801:1202.

Question (3):
May a prosecutor advise a witness of his or her right to be represented by a person of the witness`s choice during a defense interview?
We believe it is permissible for the prosecutor to advise a witness of his or her rights as a witness. Those rights include the right, if the witness chooses, to have the prosecution present at a defense interview.

The commentary to §3.3.1(c), ABA Standards, "Prosecution Function," states:
Counsel may properly request an opportunity to be present at opposing counsel`s interview of a witness, but he may not make his presence a condition of the interview.
Id., at 3-39.

The Wisconsin Supreme Court adopted this commentary as a guideline for Wisconsin prosecutors, State v. Simmons, 203 N.W. 2d 887 (1973) and Illinois, People v. Steele, 124 Ill. App. 2nd 761, 464 Ne. 2d 788 (1984); People v. Fuller, 117 Ill. App.2nd 1026, 454 N.E. 2d 334 (1983) and a number of federal circuit courts see e.g., U.S. v. Bittner, 728 F.2d 1038 (8th Cir. 1984); U.S. v. Rich, 580 F.2d 929 (9th Cir. 1978); U.S. v White, 454 F.2d 435 (7th Cir. 1972) have reached the same result.

In recognizing the right to provide this advice, however, we caution that a prosecutor may not condition the interview on the prosecutor`s presence or in any other way obstruct the ability of the defense attorney to properly prepare for trial. As the Ninth Circuit stated:
It is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of the judicial process permits nothing less.

U.S. v. Rich, supra at p. 934.

We believe that the best practice is for a prosecutor to include in the advice given to witnesses regarding their rights the essence of the following from the commentary to the ABA Standards for the Prosecution Function.

. . . The witness should be informed that, although he is not under a legal duty to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interests of justice that a witness make himself available for interview by counsel.
Id. at p. 3-38-39.

Informal opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Informal opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official opinion of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Informal opinions are based upon facts of the inquiry as presented to the committee.