

Then, Mr. Puckett and Mr. Faraj informed the Court of the main conflict: Mr. Salinas (formerly a Sgt), who was once thought of as a mere witness to the incidents was now going to say at trial that it was he, and not the accused, who was actually the person in charge that day and therefore criminally responsible.

Mr. Puckett and Mr. Faraj then explained to the Court why this was significant: there were never any charges and no Article 32 against Sgt Salinas while he was on active duty; and only the accused and three other witnesses were aware of this new development in the case. Not even Mr. Hagood, a partner in Mr. Vokey's law firm, was aware that there was a conflict between the accused and Mr. Salinas, who the firm either represented or will continue to represent. Regardless of the conflict of the law firm, Mr. Vokey now has a conflict that continues to exist if he represents SSgt Wuterich because his clients' interests will be diametrically opposed to the interests of the law firm in representing Salinas.

The Court then queried as to why this issue wasn't spotted a long time ago and why Mr. Vokey secured employment at that law firm in the first place, knowing that they were representing Mr. Salinas. Mr. Vokey reiterated that he needed a job and that no one thought there would be a conflict when he was first hired. Mr. Vokey explained that he had originally interviewed Sgt Salinas, as a percipient witness, when both were on active duty, and that now the either the prosecution or both sides would be calling him as a witness at trial.

The Court queried again when this conflict arose. Mr. Puckett stated that the attorneys saw only a possible appearance of conflict originally, in the fall of 2009 and through March and April of 2010 all of the attorneys thought there was no need to remove Mr. Vokey from the case. Then, sometime during the summer, the parties all realized what Mr. Salinas was going to testify about and they all recognized that this was an inescapable conflict for Mr. Vokey. So they had decided that now was the time to bring the issue to the attention of the Court.

The Court queried Mr. Vokey what he had done on the case since he left active duty. He responded by saying that he had done very little work from his retirement until 2009 because all of the parties were awaiting appeals on the case. He further

stated that he began to look at the case a little more towards the end of 2009 and then into 2010, but that he had not done extensive work on the case.

The Court then queried all the defense counsel as to whether this was an actual conflict or just a potential or appearance type conflict. All parties indicated that it was an actual conflict due to the emergence of Mr. Salinas as such a crucial witness. Mr. Puckett opined that there was definitely an adverse interest. All parties seemed to believe that the government had no idea that this bombshell was going to hit them during the trial.

The Court then queried Mr. Vokey as to whether this problem could be solved with his employer, *Fitzpatrick, Hagood, Smith and Uhl*. He stated that it could not be solved. He further posited that he was very worried about his employment with the law firm, if he continued to represent the accused, once this information became known to the law firm. He specifically said that if he continued to represent the accused, he would, in all likelihood, not have a job with the law firm. The Court took this to mean that either he could, or would, be fired if he continued his representation of SSgt Wuterich.

The Court then queried Mr. Vokey why he did not obtain a written, or at least an oral, waiver from his client or from the law firm when he was initially hired since he knew that the law firm was representing Mr. Salinas at his hiring. Mr. Vokey replied that he didn't think there was any conflict when he joined the firm and was not worried about it at the time.

The Court then queried if Mr. Vokey had checked his state bar rules and other ethical rules regarding any possibility of his continuing to represent the accused. Mr. Vokey indicated that he had specifically looked at his state bar rules, as well as the rules of professional responsibility of the relevant Secretary of the Navy Instruction and that he was convinced there was no way for him to continue representing the accused.

The Court then queried Mr. Vokey, again, about what involvement he had in the case over the last year leading up to the trial, as the Court was convinced that Mr. Faraj was doing the lion's share of the work, along with Mr. Puckett. The Court asked this question to ascertain as to whether there was good cause to grant a possible

continuance to the defense to make up for losing Mr. Vokey's assistance. Mr. Vokey indicated that he was involved only sporadically over the last year.


The Court then queried whether Mr. Vokey had ever secured a written contract with the accused for representation after Mr. Vokey's retirement. Mr. Vokey indicated that he had not.

The Court then queried what Mr. Vokey had shared with the law firm, or Mr. Hagood, regarding his confidential communications with the accused. Mr. Vokey indicated that he had shared nothing of an attorney client nature with the law firm. The Court then asked how that could be the case. Either Mr. Puckett or Mr. Faraj indicated that all of the defense counsel in the Haditha cases were sharing experts, and theories, etc., but there were no charges on Mr. Salinas so those things were never shared with Mr. Vokey's law firm.

The Court then queried Mr. Vokey, one last time, if he felt there was any way he could represent the accused without losing his job at the law firm. Mr. Vokey stated that he did not think there was any way to fix the problem without him losing his employment, except being released from his representation of the accused.

Lastly, the Court queried the counsel as to what the accused wanted regarding the continuing representation of Mr. Vokey. The attorneys told the Court that if the accused were asked whether he wanted Mr. Vokey to remain on the case, he would say "yes," but that there was no need for the Court to ask this question on the record because it really wasn't going to make any difference in the analysis of whether Mr. Vokey remained on the case or not.

This MEMORANDUM FOR THE RECORD, although not a verbatim transcript, is an accurate recitation of the ex parte hearing conducted on 13 September. This document will be sealed, as an appellate exhibit, to be opened only by Appellate Courts, should the need arise. Signed on 22 December 2010.


D. M. JONES
LtCol, USMC
Military Judge