

PROFESSIONAL RESPONSIBILITY FOR THE LEGAL ASSISTANCE ATTORNEY

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[problems adapted from TJAGSA outline – 1997 Professional Responsibility Seminar]

I. LEGAL ETHICS FOR LEGAL ASSISTANCE ATTORNEYS – SOME NOTES

- A. Be cautious about giving a second opinion
 - 1. This is possibly unethical, certainly problematic if you don't have the documents in front you and know all the facts.
 - 2. You may be able to get out of this by saying that you don't know the law in Ohio, Kentucky, etc. and thus cannot advise.
- B. Don't assume the facts -- use indirect discourse at all times except when you know whereof you speak [e.g., "The check was for \$400, not \$4,000 -- I have the check right here in front of me; and it was dated the 25th, not the 1st of the month@"]
- C. Avoid conflicts.

Excerpt from Mark Sullivan's pending article, "The Legal Assistance Chief's Handbook" [write for a copy – law8507@aol.com]

Screening for Conflicts

Conflicts of interest are much more likely in the Army community due to the small size of many Army legal assistance offices and the fact that LA services are free. Make sure that there are procedures in place for the screening of potential clients to detect possible conflicts of interest. AR 27-3 places this responsibility on the shoulders of the LA chief.¹ Check your policy with those at other Army legal assistance offices to compare how they deal with this problem.

Tell your legal assistance attorneys to pay particular attention to "cocktail clients" who may cause conflicts. These are individuals who recognize you as a judge advocate at, say, a reception or a cookout. They approach you to begin a conversation and, before you know it, they are pouring out their life's stories to get legal advice from you. Especially when a domestic matter is involved, steer clear of such conversations. They can inadvertently create a conflict for the entire office which could be avoided by an ounce or two of polite caution in responding to such informal entreaties for advice.

Is There a Conflict?

Do your clerical support staff know how to find out if a conflict of interest exists with some previous

¹ AR 27-3, para. 4-9b.

client of the office? If so, do they know how to make a polite referral to another office so that an LAA there can see this client?² Are there procedures in place to specify how to do this? Do the staff know where to find those procedures? Who is the person who does conflict-screening?

Do your clerical staff members also know how to do a referral without telling more than necessary? If an individual calls about setting up an appointment for divorce information, saying “CPT Brown can’t see you because he already saw your husband this morning” is a sure give-away that the husband has just talked to a lawyer about a divorce, even though the clerk didn’t specifically mention the subject of divorce when responding to the caller! How will you instruct your staff to handle such a call? Your clerical support staff needs to avoid revealing the substance of the interview expressly or by inference. How will you do this while complying with the requirement of AR 27-3b(2) that “[f]ull explanations are given to every client who cannot be assisted by attorneys in an Army legal office because of a conflict”?

D. Make competent referrals

1. Try to check out the credentials of lawyers to whom you refer cases
2. If you don’t know, then say so to the client so he or she can try other routes for referrals if necessary

E. Disaster Planning

Another excerpt from the same article:

Office Management and Contingency Plans: “What If...?”

A good commander always maintains contingency plans in case the intended course of action doesn’t work out as planned. The supervisory attorney should do the same. During your first week on the job, sit down and map out what you would do if an unanticipated problem occurred. What kind of problem should you consider? While there is no way of defining or limiting the answer to this question, perhaps some examples will illustrate the concept.

What if the wife of the deputy installation commander came to see you about a domestic violence case she had just filed against her husband in court? Since the filing is a matter of public record, there is no issue of confidentiality; should you inform the SJA of this sensitive and important concern? What would you do if the state’s child support guidelines were completely revised, leaving your attorneys with no current training in the use of the new guidelines? What should you do if you learned that one of your attorneys had

² Conflicts of interest are covered in AR 27-3, para. 4-8, 4-9.

knowingly revealed client confidences outside the office?³ What if you found out that one of your clerical support staff was “selling” separation agreements that he prepared after-hours in the LAO? What if the SJA called you into his or her office and said that you were being sent to TDY for two months to another state and that your recommendations were sought on a temporary replacement and on procedures for dealing with the manpower shortage in the LAO? What would you do if you found that one of your legal assistance attorneys was clearly deficient in the analytical or counseling skills necessary for a legal assistance attorney? What if you walked past the front desk one day and overheard your clerical support staff giving what amounted to legal advice over the phone? How would your office deal with an emergency deployment which took away half of the base personnel and a stressed-out brigade commander on the telephone telling you that she needs to do a mass will execution for fifty soldiers who are about to leave for a hostile-fire zone? Create some “worst case” scenarios and then try to provide the answers to them as part of sound contingency planning.

This leads, of course, to the issue of personnel management. You, like the other division chiefs in your office, must anticipate and deal with personnel issues and problems. You need to know the strengths and weaknesses of your office staff. You must be constantly alert to personnel issues that come up in the office and seek to resolve them firmly yet amicably. Where there are known strengths that you have identified, make sure you develop and improve them, either by granting more responsibility or by making available more training to the identified individual. If you observe a weakness, monitor it and seek to have the individual identify it himself or herself; this will allow the individual to grow in discipline and attempt self-improvement.

When there are complaints brought to your attention, act on them promptly. No problem ever got better by letting it fester. With procedural or administrative complaints, first identify the source and nature of the problem, and then outline possible solutions, reviewing each alternative for likely benefits and disadvantages. Choose the one which appears best through the lens of the cost-benefit analysis and either put it into effect yourself or, if it is a larger issue, go to the deputy or SJA to recommend a course of action.

When you are faced with a personnel problem, first you should examine it to determine whether the source is immaturity, lack of training, incompetence, lack of judgment or a character flaw. After you have all the facts, from interviews and review of any applicable documents, decide whether you can fix the problem and whether it is serious enough to report to your superiors. You should discuss with the SJA or deputy a sexual harassment complaint or a serious ethical breach, for example, while you can handle a less serious matter, such as a careless comment, within the LAO. Keep in mind that what you perceive as serious misconduct must be reported to the SJA promptly. If he or she overrides your evaluation and downgrades it as a minor incident, so be it. If the supervisor concurs, then you have done the right thing. The important point is that you have made a professional judgment, as a supervisor, and have brought it to the attention of the SJA or deputy for guidance or action.

³ See AR 27-3, para. 4-10 for guidance on alleged violations on AR 27-26.

F. Don't advise without the documents in front of you

Another excerpt...

"Got Docs?"

It is hard to overstate the importance of the next topic -- getting *all* the documents for the attorney to review. This should be a top priority for the clerical staff. How often, LAAs frequently lament, do they conduct an interview only to find out that critical papers are missing, having been left behind by the client? The LAA will sit down for the interview about a traffic ticket, only to hear the client say, "Oh, you want to see the *ticket*? I left it back at my quarters. I didn't know you'd need to look at it." The same thing happens over and over again, whether it is about the eviction papers served on the client, the notice of hearing for a court date, or the separation agreement sent by the soldier's spouse from back in the States.

Make sure your staff asks the client what documents there are, *where* they are, and when they will *all* be available so that they can be brought to the attorney. Encourage the client to take extra steps to be sure that the attorney has all the documents at the initial meeting. And encourage your staff to ask lots of questions to find out if there's a document that the LAA should see, even when the client hasn't volunteered that information. An appointment about custody, for example, could involve a no-documents interview involving an impending separation involving the children of *the current marriage*, or it could involve modification or enforcement of the custody order of the client *from a previous marriage*. Make sure the staff finds out which one it is.

G. Know the law

1. Don't advise when you can't tell the client the state of the law in a particular area.
2. Duty to associate competent co-counsel -- esp. in case where incorporation of s/a is intended or pleadings are involved

Another excerpt...

Know Your Limits – Malpractice Avoidance

Teach your legal assistance attorneys about how to avoid grievances and malpractice traps. Remember that civilian practitioners are not alone in their exposure to claims of legal negligence, also known as malpractice. Claims against the government can be, and have been, filed for negligence in the legal field in the drafting of wills and the preparation of separation agreements.⁴ The target of the claim usually resides in a military legal assistance office. Most often the problem is a legal assistance attorney who is "in over his head" due to lack of experience, time, research, or practical knowledge of state cases and laws. Whether the legal malpractice is the result of a well-intentioned LAA wanting to "go the extra mile" for a client or

⁴ For problems and solutions in malpractice avoidance, including specific examples of legal negligence claims against the government, see Mark E. Sullivan, *When to Say 'No,'* Legal Assistance Newsletter, Vol. 19, April 1984, at 22.

some other reason, it is not the way to practice law in the military. Dealing with such a problem can give one a serious case of the ulcers in terms of worrying about one's professional reputation, license to practice, OER and (possibly) personal liability.

Practicing Avoidance

Avoiding the problem of possible malpractice means knowing one's limits. It means training to prevent legal malpractice. It also means, on occasion, learning to say "No."

There are a certain number of areas where the problems of civilian attorneys do not carry a parallel into the world of military service. The principal problems for private practitioners include commingling of personal and trust funds, failure to file documents on time or perfect an appeal, and improper diversion of client trust accounts. Since the legal assistance attorney usually is not authorized to handle matters such as these, they should not be seen in the LAO.

Elsewhere, however, there is a clear parallel. Failure by a civilian attorney to refer to a specialist is a problem that may be shared by the LAA, as is failure to associate competent co-counsel. The same is true of the failure to warn a client of the statute of limitations (or other aspects of defenses and claims), and failure to decline cases for which the attorney is not qualified.

Common Problems

Part of the problem is the nature of military practice. Legal assistance attorneys are often asked to give answers to every question in the personal legal world of the client, a role that no attorney can fill. Legal assistance, with or without appointment, is usually given generously to all comers who meet the basic eligibility qualifications. LAAs are not told clearly and frequently enough that they may, indeed, *must* avoid or refuse legal work which they are not competent to handle, even if the services requested fall within the permitted area of delivery.⁵

And yet this is the world in which the LAA operates every day. This afternoon, for example, the next client of one of your LAAs might well be asking one of the following questions:

- Why can't I get a settlement from my car insurance company? It's been twelve months since that accident happened in Iowa. Should I hire a private attorney?
- Can my spouse get a share of my military pension in South Carolina if she hasn't been married to me for over ten years?
- My truck broke down again. This is the third time, and they guaranteed me the last time that it would run perfectly. What can I do?

⁵ Indeed, only one sentence in AR 27-3 addresses the issue of what to do when an otherwise qualifying client or case involves legal expertise that is beyond the ability of the LA provider: "An attorney who provides legal assistance should refer a case to another lawyer (para. 3-7h.) whenever the client's needs exceed either the attorney's competence or authority to render assistance." AR 27-3, para. 4-7b.

- How do I file for divorce in Idaho?
- My wife just served me with a lawsuit asking for child support. Can I get the child support guideline amount reduced if I request joint custody and get it?
- Once my Illinois divorce is granted, will that bar my spouse from asking for alimony? Or do we need an extra clause in this separation agreement that says this?
- I was charged last night with DWI. Do I need to get a civilian lawyer to help me? What's the maximum punishment I can receive?

These questions demonstrate the difficult choices that LAAs are called upon to discuss and the complex answers that LAAs must give every day of the week. To handle the question, the choice or the issue properly, the LAA must first obtain full and accurate information from the client. Next, the attorney must be sufficiently well trained that he or she is actually be aware of the issues and the choice that needs to be made (or else a "choice by default" will be made). If the attorney is not sufficiently trained, perhaps some quick research or the advice of a friendly co-counsel in the civilian community (or a former LAA who has handled similar problems) will do. All of this must be done in order to advise the client properly and avoid malpractice.

Claims Against the Government

AR 27-3 specifically requires the supervisory attorney to maintain records “to protect the Government from liability from any claims that may arise.”⁶ Implicit in this directive is the idea that the LAA and the LA chief should take all reasonable and practical steps to avoid claims against the government arising from legal assistance practice. The reason for this is not just a selfish motive of protecting the U.S. Government from liability. It is also to uphold the highest professional standards of competent practice, to protect clients from legal negligence and to protect the LAA from avoidable complaints and grievances.

Claims against the government usually occur in areas where monetary damages are fairly easy to calculate and are substantial. It is unlikely to find a claim filed over a visitation dispute, a late divorce, or a truck repair bill of \$50. On the other hand, substantial claims have been filed against the government in the area of wills and estates, and in the area of separation agreements and family law.⁷ For these reasons, the supervisory attorney should spend a comparatively greater amount of training time for the office attorneys on how to practice competently and skillfully in these areas.

An Example: Family Law

For example, look at the monetary exposure involved in the area of separation agreements and family law, and at the potential for claims against the government. In *Smith v. Lewis*,⁸ the husband was a member of the National Guard, and his retired pay from this employment was the only substantial marital

⁶ AR 27-3, para. 4-3e.

⁷ See note 99, *supra*.

⁸ *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (Cal. 1975).

asset. Although it was titled in the husband's name, it was considered to be community property. The wife's attorney failed to assert a claim on this potential asset, believing it not to be divisible. And, in fact, it was *not divisible at that time*, but it later became divisible under a change in the state statutes. Due to the failure of the attorney to perform a reasonable amount of research, even when a question of law was unsettled, the wife did not claim a share of the National Guard pension and she only received alimony of \$400 a month and a small amount of divided community property. The California appellate court affirmed a jury award against the attorney for \$100,000, stating that an attorney had a legal duty to perform a reasonable amount of research, even when a question of law was unsettled.

Another example of malpractice in the family law area is found in *Bross v. Denny*.⁹ In that case, the lawyer originally gave the wife legally correct advice about the law, stating that she could not receive a portion of her husband's military pension. He did not, apparently, stay current regarding developments in Congress. The Uniformed Services Former Spouses' Protection Act, which allowed military pension division, was passed several days before the separation agreement was signed and the dissolution hearing scheduled. The jury verdict, which assessed 25% of the blame to the wife, was reversed on appeal and judgment for the wife was ordered in the amount of \$108,000.

A Template for Competent Practice

Legal malpractice is a real issue for each legal assistance attorney. Training your attorneys to avoid malpractice and practice competently means teaching them the questions that they need to ask when confronting a new problem (or a new issue in a familiar problem area). Some of the general questions they should ask are:

1. *Is the client (and his legal problem) eligible for legal assistance?* (This is covered above at "Intake Procedures.")
2. *Is the particular service provided at the base legal office?* Even if the regulation does not specifically prohibit services in some areas, the base SJA may have developed guidelines on what matters cannot be handled by the legal assistance office due to lack of expertise or manpower constraints. It is a fairly common practice to prohibit the preparation of individual tax returns or lengthy trust agreements for these reasons.
3. *Ask hard questions.* Your inquiries should be centered around whether you can undertake this particular task. Have you ever handled a similar problem? Can you get some "tutoring" from TJAGSA or a civilian attorney? Perhaps a Reservist can act as co-counsel. Is the request for assistance a reasonable one? Is the problem too far off the beaten track, or is it something that can be done if time were available? Is it something that another legal assistance office could do, or perhaps could teach you how to do? Remember that a legal assistance attorney should refer a case or client to another lawyer

⁹ *Bross v. Denny*, 791 S.W.2d 416, 1990 Mo. App. LEXIS 489 (Mo.1990).

whenever the needs of the client exceed either the LAAs competence or the authority to render legal assistance.¹⁰

4. *Don't make waves.* If the work can be done competently and without "rocking the boat," sometimes it is better to provide the services to the client, even at the risk of going outside the local or service guidelines, so long as it is done with the knowledge and consent of the SJA. The practical fact of the matter is that the SJA is directing that the work be performed and he or she will have a definite impact on the rating or evaluation of that officer at the appropriate time. This is not to say that *any* work required by the SJA should be done without question, without expertise or without authority. It is simply a reflection of "the facts of life" in a legal assistance office. A common example of this situation occurs when April 15 rolls around and the base commander wants someone to prepare his income tax return. Regardless of service regulations or station guidelines, it usually falls to the chief of legal assistance to prepare the necessary forms and schedules for the general or admiral.
5. *Make a record.* When something this important like this occurs, make sure there is a lengthy and detailed record of exactly what the client is requesting and how the response is handled. This may be necessary if there is a grievance filed or a claim against the government. Keep written and electronic records to protect yourself and to protect the government in case of the filing of a claim. Obtain written releases whenever possible.
6. *Use the chain of command.* When General Jones asks to have a lengthy and complex trust agreement prepared, this almost invariably involves legal work far beyond the present expertise of the LAA, and it should be entrusted to a legal practitioner with specialization in this area. The "chain of command" within the SJA office – LA chief, deputy SJA, SJA -- is the best way to resolve these problems. Often a candid discussion with one's supervisor will put the issue in perspective and shed some light on a possible solution. Make the supervisor aware of the specific nature of the legal duty and your own limitations as the LAA to whom the problem has been entrusted. In addition, provide the supervisor with some realistic proposed solutions to the problem. In the case of General Jones, for example, it would probably not be wise simply to refuse to help. A better solution would be to interview the General, obtain detailed information on the nature and extent of his assets as well as the primary goals of the estate plan, and review the law (both federal and state) for possible tax problems. After a discussion with the supervisor it may be possible to obtain the assistance of a local attorney (for referral or for association in resolving the problem). Banks frequently provide trust officers and will manuals for assistance in estate planning matters. A Reserve of Guard attorney may have sufficient expertise to handle the trust. One or several of these proposed solutions may give the legal assistance attorney enough leeway to avoid what would almost certainly develop into a case of legal malpractice. In any event, it will help to develop a "record" in the case to show that the legal attorney identified a legal malpractice problem and took immediate steps to avoid it. As in all such cases, the taking and preserving of a complete set of notes and memoranda for the file will help to serve the client and protect the legal assistance attorney.

¹⁰ AR 27-3, para. 4-7b.

- H. Don't give unnecessary advice -- example: visitation order when client cannot afford to visit
- I. Don't call the judge-- no ex parte communications
- J. Watch out for the unauthorized practice of law in the LA office

Another excerpt...

Unauthorized Practice of Law

Remember that only your attorneys can give legal advice.¹¹ The rest of the office staff is strictly limited as to what information can be given to clients. Legal advice is, of course, on the forbidden list. *Legal advice*, strictly speaking, is information on what the law is, tailored to the individual client's situation.

Legal Resources and Information

On the other hand, the non-lawyer staff can certainly pass on certain legal information without the violation of this rule. When using a list approved by your office, they can be helpful in giving out names of civilian lawyers to whom the client will be referred, so long as there is no legal advice given in the process of the referral. This might occur, for example, when CPT Brown finishes advising Mrs. Gray and decides that she needs the names of three bankruptcy lawyers from the lawyer referral panel downtown. In such a situation, there is no good reason why CPT Brown could not delegate that task to the sergeant at the front desk for selection of the next three names on the list while CPT Brown moves on to the next interview of phone call.

Clerical staff can also be useful in giving information to clients on resources, legal and otherwise, that are available to them. The sergeant, for example, could give a competent and ethical referral to Mrs. Gray for the domestic violence program downtown, the Better Business Bureau, or the toll-free hotline to the consumer protection division of the state attorney general's office. This kind of help, properly supervised, can be a real time-saver for CPT Brown, who probably has enough work on her hands as it is.

What about factual information or straightforward and simple legal answers that do not application to the individual situation of the client? For example, suppose you overhear SGT Smith saying, "The law here in East Virginia requires a 2-year separation before you can file for divorce" or "Guideline child support in this state is 25% of gross pay for two children." Is that forbidden legal advice? Or is it permissible to delegate this sort of information providing to the sergeant at the front desk?

How and Where to Draw the Line

¹¹ AR 27-3, para. 2-2a.

This is a matter for each individual LA chief to decide after gaining sufficient experience with the current clerical staff and reviewing the current workload. You will have to make some judgments about the ability of the sergeant to understand questions, to discern the difference between legal advice to the individual and general legal information that is already printed in client handouts that are readily available. How old is the sergeant? How experienced? Has SGT Smith ever served in a legal office before? These and a host of other questions should be posed and answered before you reach a decision. Quite possibly you may decide that the SGT Smith lacks the judgment and experience necessary to undertake this type of delegated task. You might also decide that there isn't a heavy enough workload to justify giving this responsibility to the front desk staff.

On the other hand, if you decide that such information is within the capabilities of one or two members of the office staff, then you should start out by writing and posting a set of guidelines that must be drilled into each delegated staff member and followed to the letter each time legal information is given. The rules should be posted in a conspicuous place (or several places) in the staff area of the front office. They should be revised and refined regularly, as well as taught to each arriving clerk, paralegal or enlisted person. They should emphasize that individual legal advice, tailored to the needs of a client, is solely the province of the LAA. They should also state that, when in doubt, the question should be referred to an attorney. Only if the question is clear and requests non-individualized information of a legal issue may the staff member give an answer, and then only by using printed guidelines provided by the LAO.

Continue to search for ways to delegate functions to intelligent and responsible members of your clerical support staff.

The purpose of ... delegation to clerks is not to abdicate your responsibilities, but to channel your efforts to those matters requiring professional expertise. You should constantly look for new ways to increase productivity by more effectively using the...[staff].¹²

The Use of Common Questions, Answers

In order to accomplish this latter task, you should prepare a set of "Common Questions and Answers" that can be safely given by front desk staff for those inquires that frequently arise over the phone or in person. This is an example:

COMMON QUESTIONS AND ANSWERS

Question	Answer
How do you get a divorce here in East Virginia?	Our legal clerks cannot give you specific legal advice. In general, there are three requirements for a divorce in this state: First, the husband or wife must be a legal resident of the state. Secondly they must have lived apart for more than a year. And

¹² Pardue, *supra* note 20 at 3.

	third, the separation must have been intended to be permanent. We can send you by mail or e-mail our client handout, "Divorce in East Virginia," or we can set you up for an appointment with one of our legal assistance attorneys.
Do you have to have a separation agreement to get a divorce here?	I'm not a lawyer, ma'am, so I can't give you legal advice. East Virginia law, however, doesn't require a separation agreement in order to get a divorce. Would you like an appointment? Can we send you our client brochure on "Separation Agreements"?
I'm not getting along with my husband. We've been married only two months and it was a mistake. Can't I just get an annulment?	I can't give you legal advice, ma'am, since I'm not an attorney. You can set up an appointment with one of our legal assistance attorneys as early as Thursday of this week. As to annulments, an annulment is not a divorce involving a short marriage. An annulment is granted if the marriage was not legal in the first place. All of this is explained in our office handout on "Annulment and Divorce." Would you like us to send you a copy by mail or by e-mail? You can also download it from our office website. Would you like
Why can't I talk to an attorney before I set up an appointment?	Our legal assistance attorneys receive many phone calls each day. Due to the volume of clients whom we serve, we have the clients screened by a paralegal in order to ensure that our attorneys can devote their full attention to existing clients who have already retained us. We can send you a client handout on any of the subjects that would be involved in your case, and we have over 20 of these handouts.

Make sure the staff knows that, as soon as the questioning goes beyond the permitted ones, it's time to say, "You will need to speak to a legal assistance attorney about that, sir. Can I set you up for an appointment?" In the alternative, you might suggest to the staff that, if the individual just wants some general questions answered, a couple of handouts might solve the problem instead of scheduling an appointment. Or perhaps the client could be given or sent the handout applicable to his or her situation and told to contact the office for an appointment if follow-up information is needed.

K. Enforce confidentiality

Confidentiality

Confidentiality is essential to the LA office. Any communications between the LAA and the client are legally privileged and must be guarded to protect the confidentiality of the information, whether oral or written, that the client imparts to the LAA.¹³ The source of the requirement is AR 27-26, "Rules of Professional Conduct for Lawyers." In general, Army Rule 1.6 states that an attorney shall not reveal any information regarding the representation of a client.¹⁴ While this sounds very broad and sweeping, there are several exceptions which must be noted. The three permissive exceptions are:

¹³ AR 27-3, para. 4-8a.

¹⁴ See also AR 27-3, para. 4-8a.-c. (containing rules on confidentiality for LA providers, those who assist LAAs and those who supervise LAAs).

- When a client consents to disclosure of information that otherwise would be confidential;
- When the disclosure is impliedly authorized to carry out the representation¹⁵; and
- When the lawyer needs to disclose this information to establish a claim or defense in a controversy with a client.

The single mandatory exception to the rule of confidentiality is in the situation where a client reveals information to the lawyer about a future crime. Even here, however, the Rule is very specific about when such information must be revealed; such disclosure is only required in cases where the lawyer reasonably believes it necessary to prevent a client from committing a crime that is likely to result in imminent death or substantial bodily harm, or significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system. If the act doesn't fall within these parameters, then the lawyer may not reveal the intended crime.¹⁶

Make sure that your non-lawyer staff understands the importance of keeping communications confidential. When taking calls and screening potential clients, are voices kept low so that others in the nearby area will not know the matter being discussed? Are names avoided? Are letters kept in an area where clients cannot see them? Are staff members briefed upon arrival as to the importance of keeping privileged information within the legal assistance office? “Loose lips” are dangerous in a legal assistance office.

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PROBLEMS

1. You just arrived at Fort Swampy from the Graduate Course and have been assigned as the Chief of Legal Assistance. You are standing in the open area where your clerks are slaving away and smile smugly to yourself as you survey your kingdom. The booming command voice of your NCOIC interrupts this daydream and you overhear this part of a phone conversation:

NCOIC: Hello, Mrs. Brown. It's been a couple of years since we talked. You've left Sergeant Brown and coming back here from Alaska? To get a divorce? Well, I think we can help you there. Yes, you'll need to be separated for more than a year. And you've got that? Okay. You also have to have the intention that it'll be permanent. OK, just give me a call when you arrive – we'll try to set you up. I think you might be able to do it inexpensively with a copy of some divorce papers from a friend of mine who went through a divorce just last year – I've got an extra copy you can have.

¹⁵ As, for an example, when an LAA releases information obtained from a client in a letter to the spouse's commander in regard to non-support, or in a letter to a used car dealer about a client's consumer complaint.

¹⁶ See generally Holland, *Confidentiality: The Evidentiary Rule versus the Ethical Rule*, ARMY LAW., May 1990 at 17, 19.

What, if anything, do you do?

2. As the new Chief, you are invited by CPT Green into his office to supervise an interview with a domestic client, Mrs. Tan Chen Gray. As you sit down in a chair in the corner (after being introduced), Mrs. Gray says that she really needs help. She's ready for a divorce, but her husband has just told her that she can't get any of his military pension because of their separation agreement. When asked about the agreement, she says that it's back at her apartment.

CPT Green: Well, Mrs. Gray, I don't think you have anything to worry about. You see, unless there's a specific waiver set out in the separation agreement, you have not given up your right to claim part of your husband's pension. I did your separation agreement last year and I remember it like the back of my hand.

As for a divorce attorney, you should see Ron Bennett – he's a friend of mine just down on Swampy Boulevard outside the installation. He's taken care of the last three clients I've sent him for divorce – he and I often swap favors and I'm sure he'll help you out.

What's that? He's too expensive? Well, I'll get SGT Logan to show you the Yellow Pages. There are plenty of good divorce lawyers there. I've got to get going – my next appointment is waiting.

Do you see any problems?

3. It is will day in the legal assistance office and Sergeant and Mrs. Jones come in to see you for a will. They have been married for about six months and both have children by former marriages. Both explain that if they were to die and not be survived by their spouse, they would want to provide for their children from the former marriage as well as their spouse's children from their former marriage.

- a. May you ethically represent both Sergeant and Mrs. Jones?

- b. If so, what action should you take prior to undertaking the representation?

- c. If, after the initial appointment and prior to completion and execution of the wills, Sergeant Jones calls you and tells you he has changed his mind and no longer wants to provide for Mrs. Jones' children by former marriage, what action should you take?

4. You are a Legal Assistance Attorney at Fort Tarheel, North Carolina. Staff Sergeant Rough came to see you for assistance concerning marital problems. He explained that his wife, Sally, left him about six months ago after he beat her up for having an affair. SSG Rough indicated that jealousy caused him to lose his temper, and that he broke Sally's arm and knocked her unconscious during the assault. This was not the first violent confrontation during their marriage, but it convinced Sally to file for divorce. Pending a final decree of divorce, the court awarded custody of their three-year old child, Jill, to Sally and required SSG Rough to pay \$250 per month in child support and \$100 per month in alimony. Rough is outraged because his wife and daughter have moved in with Sally's boyfriend, Jodie. Rough now wants you to help him get custody of his daughter. As you explain the lengthy process involved in obtaining a modification of the court order, SSG Rough got angry. He said he would not wait for court assistance and told you that he was going to go over to Sally's boyfriend's house, "get even" with Sally and her boyfriend, and take Jill to his parents' home in Georgia so she would be in a more wholesome environment. What should you do?

5. You are Chief of Legal Assistance at Fort Tarheel. The LAA's appointment with SSG Rough discussed in problem 4 concluded twenty minutes ago. The LAA explains to you what Rough said and asks your advice as to what she should do. You advise her to report the conversation to the police. Your subordinate LAA disagrees and explains that the state which licensed her to practice law permits her to withhold the information and she does not want to get involved. She emphatically refuses to reveal the information. After you listen to this information, you recall that Mrs. Sally Rough was represented in the divorce by CPT Able, one of your other LAA's, and that he also discussed her case with you.

- a. Has the LAA acted unethically by seeing SSG Rough since the office previously represented Mrs. Sally Rough?
- b. Did the LAA act unethically by revealing the confidence to you?
- c. Could the LAA rely on your determination of the ethical issue in the case (whether to reveal the communication) and be protected from claims against him of unethical conduct?
- d. As the legal supervisor of this LAA, knowing that she will not reveal the confidence, do you have any obligation to act? If so, what action should you take?

* * *

SUGGESTED SOLUTIONS

1. This problem highlights your supervisory responsibility over non-lawyer assistants and the requirement that you stop the unauthorized practice of law. It illustrates how difficult it is to differentiate between a legal technician performing a ministerial function, and one providing legal advice which requires the training, expertise, and certification of a licensed attorney.

Rule 5.5 states that a lawyer shall not assist another in the unauthorized practice of law. The comment states that the lawyer may delegate legal work to subordinates as long as the lawyer supervises the legal work and remains responsible for it.

This scenario presents a questionable case of unlicensed practice of law. One interpretation is that the legal assistance NCOIC is advising a client of the office on whether she can file for divorce in North Carolina. He is making a legal conclusion as to the elements of a lawsuit. This is legal advice and should come from a legal assistance attorney. It would have been appropriate for the legal NCOIC to act as a conduit between the LAA and the client if phone advice were necessary. In this instance, however, it is apparent the legal NCO intercepted the client's question, made a legal conclusion, and rendered the advice, not a lawyer.

Another approach, however, is that the NCO's response is not the practice of law, but merely the performance of military duties. Legal NCOs are expected to assist LAA's in the running of the legal assistance office. Many of these actions do not require any attorney involvement, but the local practice may be to require a LAA review the paperwork. Further, each jurisdiction is entitled to define what is the practice of law within that jurisdiction. What the NCOIC said is legally correct – separation for more than a year and the intent for it to be permanent are required for a divorce in North Carolina. What about domicile? He didn't mention that. Is it because he knows the domicile of Mrs. Brown? Or is it because he is unaware of this legal requirement? You need to find out.

Supervisors must always remember that Rule 5.3 makes all lawyers responsible for the actions of their non-lawyer assistants. First, if the lawyer either orders an action, or ratifies it, the lawyer is responsible. Second, if the lawyer knows of the conduct when its consequences can be avoided or mitigated, and fails to take such action, the lawyer is responsible.

In this scenario, you should make certain that the NCO is being closely supervised and is not giving advice which equates to the practice of law. He is under your supervision -- you are directly responsible for him. Is he giving advice that should be reserved for attorneys? Or is he simply reciting the basic requirements of the law (and, in the process, saving attorney time for those LAA's who might have to see this client and explain the law to her first-hand).

If an improper practice has been occurring with the knowledge of the supervisor of these non-lawyers, you need to consider whether that lawyer's actions give rise to a substantial question regarding his or her fitness to practice law. It may be necessary to initiate a professional inquiry against that lawyer under Rule 8.3 and AR 27-1.

In addition to the above, there is also the question of whether the NCOIC is giving phone advice to an ineligible person. How does he know that she is entitled to advice other than her representation on the phone that she is married to Sergeant Brown? He may know her personally, but he also may not know her at all. Advice should not be given to persons ineligible for legal assistance.

A final caution is the advice about "do-it-yourself" divorce. While there's nothing wrong *per se* with providing a client with materials that can help her to obtain a divorce, file a small claims court action or complain to the FTC, there is a major potential problem in North Carolina with obtaining a divorce in this way. When a divorce is granted without a pending claim for alimony or equitable distribution, these two items are "lost"; Mrs. Brown will be barred from obtaining them later. Since there may be substantial military pension rights (at the very least) and since she may be a dependent spouse, the loss of alimony and equitable distribution may be a costly mistake for her – as well as a potentially costly claim against the government.

2. The facts here involve three issues. The first is advising without seeing the document involved. This is an all-too-common problem in legal assistance offices. A client wants to talk to an attorney about a traffic ticket... but she left the ticket back home (or lost it). Another client wants advice about a contract he's signed... but he doesn't have it here, it's in the household goods shipment on its way here from Korea. Legal assistance attorneys have a duty to scrutinize each legal document involved in a case to determine whether there is a valid claim or defense for the client. How can this be done when the document itself is missing? How can this be done without the agreement? Even if he did it last year, CPT Green needs to see the agreement that was signed (since there may have been handwritten changes on it) or, at the very least, retrieve it on his computer. Except in emergency situations, never see a client without the document in question. The best way to ensure this is to catch it at the appointment-setting stage. Be sure that the legal NCO or the receptionist who answers the phone always advises clients to bring in any documents that are involved in the subject matter of the consultation. [Note: In addition, CPT Green is wrong about the pension waiver issue. Even if there is no specific waiver in the agreement, it may be waived if there is (as in most separation agreements) a *general release clause* which states that "all rights, duties and claims of the parties arising out of the marriage are waived and released, except as provided herein."]

The second issue is the appearance of favoritism in referrals. One possible view of this is that CPT Green usually steers his divorce and domestic clients to a nearby attorney, Ron Bennett, and also that he receives some sort of compensation from Mr. Bennett for this service.

But another view might be that Mr. Bennett has been the one to whom the last few divorce referrals have gone, but that other attorneys have gotten other cases from CPT Green so no favoritism is shown. The favors involved could simply mean that CPT Green occasionally helps out Mr. Bennett when a military issue comes up involving a military client – like SGLI or military pension division.

The third issue involves the method of referral. Not only should referrals not show favoritism, but they should also be done with courtesy and an eye toward competence. Is it kind and courteous to hand this client, who is probably foreign-born, a copy of the Yellow Pages basically telling her, "Here, figure it out yourself... I'm too busy"? In addition, is CPT Green providing a referral to a competent lawyer when he simply advises a client to pick a name out of the phone book? With a serious problem such as this client has, it would be wise to pick out one or two family law specialists, or at least some lawyers that CPT Green knows will handle the case effectively and competently, instead of making a blind referral.

3. Rule 1.7 permits attorneys to represent multiple clients if the attorney *reasonably believes* the representation will not be adversely affected and each client consents after consultation. The rule requires that, for multiple clients in a single matter, the attorney discuss the implications of multiple representation with the client. The comment to the rule makes clear that the term *reasonably believes* refers to how a disinterested lawyer would view the situation. Thus, *when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for... [consent]*. The comment goes on to highlight an additional problem posed by the requirement of confidentiality. If one client refuses to grant the attorney permission to make the disclosures necessary to ask for the informed consent from the other client, the attorney cannot properly ask the latter client for consent. Paragraph 4-9, AR 27-3 gives additional guidance on conflicts of interest in legal assistance. It specifically directs attorneys to resolve conflicts prior to representation when there is a joint request by spouses for a will or other estate planning document. The regulation specifically highlights the situation of children from prior marriages as an issue that underscores the need for careful consideration of the conflict.

In resolving this conflict issue, attorneys should consult with their supervisors. The Rule does not necessarily preclude this representation since the comments say that *common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them*. If the supervisor approves the joint representation, the attorney must obtain informed consent from each client individually. This consent should be in writing. Paragraph 4-9, AR 27-3 places the responsibility on supervisors to ensure procedures are in place to avoid conflicts of interest. Additionally, prior to undertaking the representation, the attorney should discuss the risks of dual representation, including the fact that attorney-client privilege may be lost. Note that Rule

1.6 makes all *information related to the representation* confidential, whether it is communicated by the client in confidence or not. Thus, communication would still be confidential.

One practical solution that a supervisor may recommend is assigning a different attorney in the office to handle one of the spouses. This raises the issue of Imputed Disqualification under Rule 1.10. While the Army does not have a rigid rule of imputed disqualification like the model rules, it does require supervisors to perform a *functional analysis* of the circumstances when deciding whether to approve the representation. Again paragraph 4-9, AR 27-3 helps. It states the Army policy that representing both parties in **any legal dispute** is discouraged. It further requires supervisors to ensure that informed consent is obtained from both clients, that a record of that consent is made and stored in the client's file, and that they take action to protect confidential communications such as using different clerical personnel and segregating files and file locations.

Part 3 of the question highlights the constant danger that is present in a dual representation situation. That is why attorneys should avoid representing both spouses in an estate planning case wherever possible. If attorneys do end up representing both parties, the attorneys must remain alert to potential conflicts arising. Sergeant Jones' change of heart in this case has now created an impermissible conflict of interest and the attorney needs to see his supervisor to withdraw from the representation of BOTH parties. Whether or not you have a duty to reveal this information to Mrs. Jones because of your obligations to her as your client and whether you are ALLOWED to reveal because of your confidentiality obligation to Sergeant Jones raise thorny issues that have not been formally resolved by disciplinary authorities. This dilemma B duty to communicate because your client's interests are threatened versus duty to withhold because your duty to another client requires it B simply serves to underscore the potential disaster of dual representation and why it is discouraged by Army policy.

4. Rule 1.6 requires disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a future crime which is likely to result in imminent death or substantial bodily harm (or which will impair the readiness or capability of a military unit, vessel, aircraft, or weapon system). Since the Military Rules govern the LAA's ethical conduct, it is necessary to determine whether Staff Sergeant Rough's statement that he will "get even" with Sally and her boyfriend involves the requisite intent to commit an offense reasonably likely to result in imminent death or substantial bodily harm. There is no guidance in Rule 1.6 or its commentary to help make the determination. Under the facts, however, SSG Rough's statement could be construed as an intention to commit a serious offense mandating disclosure under Rule 1.6. His history of physical violence and his expressed intent to avoid taking legal steps to resolve the dispute support a decision to release the information.

Prior to releasing the information, however, the LAA should confront the client and seek to persuade him to take other more suitable action. If these steps fail, the LAA's disclosure should not be greater than that reasonably necessary to avoid the harm. One option he could consider is warning SSG Rough's wife and boyfriend, and withholding the information from the police and SSG Rough's commander.

SSG Rough's statement that he intends to take Jill out of the state cannot be released by the LAA under Rule 1.6, even though the kidnapping would be a crime. Rule 1.6 contains no authorization, mandatory or permissive, to reveal threatened criminal acts unless they would impair military readiness or cause substantial physical harm. Thus, CPT Conceal must possess a reasonable belief that SSG Rough's threatened actions would be likely to result in substantial bodily harm before he could release the information.

4. This hypothetical raises several issues that are indicated by the sub-questions.

- a. The first issue is whether the LAA was precluded from assisting SSG Rough because Rough's wife had previously been seen in the office. Rule 1.10 indicates that the approach to *imputed disqualification* taken by the Model Rules, do not automatically disqualify a lawyer from representing a client simply because another attorney within the office saw the adverse client. The comment requires supervisors to approve using a *functional analysis*. This analysis requires consideration of whether the following will be compromised: preserving attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to the client. The comment also allows policies regarding imputed disqualification. As discussed above, the Army has expressed a policy of discouraging this representation in Paragraph 4-9, AR 27-3. A conflicting client should be referred to a nearby legal assistance office wherever possible. Representing both sides within the same office is a last resort. As the supervisor, you should review your system for screening for conflicts to see how this inadvertent conflict occurred. The LAA can probably continue to advise SSG Rough. However, you will need to take measures IAW Paragraph 4-9, AR 27-3 to get client consent, document that consent in the file, and take measures within the office to preserve confidentiality for both clients.
- b. Rule 1.6 allows attorneys to reveal information when necessary to carry out the representation. The comments indicate that this implied authorization normally includes other lawyers, paralegals, and support personnel within your office. Of course, this implied authorization may be expressly withheld by the client or by other provisions of the Rules. In our scenario, the initial disclosure does not violate the Rule since the LAA is obviously in need of help from his supervisor and is seeking it. Once the supervisor recognizes the conflict and realizes that he has already heard information from an adverse party, he should stop the conversation and have the LAA consult with another senior attorney in the office for advice because of the conflict of interest. This underscores the importance of good screening systems for conflicts in the LAO.
- c. Rule 5.2 permits subordinate lawyers to rely on the ethical judgment of their superiors concerning the resolution of arguable questions of professional responsibility. The comments, however, advise that if the question is one which reasonably can only be answered one way, the subordinate lawyer must act ethically and cannot rely on a wrong decision by the supervisor. Under the facts of this case, the issue of whether to reveal is a judgment call and, as to the Army, the LAA could rely on your judgment and be protected. This sounds good, but the problem is that the LAA is still subject to state rules as well. Therefore, if she violates her state rules based on her military supervisor's judgment and this is somehow reported to the state, the LAA may still be subjected to discipline.
- d. Rule 5.1 holds supervisory lawyers responsible for a subordinate's ethical violations if the supervisor knew of the unethical conduct at a time when its consequences could be avoided or mitigated, but failed to take reasonable remedial action. Additionally, the supervisor may be held responsible if he knew of the conduct and ratified it, or if he did not make reasonable efforts to ensure that the subordinate conformed his conduct to the Rules. Since Army Rule 1.6 makes disclosure MANDATORY when a lawyer reasonably believes the client will commit a crime likely to result in death or substantial bodily harm, nondisclosure violates the Rule. If the supervisor in this case knows that the subordinate is not going to disclose, he must do so in order to comply with the Army rules.

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