

THE AMERICAN BAR ASSOCIATION
LEGAL ASSISTANCE FOR MILITARY PERSONNEL COMMITTEE
CONTINUING LEGAL EDUCATION CONFERENCE – YORKTOWN, VIRGINIA

PROFESSIONAL RESPONSIBILITY

“Always do right; this will gratify some people and astonish the rest.”
-- Mark Twain

“From the beginning, America has been a society based on law and forged by lawyers. . . . [J]ust as the law has been a principal means for founding, defining, preserving, reforming, and democratizing, a united America, America’s lawyers have been charged with setting the nation’s values—a charge that runs not only to “great cases” and major reform movements, but also to the lawyer’s day to day dealing with clients. In our society, **lawyers are and must be the conscience of both the legal system and the client**—for if they are not, no one will be.”
-- Dean John Sexton, NYU Law School

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OUTLINE OF INSTRUCTION

I. THE ROLE OF THE LAWYER

- A. Two Extremes. Colonel Donald L. Burnett, Jr., *Twenty-Second Edward H. Young Lecture In Legal Education: Professionalism: Restoring The Flame*, 158 MIL. L. REV. 109 (December 1998).
1. The Heroes of Our Profession: “Indeed, the reflective practitioner is the true hero of our profession today—a lawyer who understands that our professional responsibilities are threefold. First, of course, the lawyer is a **representative of clients**. This is the role of the lawyer as an attorney. Although anyone can be an attorney in a contractual sense—an agent for someone else—only lawyers are trained to be attorneys in the full professional sense, exercising an informed and independent judgment. Second, lawyers—unlike contractual “attorneys”—are **officers of the courts and legal system**. Third, lawyers are **public citizens having a special responsibility for the quality of justice**. All these roles are recognized, as you know, in the Model Rules of Professional Conduct.”
 2. The Strip Miners of Our Heritage: “The profession envisioned by Brandeis, and exemplified by his work, has no place for those who today are the strip miners of our heritage. These are the lawyers who stretch rules and ignore ethics, promote themselves while pretending to serve clients, try cases in the media while claiming to be courtroom lawyers, and engage in tasteless or predatory marketing of legal services—asserting, sometimes correctly, a First Amendment right to do so, but forgetting that professionalism means choosing a course of conduct higher than the minimum allowances of the law.”
- B. A “Professional Lawyer”? AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM (1996).
1. “A professional lawyer is an expert in law pursuing a learned art in service to clients and the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.”
 2. “The ideal legal profession is more than a group working with specialized skills on a job that requires expertise. It is a way of life in public service.”

II. WHY HAVE A PHILOSOPHY? Discretion (or lack of discretion) in the practice of law. Three examples:

A. Conflicts of Interest (Rules 1.7 & 1.9).

1. **Directly adverse to the current client.** A lawyer shall not represent a client if the representation of the client will be directly adverse to another client unless:

- a. The lawyer reasonably believes the representation will not adversely affect the other relationship, and
- b. Each client consents after consultation (Rule 1.7(a)).
- c. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw.

d. Potential conflicts in legal assistance:

(1) Estate planning.

(2) Debtor-creditor and seller-purchaser. *Compare Atlantic Richfield Co. v. Sybert*, 456 A.2d 20 (1983) (no conflict), with *Hill v. Okay Construction Co.*, 256 N.W. 2d 107 (1977) (conflict).

(3) Domestic relations. *Coulson v. Coulson*, 448 N.E.2d 809 (1983); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

2. **Imputed Disqualification (Rule 1.10).** Lawyers working in the same military law office are not automatically disqualified from representing a client. A *functional analysis* is required. Army policy may discourage representation of both parties in certain instances. AR 27-3, para. 4-9c. (Representation of both parties in a domestic dispute **discouraged**).

3. Representation materially limited.
 - a. A lawyer is also precluded from representing a client if the representation would be materially limited by the lawyer's responsibility to another client, a third party, or by the lawyer's own interests (Rule 1.7(b)). **Example:** Defense counsel materially limited by loyalty to Army - result is ineffective assistance of counsel. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).
 - b. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest **and** the client consents after consultation.
4. **Former client.** A lawyer who has represented a former client shall not thereafter represent another person in the same matter or use information to the disadvantage of a former client (Rule 1.9).

B. Providing Complete Legal Advice (Rule 2.1)

1. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Army Rule 2.1).
 - a. Purely technical legal advice may sometimes be inadequate.
 - b. NOT a moral advisor as such. Discuss how other factors influence the way the law will be applied.

C. Confidentiality (Rule 1.6)

1. General rule. A lawyer shall not reveal any information relating to the representation of a client.
 - a. No distinction between confidences and secrets.
 - b. Applies to information obtained prior to formation of attorney-client relationship.

- c. Applies after death of client. *Swidler & Berlin v. United States*, 66 U.S.L.W. 4538 (U.S. Jun. 25, 1998) (No. 97-1192).
 - d. The Supreme Court of Oregon upheld a one-year suspension from the practice of law of a National Guard attorney who improperly disclosed military personnel information to the press. TJAG revoked his credentials to practice law for the Army in connection with the case. *In Re Lackey*, 333 Ore. 215; 37 P.3d 172 (2002)
 - e. Applies when reporting suspected judicial or lawyer misconduct. The Supreme Court of the State of Washington upheld a six-month suspension from the practice of law for attorney Schafer's disclosure of client confidences, concerning a judge, to the FBI, the prosecutor's office, the IRS and the press. *In Re Disciplinary Proceeding against Schafer*, (April 17, 2003) available at JACNET.
2. Exceptions to confidentiality.
- a. Permissive.
 - (1) A client may consent to disclosure of confidences (Rule 1.6). *See also* AR 27-3, para. 4-8a.
 - (2) Disclosure is also authorized in order to carry out the representation.
 - (3) Disclosure is permitted to establish a claim or defense in a controversy with a client.
 - (4) Air Force Rules.

Air Force Rule 1.6(b)(1) leaves to the discretion of the lawyer (*i.e.*, lawyer *may* reveal...) the disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or which will substantially impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

b. **Mandatory** for Navy/Marine Corps and Army.

Rule 1.6(b)(1) mandates disclosure of (*i.e.*, lawyer *shall* reveal...) information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to result in imminent death or substantial bodily harm, or to prevent a client from committing a crime which will substantially impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

c. There is no authority for revealing information of other potential offenses or past offenses under the Rules.

III. WHAT TYPES OF PHILOSOPHIES ARE THERE?

A. Neutral Partisanship – Client Centered. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978).

1. Principle of Professionalism. In their professional roles, lawyers may do anything that is not a *clear* violation of the rules or the law.
2. Principle of Nonaccountability. When acting in this profession role, lawyers are not legally or morally accountable for their actions.
3. Lord Brougham, as quoted in 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821):

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

B. Philosophy of Morality. “lawyers are morally accountable for the actions that they take on behalf of their clients and must be prepared to defend the morality of what they do.”

C. Philosophy of Social Value. “The lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice.” William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (April 1988)

1. Two Considerations.

a. Relative Merit. “[L]egal services are necessarily a scarce resource. The legal system cannot be indifferent to the distribution of this resource.” Simon, *supra*.

(1) “In deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others whom she might serve.”

(2) The criteria the lawyer should employ in making this assessment are suggested by the bases of legal concern about the distribution of services:

(a) the extent to which the claims and goals are grounded in the law,

(b) the importance of the interests involved, and

(c) the extent to which the representation would contribute to the equalization of access to the legal system.

b. Internal Merit

(1) Substance and Procedure

(2) Purpose and Form, and

(3) Broad and Narrow Framing

2. Commitment to the Rule of Law. Six Values at the Core of Professionalism. Timothy Terrell and James Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403 (Spring 1992)
 - a. An Ethic of Excellence;
 - b. An Ethic of Integrity: A Responsibility to Say "No";
 - c. A Respect for the System and Rule of Law: A Responsibility to Say "Why";
 - d. A Respect for Other Lawyers and Their Work;
 - e. A Commitment to Accountability;
 - f. A Responsibility for Adequate Distribution of Legal Services.

3. Social Morality. W. Bradley Wendel, *Public Values and Professional Responsibility,* 75 NOTRE DAME L. REV. 1 (October 1999).
 - a. "For the public morality conception of legal ethics to function effectively as an alternative to incorporating personal ethical beliefs into professional decision making, the moral values that bear on professional decisions must derive from the social function of lawyers. If these public normative principles do indeed arise from the role of lawyers, then they function as a constraint on the personal morality of individuals acting as professionals, rather than the other way around."

 - b. Three Principles
 - (1) Loyalty

 - (2) Seeking Justice

 - (3) Ethic of Care or Mercy

IV. DEVELOPING YOUR OWN PHILOSOPHY. NATHAN M. CRYSTAL,
PROFESSIONAL RESPONSIBILITY 6 - 37 (1996)

Within the framework of [The Model] Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of

sensitive professional and moral judgment guided by the basic principles underlying the Rules.

-- *Preamble*, ABA Model Rules of Professional Conduct

The perplexing nature of [professional responsibility] problems usually flows from . . . tensions or conflicts between three ideas that are central to the lawyer's role: the lawyer as fiduciary, the lawyer as an officer of the court functioning in an adversarial system, and the lawyer as an individual with personal values and interests. . . . The tensions among these central aspects of a lawyer's role generate the need for what can be called a "philosophy of lawyering" – a general approach to dealing with conflicts among these fundamental ideas. A philosophy of lawyering operates at three interrelated levels. . . ."

-- Professor Nathan Crystal

- A. Personal Level – How the lawyer integrates her personal and professional life
- B. Practice Level – Dealing with uncertain questions of professional ethics.

These Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. These Rules simply provide a framework for the ethical practice of law.

--*Preamble*, ABA Model Rules of Professional Conduct

- 1. Consider 4 possible factors:
 - a. Client-Centered: Resolve questionable issues with an approach that favors the interest of the client.
 - b. Defensive Lawyering: Adopt an approach that minimizes the likelihood of discipline.
 - c. Officer-of-the-Court: Adopt the approach that is most consistent with the principles underlying the rules of professional responsibility.
 - d. Personal Morality: Adopt the approach that is most consistent with your personal moral values.

- C. Institutional Level – The set of **fundamental institutional values** that form the basis of the system of rules governing professional responsibility and lawyer behavior.

Many of a lawyer's professional responsibilities are prescribed in these Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, to exemplify the legal profession's ideals of public service, and to respect the truth-finding role of the courts.

* * *

These Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.

--Preamble, ABA Model Rules of
Professional Conduct

1. Colonel Donald L. Burnett, Jr., *Twenty-Second Edward H. Young Lecture In Legal Education: Professionalism: Restoring The Flame*, 158 MIL. L. REV. 109 (December 1998).
 - a. “During the early history of the United States, the role of the lawyer was understood to be that of **seeking justice**. The lawyer provided **a voice for community values** and, by serving many clients of different backgrounds, furnished a dynamic of inclusiveness within the community.”
 - b. “Even in the first half of the twentieth century, a lawyer was known primarily for **service**. . . . [There is] something noble in helping real people in real situations, accepting their human imperfections and serving them in response to a higher calling.”
 - c. “Jerome Shestack, president of the American Bar Association, has enumerated the elements of professionalism:

“First is fidelity to ethics and integrity as a meaningful commitment
“Second is service with competence and dedication—but with independence

“Third is meaningful legal education—not as a chore to meet some point system but as a means for growth and replenishment

“Fourth is civility and respect for authority. Let us resist the Rambo-type tactics in which civility is mocked and ruckus is routine. Civility is more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to non-litigious resolution. It modifies the antagonisms and aggressiveness of an adversarial society. . . .

“Fifth is a commitment to improve the justice system and advance the rule of law. The justice system is our trust and our ministry. And we bear the brunt of public dissatisfaction with the justice system’s flaws and deficiencies To make that limping legal structure stride upright is the obligation of every lawyer.

. . . .

“The final element of legal professionalism is pro bono service. . . . Much has been given to our profession; it seems right to give something back—indeed, it is an ethical obligation”

2. What pressures might cause lawyers to fail to live up to these values?
Dean John Jay Douglass, *The Nineteenth Annual Kenneth J. Hodson Lecture: Military Lawyer Ethics*, 129 MIL. L. REV. 11 (1990).
 - a. **A**mbition: careerism, politics
 - b. **E**motion: provocation, personal acquaintance
 - c. **I**gnorance & Incompetence
 - d. **O**verkill
 - e. Simply **U**nethical: No personal code of behavior or morality