

# PROFESSIONAL RESPONSIBILITY

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# OUTLINE OF INSTRUCTION

## I. REFERENCES.

### A. Primary.

1. AR 27-26, Rules of Professional Conduct for Lawyers (1 May 1992).
2. American Bar Association Model Rules of Professional Conduct (1998).
3. AR 27-3, The Army Legal Assistance Program (10 September 1995).
4. TJAG Policy Number 26, Rules of Professional Responsibility and USAF Standards for the Administration of Criminal Justice [AIR FORCE] (1 July 1994.)
5. JAGINST 5803.1B, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General [NAVY/MARINE CORPS] (11 February 2000).
6. Coast Guard - follow rules of licensing jurisdiction.

### B. Secondary.

1. AR 27-1, Judge Advocate Legal Service (3 February 1995).
2. American Bar Association Annotated Model Rules of Professional Conduct (4th ed. 1999).
3. OTJAG Standards of Conduct Office, Professional Responsibility Notes (published periodically in THE ARMY LAWYER).

## II. INTRODUCTION

### III. APPLICABLE STANDARDS

A. Rules of Professional Conduct. The applicability of the Rules for each service are set forth in the following table:

	<i>Army</i>	<i>Navy</i>	<i>AF</i>	<i>CG</i>
<b><i>Department Attorneys (Military &amp; Civilian)</i></b>	All Components	All Components	All in TJAG Department	ABA Code Applies during C/M only
<b><i>Private Practice Attorneys</i></b>	Only at Courts-martial	Any JAG Matter	Only Foreign National Attorneys (If no conflict with their rules)	N/A
<b><i>Department Non-Attorneys</i></b>	N/A	Rules Serve as a Guide for Conduct	N/A	N/A

B. Effect of the Rules of Professional Conduct.

1. Provide a basis for taking action should a lawyer fail to comply or meet the standard. Do not provide a basis for a civil cause of action against either the Service or an attorney.
2. Comments/Discussion are non-binding guidance.
3. Attorneys must comply with both the letter & the spirit of the Rule. The Rules are only one source of rules governing the conduct of judge advocates (See, e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).

C. Other Applicable Standards.

1. ABA Standards for Criminal Justice.
2. Regulatory and statutory standards (e.g., UCMJ, Joint Ethics Regulation, JAGC Personnel Policies).
3. Ethics code where licensed to practice law. "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs." (Model Rule 8.5).

4. Ethics opinions and standards promulgated by State Bar and TJAG.
5. Another state's ethical standards if the attorney is licensed to practice or practicing within another jurisdiction.

D. Resolving Ethical Conflicts.

1. Rule 8.5 deals w/ jurisdiction. General Rule is that military rules trump!
  - a. The Army Rule explicitly provides that although attorneys remain subject to the Rules in effect in their licensing jurisdictions, the Military Rules supersede in case of a conflict regarding official duties.
  - b. The Navy Rules take a similar approach. In para. 8 of the instruction, it states that the Navy Rules will supersede other rules that may conflict for "legal functions under JAG supervision."
  - c. The Air Force cover memo to their Rules provides that the Rules "govern Air Force practice." It further states that "when there is a difference in state and Air Force rules, the Air Force provisions will control."
2. Model Rules Approach
  - a. ABA Model Rule (old approach in comment to Model Rule 8.5).
    - (1) Apply principles of conflicts of laws.
    - (2) Most significant relationship test.
  - b. ABA Model Rule 8.5 as amended August 1993. Disciplinary Authority must make a choice of law:
    - (1) For conduct in connection with a court action - apply the rules of the jurisdiction where the court sits.
    - (2) For other conduct - apply the rules of the jurisdiction in which the lawyer principally practices.
3. Practical Approach.
  - a. Follow the most restrictive rule.
  - b. Seek alternate solutions.

- (1) Request that a different attorney be appointed to the case.
- (2) Request an opinion or waiver from the state ethics review panel. CAUTION: Coordinate w/technical chain!
- (3) If the conflict is irreconcilable - follow your service's rule regarding conflicts.

#### IV. WHO IS THE CLIENT?

A. General Rule - The department you serve with (e.g. Dept of the Army) acting through its authorized officials (Rule 1.13). Rule rejects the concept that the government as a whole is the client.

B. However, each department establishes exceptions to that rule.

1. Army - Rule 1.13(g) - a lawyer has an attorney-client relationship with an individual if they are assigned to represent an individual

a. Who is subject to disciplinary action or administrative proceedings;  
OR

b. Being provided civil legal assistance

2. Navy/Marine Corps

a. Similar to the Army, except the language is in Rule 1.13(f).

b. The Navy does NOT qualify legal assistance with the term "civil."

3. Air Force: Has an exception identical to the Army's in Rule 1.13(f). They also specifically allow attorneys to establish an attorney-client relationship with the government of the United States when authorized. (Rule 1.13(a)).

C. If an official of the military (e.g., a commander) is acting illegally or intends to act illegally, and if the action reasonably might be imputed to the military, the lawyer shall:

1. Proceed as is reasonably necessary in the best interest of the applicable service.

2. Consider taking the following measures:

a. Ask the official to reconsider.

b. Advise the official to get a separate legal opinion.

c. Advise the official that his or her personal legal interests are at risk and he or she should consult counsel.

d. Refer the matter to or seek guidance from higher authority in the technical chain of supervision.

3. All services require the attorney to clarify that the service department is the client, not the individual.

4. If unsuccessful in taking these efforts, the lawyer may terminate representation with respect to the matter in question. (Army Rule 1.13(d); Navy Rule 1.13(c)). The Air Force does not explicitly allow termination of the representation. Instead, they allow the attorney to consult with JAs at higher levels of command to avoid violation of the law by the Air Force. (AF Rule 1.13(c)).

5. Rule 1.13 does not require that an attorney report the official's misconduct or violation of law. A requirement to disclose misconduct may arise, however, under other laws or regulations. See, e.g., Joint Ethics Regulation.

## **V. DUTIES TO THE CLIENT**

### **A. The Basics**

#### **1. Competence (Rule 1.1).**

a. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.

b. The required proficiency is that generally afforded to clients in similar matters.

c. SUPERVISOR makes the initial determination as to competence for a particular assignment. Supervisor's role:

(1) Training

(2) Oversight

(3) Standard Procedures

d. Lawyers may give advice and assistance even if they do not have skill ordinarily required if referral or consultation with another lawyer is impractical.

## 2. Scope of Representation (Rule 1.2)

- a. A lawyer must abide by a client's decisions concerning the objectives of representation and must consult with the client as to the means by which the objectives are to be pursued (Rule 1.2(a)).
- b. A lawyer should assume responsibility for technical and legal tactical issues.
- c. A lawyer may not counsel a client to engage in criminal or fraudulent conduct.
- d. Scope of representation may also be limited by a non-ethics regulation. In the Army, AR 27-3 and in the Air Force, AFI 51- 504, limit the areas of practice under the Legal Assistance Program.

## 3. Diligence (Rule 1.3).

- a. Lawyers must act with reasonable diligence and promptness.
- b. A Lawyer must carry through to conclusion all matters undertaken.
- c. Lawyers must consult with clients as often as necessary.

## 4. Communication (Rule 1.4).

- a. Lawyers have a duty to keep clients reasonably informed about the status of a matter and to comply with client requests for information.
- b. Lawyers also must explain matters to clients to permit them to make "informed decisions."

## B. 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. The duty of confidentiality continues after the lawyer-client relationship has terminated.

- d. Applies to all office personnel, including volunteers.
2. Supervisors should ensure procedures are in place to ensure confidentiality. AR 27-3, para. 4-9b(1).
- a. Separate administrative and confidential files. AR 27-3, para. 5-5c.
    - (1) See also, OTJAG Standards of Conduct Office, Professional Responsibility Note, ARMY LAW, Oct. 1993, at 47-48. (State bar opinions regarding management of office waste and FAX machine security).
    - (2) SRP confidentiality.
  - b. E-mail/Internet/Fax Security Measures.
3. Exceptions to confidentiality.
- a. A client may consent to disclosure of confidences (Rule 1.6(a)).
  - b. Disclosure is also authorized in order to carry out the representation.
    - (1) Office communications.
    - (2) Reading files.
      - (a) Supervisors are permitted to review office files to ensure adequate legal representation.
      - (b) Both supervisors and subordinates need to be sensitive to potential for conflicts of interest inherent in reviewing reading files.
  - c. Disclosure is permitted to establish a claim or defense in a controversy with a client (Rule 1.6(b)).
  - d. Intention to commit a crime. Army Rule 1.6(b)(1) and Navy Rule 1.6b mandates (Air Force Rule 1.6 has the same exception, but it is discretionary -- the lawyer MAY disclose) disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to--
    - (1) result in imminent death or substantial bodily harm, or

(2) significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.

e. There is no authority for revealing information of other potential offenses under the Rules.

f. Information regarding past crimes may not be released under any of the ethical standards.

4. Client authorizes disclosure - AR 27-3, para. 4-8a strongly suggests having authorization in writing. See also AFI 51-504, para. 1.6.2 (Information received for legal assistance will be released “only with the client’s express permission. . . .”)

5. Compare to Mil. R. Evid. 502 – Lawyer-Client Privilege.

a. Protects against disclosure of privileged communication between attorney and client.

b. Does not protect against other disclosures (e.g., information gained from sources other than the client).

c. Narrower protection than Rule 1.6 (e.g. future crimes are not privileged).

## **VI. THE LAWYER AS ADVISOR.**

A. Lawyers should provide complete advice.

1. A lawyer may refer to moral, economic, social, and political factors when rendering advice to clients (Rule 2.1).

2. Rule 2.1 sets forth a permissive standard.

B. Lawyers must provide independent advice.

1. When advising individual clients, lawyers are required to exercise unfettered loyalty and professional independence (Rules 2.1 and 5.4).

2. A lawyer who cannot provide independent advice must seek to withdraw from the representation of an individual client.

3. LAAWS-LA and DLWILLS software represents Army policy on the proper form of documents, but is not a substitute for an attorney’s independent professional judgment. AR 27-3, para. 4-4a.

C. Terminating the Relationship (Rule 1.16).

1. Notwithstanding any other provision of the rule, a lawyer shall continue the representation when ordered to do so by a tribunal or other competent authority.
2. A lawyer SHALL seek withdrawal (or not commence representation) if –
  - a. The representation will violate the rules
  - b. The lawyer's physical or mental condition materially impairs his ability to represent the client; OR
  - c. The lawyer is dismissed by the client.
3. A lawyer MAY seek withdrawal if it can be accomplished without material adverse affect to the client's interest AND
  - a. The client persists in a course of action that the lawyer reasonably believes to be criminal or fraudulent;
  - b. The client has used the lawyer's services to perpetrate a crime or a fraud;
  - c. The client persists in pursuing an objective which the lawyer considers repugnant or imprudent; OR
  - d. Other good cause for withdrawal exists.
4. A lawyer must take reasonable steps to protect a client's interests upon termination of the relationship (Rule 1.16).
5. Steps should include giving notice to the client, allowing time for employment of other counsel, and surrendering all papers and property.
6. Good cause exists to withdraw when you are transferred to a new assignment (Comment to Rule 1.16 (Army & Navy only)).

**VII. SELECTED ETHICAL ISSUES**

A. Conflicts of Interest (Rule 1.7, 1.8, 1.9).

1. Representation directly adverse to existing clients.

a. Rule 1.7(a) prohibits a lawyer from representing a client if the representation of the client will be adverse to another (present) client unless:

(1) The lawyer reasonably believes the representation will not adversely affect the other relationship, and

(2) The client consents after consultation.

b. Rule 1.7(b) prohibits a lawyer 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 unless:

(1) The lawyer reasonably believes the representation will not be adversely affected, and

(2) The client consents after consultation.

c. A possible conflict does not preclude representation. Likewise, simultaneous representation of unrelated matters of clients whose interests are only generally adverse does not require consent. However, in both cases the prudent course is to disclose and obtain consent.

d. Factors in determining whether multiple representation should be undertaken include:

(1) duration and intimacy of the lawyer's relationship with the clients involved,

(2) likelihood actual conflict will arise, and

(3) likely prejudice to the client if conflict does arise.

2. Rule 1.9 prohibits a lawyer, who has formerly represented a client in a matter:

(a) From representing another person in the same or substantially related matter unless the client consents after consultation, or

(b) From using information to the disadvantage of the former client.

3. Rule 1.8 lists other areas that would create a conflict of interests rules. These include:

- a. A lawyer shall not enter into a business transaction with a client (Rule 1.8(a)).
- b. A lawyer shall not prepare an instrument for a client that gives the lawyer, or a relative of the lawyer, a gift from the client (Rule 1.8(c)).
- c. A lawyer related to another lawyer may not represent a client in a matter adverse to the relative's client (Rule 1.8(i)).

4. If a conflict develops after representation has been undertaken, the attorney must seek to withdraw.

#### B. Imputed Disqualification (Rule 1.10).

1. Lawyers working in the same military law office are not automatically disqualified from representing a client. A functional analysis is required (Rule 1.10. Compare ABA Model Rule 1.10.)

2. Representing multiple legal assistance parties (See AR 27-3, para 4-9).

- a. Can provide a list of attorneys IAW AR 27-3, para 3-7h and I for referral.
- b. Can refer to another military legal office, a USATDS attorney, or a RC JA.
- c. When other alternatives are not feasible, as a last resort, supervising attorneys may authorize exceptions to use an attorney from a separate section of the same Army legal office. In cases where exceptions are approved, those attorneys providing LA from the same Army legal office will –obtain informed consent of both clients; make and maintain records of their consent in the clients' files; and further protect the confidential attorney-client communications by using different clerical personnel to assist.
- d. Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses in a domestic dispute.

3. Permitted Dual Representation.

- a. Practically speaking, may represent both sides in estate planning or in preparation of bill of sale provided conflicts are resolved before undertaking representation.
- b. Client confidences – Husband and Wife request estate counseling together.

(1) Must consent to joint interview.

(2) Recommended – sign Dual Representation letter for case file.

c. Be alert for conflicts of interest (e.g. Spouse with children of former relationship, Child of testator present for interview, step-parent adoptions).

C. Fees and Self-Referral (Rule 1.5). The Navy and Army rules are similar. The Air Force omitted Rule 1.5 “as inapplicable to military practice.”

1. A lawyer shall not accept a gratuity, salary or other compensation from a client for services performed as an officer of the U.S. Army.

2. A lawyer shall not receive compensation for making a referral of a client to a private practitioner.

3. A RC Legal Assistance Attorney shall not receive any actual or constructive compensation or benefit for referring to a private-practitioner (including himself) a matter the lawyer first became involved with in a military legal assistance capacity. Comment to Rule 1.5, see also, AR 27- 3, para. 4-5 and 4-7.

a. Does not subsequently prohibit a reserve component lawyer from representing military personnel or dependents in a private capacity concerning new matters.

b. Prohibits lawyer from using official position to solicit or obtain clients for private practice.

c. An RC Judge Advocate may accept a fee referral from active component LAA, if,

(1) The fact that the referral is for fee is acknowledged at the outset of representation,

(2) The client fully understands the referral is for fee at the outset of representation, and,

(3) The client consents to such representation.

D. Unauthorized Practice of Law (Rule 5.5).

1. A lawyer shall not:
  - a. Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction, or
  - b. Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
2. A lawyer may perform legal assistance duties even though the lawyer is not licensed to practice in the jurisdiction within which the lawyer's duty station is located.
  - a. However, the scope of your representation may be limited by the jurisdiction.
  - b. Know the state rules.
3. Nothing in this rule prohibits a lawyer from employing the services of nonlawyers and delegating functions to them, provided –
  - a. Lawyer supervises the delegated work.
  - b. Lawyer retains responsibility for the work.

**VIII. DEALING WITH THIRD PARTIES.**

A. Communications with Opposing Parties.

1. A lawyer shall not discuss a case with another party who is represented by an attorney unless:
  - a. the lawyer has the consent of the other attorney, or
  - b. the lawyer "is authorized by law to do so," (Army Rule 4.2).
2. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.
3. Communication with a party concerning matters outside the representation is permissible.

4. A lawyer may communicate with the commander of an opposing party even if the party is represented by counsel (Comment, Army and Navy Rules 4.2).
5. A lawyer is not precluded from communicating with a person who is not represented by counsel (Army Rule 4.3).
  - a. Lawyers may not state or imply that they are disinterested.
  - b. Lawyers should refrain from giving advice to unrepresented persons (Comment, Army and Navy Rules 4.3).

**B. Threatening Criminal Prosecution.**

1. Under ABA Code DR 7-105, lawyers could not present, participate in presenting, or threaten to present criminal charges “solely to gain an advantage in a civil matter.” See *Iowa State Bar v. Michelson*, 345 N.W.2d 112 (Iowa 1984); TJAG Opinion, *The Army Lawyer*, May 1977.
2. There is no parallel provision in the Army Rules (or ABA Model Rules). Threatening or filing criminal charges may, however, violate other rules. (See Army Ethics Opinion 89-01).

**C. Other Limitations Involving Third Parties.**

1. A lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person (Army Rule 4.4).
2. A lawyer shall not knowingly make a false statement of fact or law (Army Rule 4.1).

**IX. DUTIES OF SUPERVISORS AND SUBORDINATES.**

**A. Supervisors Must Ensure Subordinates Comply With Rules (Rule 5.1).**

1. Includes non-lawyers under supervision, see Rule 5.3, and volunteers in legal offices, AR 27-3, para. 4-3e.
2. Staff Judge Advocates should provide practice-oriented classes on professional responsibility. See AR 27-3, para 1-4g(2)(j), 2-4a. Three hours of training annually is mandatory for Army attorneys. AR 27-1, para. 7-2c.
3. A Supervisor Assumes Imputed Responsibility for Acts of Subordinates if (s)he:
  - a. Orders or ratifies a subordinate's violation, or,

b. Fails to take remedial action to avoid or mitigate the consequences of a violation.

B. Subordinates are bound by the Rules of Professional Conduct (Rule 5.2).

1. Subordinate may rely on ethical judgment of a supervisor if the issue is subject to question. The Navy requires this resolution to be in writing.
2. If the ethical question can be answered only one way, subordinate must comply with the Rules even if supervisor directs a contrary course of conduct.
3. When representing individual clients, subordinates are required to exercise unfettered loyalty and professional independence (Rule 5.4).

## **X. PROFESSIONAL RESPONSIBILITY COMPLAINTS.**

A. Reporting Requirements.

1. A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness, must report the violation (Rule 8.3).
2. Rule 8.3 does not require disclosure of information protected under Rule 1.6. (confidentiality).
3. Professional Misconduct Defined (Rule 8.4).
  - a. Professional misconduct includes a criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness to practice law.
  - b. Not all criminal offenses constitute professional misconduct.
  - c. Concept of offenses involving moral turpitude is rejected under Rule 8.4.
  - d. Professional misconduct, however, does not have to consist of a criminal act. For example, conduct prejudicial to the administration of justice or conduct involving dishonesty, fraud, deceit, or misrepresentation violates Rule 8.4.

B. Processing Complaints (AR 27-1, Chap. 7; Navy JAGINST 5803.1a, enclosure).

1. New Army system implemented in AR 27-1, dated 3 Feb 1995. (See Appendix)

- a. Allegations are reviewed by several supervisory JAs up to and including TAJAG before a formal preliminary screening inquiry (PSI) is ordered.
- b. Increased due process protections for the accused attorney.
- c. Designed to protect the interests of both the Army and the attorney.
- d. OTJAG determines whether to report violation to state bar.

2. Navy/Marine Corps

- a. Complaints are handled by JAG (Code 13).
- b. A Rules Counsel for probable cause conducts review. Orders preliminary inquiry if necessary. Determines whether to forward the case to a formal ethics investigation.
- c. Subject attorney is provided copies of actions throughout.
- d. JAG makes the final decision on the case. All other decisions are recommendations.

**XI. CONCLUSION.**

## Appendix A

### TOP TEN PITFALLS

1. **COMMUNICATE. COMMUNICATE. COMMUNICATE.**

- Return all phone calls within 24 hours. If it is a Friday, call that same day.
- Copy your clients on correspondence. Let them see you are working for them.
- Send your clients a monthly letter briefly informing them of the status of their case.

2. **KEEP A RECORD OF WHAT YOU DO.**

- Keep a chronology in the front of your client file and annotated everything.
- Annotate phone conversations. Type in notes while talking on phone.
- Send follow-up letters confirming agreements and conversations.
- Outline everything on the computer for every client you see. Set up an outline template. Save your work on the hard drive, then the floppy, and be sure to back it up every night!

3. **KNOW HOW TO REFER A CLIENT TO A GOOD CIVILIAN ATTORNEY.**

- Develop a list of potential civilian attorneys with areas of specialty as well as contact information.
- Try to find attorneys who will take military clients pro bono or for a reduced fee.
- Scrub list with Martindale-Hubbel and local state bar.
- Call the attorney to make the introduction for the client.

4. **"SILENCE IS GOLDEN" - OR IS IT?**

- When in doubt, write it out! What happens when you can't reach an agreement on contested issues in a separation agreement? Don't let silence be misinterpreted as agreement and don't let the general release clause found in most agreements wipe out a good claim for alimony or property division.

5. **WHEN IN DOUBT ASK!**

- If you do not know what you are doing, **STOP!** You cannot ethically practice law or advise clients if you don't know the law. Know your resources - SJA, DSJA, section chief, civilian attorneys, or reservists. When you have a tough nut to crack be smart enough to ask around. The only dumb question is the one never asked! Also, know when to say NO!

6. **KNOW YOUR RESOURCES.**

- Know what is in your office library.
- Read the Army Lawyer, or branch equivalent.
- Use the JAGCNET or other Internet tools.
- Keep current copies of the LEGAL EAGLE client handouts and the SILENT PARTNER lawyer pamphlets at your desk at all times. **Read them!** (They can be found at the LAMP web site at <http://www.ncbar.com/home/lamp.htm>)

- Get involved with the local bar and go to their meetings, luncheons, etc. **Use your civilian contacts!**
- Go to CLE programs and borrow videotapes from TJAGSA (OPD).
- Establish checklists and scripts for will executions and other routine procedures and use them.

7. **KNOW YOUR STATE BAR'S RULES OF ETHICS.**

- Don't forget that you are bound by your state bar rules as well as the military rules of ethics. Sometimes they do not agree. Be on the lookout for these conflicts and resolve them before they become a problem.

8. **BE CAREFUL OF "BOILERPLATE"**

- Annually review the boilerplate documents you use.
- Review all separation agreements and wills for content prior to execution. Do not rely on the software system to be foolproof.
- Think like an attorney, not like a scribe

9. **GET IT IN WRITING.**

If you need your client's consent, get it in writing. An oral agreement is not worth the paper it is written on.

10. **DON'T GIVE ADVICE WITHOUT SEEING THE DOCUMENT.**