

Professional Responsibility for the Military Paralegal

MAJ Jeremy Ball

Administrative and Civil Law Department

The Judge Advocate General's Legal Center and School



Goals of Instruction

- Discuss ethical duties and responsibilities of military paralegals
- Review frequently arising rules of professional conduct
- Open discussion of professional ethics issues applicable to military paralegals



References

- AR 27-3, The Army Legal Assistance Program
- AR 27-26, Rules of Professional Conduct
- NFPA Model Code of Ethics and Professional Responsibility – Appendix A



Introduction

- “Professional Conduct”
- Profession of law is self-regulating
- Rules create uniformity and predictability
- Paralegals often interact with clients
- Expectations for JAG Corps – preamble



Application of Rules

- All JA's – Active, Guard, & Reserve
- DA Civilian Attorneys
- Paralegal support, enlisted or civilian
- Non-DoD Civilian Attorneys - Army rules apply when practicing before tribunals pursuant to UCMJ or MCM



Interpretation & Effect

- Rules govern both professional and ethical conduct
- Mandatory rules provide a basis for discipline
- Permissive rules guide conduct
- Attorneys and paralegals must adhere to both letter and spirit
- Interpret rules in light of ABA Model Rules



Other Sources of Ethical Rules

- Service regulations (AR 27-1, 27-3, & 27-10)
- Joint Ethics Regulation (JER)
- ABA Standards of Criminal Justice
- Ethical standards of licensing state
- Ethical standards in the state where practicing



Regulatory Guidance

- Professionalism reflected in conduct and demeanor of all legal personnel. AR 27-3
- ABA Standards of Criminal Justice applicable to personnel performing duties related to a courts-martial. AR 27-10



Supervisor's Responsibilities

- Ensure subordinates comply with the rules
- Training – 3 hours annual training
- Imputed responsibility for violation if:
 - Supervising attorney orders or ratifies the conduct, with knowledge of the circumstances;
or
 - Failure to avoid the violation or mitigate the consequences



Subordinate's Responsibilities

- Comply with all Rules of Professional Conduct
- Seek guidance from supervisor when necessary
- Perform only those duties authorized by regulation or a supervisory attorney
- Understand what constitutes the practice of law



Multijurisdictional Practice

- Unauthorized Practice of Law (UPL) Statutes
- Army Rule 5.5. A lawyer shall not:
 - Practice law in violation of state rules, unless authorized by the service
 - Assist a non-lawyer in the performance of activity that constitutes the unauthorized practice of law
- ABA Model Rule 5.5
 - Permits an attorney to provide legal services authorized by federal law or regulation outside of his or her licensing jurisdiction



Practice of Law

- “Commonly Understood Test”
- “Client Reliance Test”
- “Application of Law to the Facts Test”
- “Affecting Legal Rights Test”
- “Attorney-Client Relationship Test”
- What paralegal duties are permissible?



Lawyer-Client Relationship

- Rule 1.13 – Service (Army) as Client
- Rule 1.6 – Confidentiality of Information
- Rule 1.7 – Conflicts of Interest (COI)
- Rule 1.8 – COI: Prohibited Transactions
- Rule 1.9 – COI: Former Client
- Rule 1.5 – Fees and Self-Referral



Service as the Client

- Client – the Army, acting through authorized officials
- Authorized officials – division commanders or higher
- Matters of official business
- A commander may not invoke the lawyer-client privilege for personal benefit
- The Army TJAG, not the SJA, appoints individual counsel, generally through Trial Defense Service



Confidentiality

- A lawyer shall not reveal any information relating to the representation of a client.
 - Includes information obtained from any source, prior to or after formation of attorney client relationship.
 - Applies after the client's death.
- Confidentiality is preserved by the lawyer-client privilege and the work product doctrine.



Triggering the Duty of Confidentiality

- Confidentiality may attach prior to formation of the attorney client relationship
- Subjective expectations of the client
- Right to confidentiality belongs to the client
- Avoid informal situations that may result in a confidential communication
- When in doubt about the person's expectations, clarify the relationship



Exceptions to Confidentiality

- Client consent after consultation
- Disclosures necessary to carry out the representation
- To establish a claim or defense in a dispute between the client and lawyer
- Disclosures required or authorized by law
- Future crimes



Disclosure of Future Crimes

Reasonable belief that disclosure is necessary to prevent a crime which is likely to:

- Result in imminent death or substantial bodily harm, or
- Substantially impair the readiness or capability of a military unit, vessel, aircraft, or weapon system



Confidentiality: Legal Assistance Appointments

- Domestic dispute, e.g. divorce or separation, client has been seen by your Legal Assistance Office
- His or her spouse contacts the office and requests an appointment
- The caller may not be advised of the nature of the conflict – no consent



Confidentiality: Soldier Readiness Processing (SRP)

- Prepare wills at the Legal Assistance Office
- Set up wall dividers at the SRP site
- Safeguard contents of client documents
- Exigency of SRP is not an excuse!



Other Examples

- Intake / screening
- Sign-in sheets
- Telephone calls, letters and documents
- Email, internet, fax communications
- Use and access of office files
- “Loose lips sink ships”



Conflicts of Interest

- A lawyer shall not represent a client if the representation will be directly adverse to another current client unless:
 - The lawyer reasonably believes the representation will not adversely affect the other relationship; and
 - Each client consents after consultation
- Attorney must withdraw if the conflict develops



Representation Materially Limited

- A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client, a third party or by the lawyer's own interests, unless;
 - The lawyer reasonably believes the representation will not be adversely affected, and
 - The client consents after consultation



Example: Representing Multiple Accused

- Ordinarily a lawyer should refuse to act for more than one accused
- Representation of co-accused is not strictly prohibited
- Army procedure
 - Co-accused initially contacted by separate defense counsel
 - Co-accused may submit request for same counsel
 - Chief, USATDS, decides whether to grant the request



Potential Conflicts in Legal Assistance

- Estate planning
- Debtor-creditor
- Seller-purchaser
- Divorce counseling
- Separation agreements



Moving Between Criminal Law Office, TDS, and Legal Assistance

- Avoiding conflicts of interest
- Maintaining lists of clients served
- Conflicts may be created by witnesses
- Conflicts may be created by personal relationships
- New challenges in the modular BCT



Fees and Self-Referral

- Military lawyers may not accept gifts or payment from a client for performance of legal services
- Gifts or payment are also prohibited for referring clients (or prospective clients) to a private attorney
- Reserve attorneys may not refer a client to themselves on a legal matter for which they provided legal assistance



Obligations to Third Parties

- Truthfulness in Statements to Others
- Respect for the Rights of Third Parties
- Communications with Opposing Parties
- Fairness to Opposing Party and Counsel
- Impartiality and Decorum of the Tribunal



Truthfulness to Others

- A lawyer shall not make a false statement of law or fact to another person
 - Violation requires knowledge that the statement is false
 - Misrepresentation may occur if a lawyer affirms a false statement
- A lawyer must disclose past misstatements
- Rule applies equally to paralegals



Respect for Third Parties

Army Rule 4.4 – Prohibits the following:

- Actions for no other purpose than to embarrass, delay, or cause unnecessary burden
- Collection of evidence in violation of the rights of another person (theft)
- Illegal, dishonest, and fraudulent conduct
- Derogatory remarks about an opposing party or counsel



Communications with Opposing Parties

- A lawyer shall not discuss a case with another person who is represented by an attorney on the same matter
- Rule applies equally to paralegals
- A lawyer may not encourage a client to communicate with an opposing party
- A lawyer may communicate with a client's commander



Fairness to Opposing Party & Counsel

Army Rule 3.4 prohibits the following:

- Hiding or destroying evidence
- Falsifying physical or testimonial evidence
- Disobeying an obligation to the opposing party
- Failure to comply with a reasonable discovery request, or making a frivolous request
- Making prohibited statements at trial
- Discouraging persons, other than a client, from providing relevant information



Impartiality & Decorum of the Tribunal

- A lawyer shall not seek to influence a judge, court member, member of a tribunal, or prospective members
- A lawyer shall not communicate *ex parte* with a judge or court member except as permitted by law



Questions ?

