

**Army Regulation 27–26**

**Legal Services**

# **Rules of Professional Conduct for Lawyers**

**Headquarters  
Department of the Army  
Washington, DC  
28 June 2018**

**UNCLASSIFIED**

# ***SUMMARY of CHANGE***

AR 27–26

Rules of Professional Conduct for Lawyers

This major revision, dated 28 June 2018—

- o Designates certain officials as Senior Counsel (para 4*a*).
- o Defines proper conduct for the purposes of professional discipline (para 6).
- o Applies the Army Rules of Professional Conduct for Lawyers to local national lawyers employed overseas by the Department of the Army, to the extent the Rules are not inconsistent with their domestic law and professional standards (para 7).
- o Parallels the structure of the American Bar Association's Model Rules of Professional Conduct for Lawyers (app B).
- o Amends the Comment to Rule 1.1 to provide that a lawyer's duty of competence includes keeping abreast of the benefits and risks associated with relevant technology (app B).
- o Amends Rule 1.6 to recognize the overriding value of life and physical integrity by requiring a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. (app B).
- o Amends Rule 1.8 to prohibit all client-lawyer sexual relationships, including consensual relationships, except those predating the formation of the client-lawyer relationship (app B).
- o Amends Rule 4.4 to provide that if a lawyer receives a document or electronically stored information (including metadata) relating to the representation of the lawyer's client and the lawyer knows or reasonably should know the document or information was sent inadvertently, he or she must promptly notify the sender (app B).
- o Amends Rule 5.7 to provide that Army lawyers shall be subject to these Rules of Professional Conduct for Lawyers with respect to non-law but official, and law-related but official, in addition to purely legal duties performed as an Army lawyer (app B).

Legal Services

Rules of Professional Conduct for Lawyers

By Order of the Secretary of the Army:

MARK A. MILLEY  
General, United States Army  
Chief of Staff

Official:



GERALD B. O'KEEFE  
Administrative Assistant to the  
Secretary of the Army

**History.** This publication is a major revision.

**Summary.** This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and of non-Department of Defense civilian lawyers appearing before Army tribunals and other proceedings governed by the Uniform Code of Military Justice or the Manual for Courts–Martial or under the supervision of one of the Senior Counsels (as defined in appendix B, Rule 1.0(s)). It establishes the Department of the Army Professional Conduct Council to provide authoritative interpretations of these rules.

**Applicability.** This regulation applies to all Judge Advocates of the Regular Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve; all other military personnel who are lawyers and are called upon to deliver legal services within the Department of the Army as a part of their duties; all civilian lawyers employed by the Department of the Army who provide legal services; all local national lawyers employed overseas by the Department of the

Army, to the extent these Rules are not inconsistent with their domestic law and professional standards; and to all non-Department of Defense civilian lawyers who practice in proceedings governed by the Uniform Code of Military Justice or the Manual for Courts–Martial or under the supervision of one of the Senior Counsels (as defined in appendix B, Rule 1.0(s)). It also applies to all other Army nonlawyer personnel, military and civilian, who perform duty in an Army, or any other, legal office. Penalties for violations of imperative rules by Army lawyers include all administrative sanctions prescribed by law and regulation. Violations by non-government lawyers may result in imposition of sanctions pursuant to Rule for Courts–Martial 109, Manual for Courts–Martial. A violation by a military lawyer would not, in and of itself, be a violation of Article 92(1), Uniform Code of Military Justice, but the conduct itself may violate a punitive article of the Code, including Article 48. Nothing in this regulation precludes referral of violations to appropriate licensing authorities.

**Proponent and exception authority.** The proponent agency of this regulation is the Office of The Judge Advocate General. Only the Secretary of the Army or the General Counsel, as his designee, may grant an exception to the provisions of this regulation that is consistent with controlling law and regulations. The granting of an exception is in the sole discretion of the Secretary or his designee, and the granting of an exception in one case is not precedent for a later request. A request for an exception will be submitted through the requesting lawyer's legal supervisory chain, except that a request by a non-Department of Defense civilian lawyer subject to Rule for

Courts–Martial 109, Manual for Courts–Martial, will be submitted through the Chief, U.S. Army Trial Defense Service, and a request by a non-Department of Defense civilian lawyer who practices in non-military justice proceedings that are under the supervision of one of the Senior Counsels will be submitted to the appropriate Senior Counsel's office.

**Army internal control process.** This regulation contains internal controls and provides an Internal Control Evaluation for use in evaluating key internal controls (see app C).

**Supplementation.** Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval from the General Counsel of the Army. Proposed supplements will be submitted to The Judge Advocate General (DAJA–PR), 2200 Army Pentagon, Washington, DC 20310–2200.

**Suggested improvements.** The proponent agency of this regulation is the Office of The Judge Advocate General (DAJA–PR). Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to The Judge Advocate General (DAJA–PR), 2200 Army Pentagon, Washington, DC 20310–2200, with a copy to the Department of the Army General Counsel, 0104 Army Pentagon, Washington, DC 20310–0104.

**Distribution.** This regulation is available in electronic media only and is intended for the Regular Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve.

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### **Glossary**

## **1. Purpose**

This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and, pursuant to Rule for Courts-Martial (RCM) 109, Manual for Courts-Martial (MCM), of non-Department of Defense civilian lawyers who practice before tribunals and other proceedings governed by the Uniform Code of Military Justice (UCMJ), the MCM, or under the supervision of The Judge Advocate General, and of all non-Department of Defense civilian lawyers who practice in proceedings that are under the supervision of one of the Senior Counsels (as defined in appendix B, Rule 1.0(s)). It also provides professional conduct advice to all other Army personnel, military and civilian, to whom these Rules apply (see para 7).

## **2. References**

See appendix A.

## **3. Explanation of abbreviations and terms**

See the glossary.

## **4. Responsibilities**

*a. Senior Counsel (see also appendix B, Rules 5.1 and 8.5).* The General Counsel of the Army; The Judge Advocate General of the Army; the Command Counsel, Army Materiel Command; and the Chief Counsel, Army Corps of Engineers, will serve as Senior Counsel for the organizations under their qualifying authority and/or jurisdiction. They will—

- (1) Issue enforcement procedures required by appendix B, Rule 10.1(a)(1).
- (2) Serve on the Department of the Army Professional Conduct Council, or appoint an appropriate designee.
- (3) Ensure general compliance with these Rules of Professional Conduct for Lawyers by personnel under their qualifying authority and/or jurisdiction.

*b. Other supervisory lawyers.* Other civilian or military supervisory lawyers shall make reasonable efforts to ensure that lawyers subject to their supervision are aware of and conform to these Rules of Professional Conduct for Lawyers. More specific aspects of supervisory responsibility are found in appendix B, Rule 5.1.

## **5. Exception**

Only the Secretary of the Army or the General Counsel, as his designee, may grant an exception to the provisions of this regulation. The granting of an exception is in the sole discretion of the Secretary or his designee, and the granting of an exception in one case is not precedent for a later request. A request for an exception will be submitted through the requesting lawyer's legal supervisory chain, except that a request by a non-government lawyer subject to RCM 109 MCM will be submitted through the Chief, U.S. Army Trial Defense Service.

## **6. Preamble: A Lawyer's Responsibilities**

*a.* An Army lawyer is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen having special responsibility for the quality of justice and legal services provided to the Department of the Army and to individual clients.

*b.* As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the law and the ethical rules of the adversary system. As negotiator, a lawyer seeks results advantageous to the client but consistent with requirements of honest dealings with others. As evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others as authorized.

*c.* In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, for example, appendix B, Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of personal business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation (see appendix B, Rule 8.4).

*d.* In all professional functions a lawyer should be competent, prompt, diligent, and honest. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client, except so far as disclosure is required or permitted by these Rules of Professional Conduct or other law or court order.

*e.* A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

*f.* As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education.

*g.* 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.

*h.* A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of their own client and justice will be served. So also, a lawyer can be sure that preserving client confidence ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

*i.* In the nature of legal practice, however, conflicting responsibilities are encountered. Mostly all difficult ethical problems arise from conflict among a lawyer's responsibilities to clients, to the law and the legal system, and to the lawyer's own interest in remaining an upright person. These Rules of Professional Conduct prescribe guidance for resolving such conflicts. Within the framework of these Rules, however, 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 these Rules. These principles include the lawyer's obligation to zealously protect and pursue a client's legitimate interests within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

*j.* Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. These Rules of Professional Conduct, when properly applied, serve to define that relationship.

## **7. Purpose of the Rules**

*a. Governance and applicability.* These Rules of Professional Conduct govern the ethical conduct of lawyers practicing under the UCMJ, MCM, the supervision of the four Senior Counsels, Section 1044, Title 10, United States Code (10 USC 1044), other laws of the United States, and regulations of the Department of the Army, including AR 27-1, AR 27-3, and AR 27-10. The definitive interpretation, implementation, and enforcement of these Rules are the exclusive province of the authorities listed in appendix B, Rule 5.1, Rule 8.5, and Rule 9.1. These Rules are not substitutes for, and do not take the place of, other rules and standards governing Department of the Army personnel, such as DOD 5500.7-R, Executive Order 10631, the UCMJ, and the general precepts of ethical conduct to which all Department of the Army service members and employees are expected to adhere. Similarly, action taken to enforce these Rules is not supplanted or barred by, and does not supplant or bar, even if the underlying misconduct is the same, other appropriate punitive, disciplinary, or administrative action by other applicable authority.

(1) These Rules apply to:

(a) All Regular Army Judge Advocates with military occupational specialty (MOS) 27A, regardless of whether serving in a legal MOS billet.

(b) All U.S. Army Reserve and Army National Guard/Army National Guard of the United States Judge Advocates, regardless of whether serving in a legal MOS billet and not just when performing duty in a Title 10 or Title 32 status.

(c) All other military personnel who are lawyers and are called upon to deliver legal services within the Department of the Army as a part of their duties.

(d) All civil service and contracted civilian lawyers who practice law or perform legal services under the cognizance and supervision of one or more of the four Senior Counsels. This includes civilian lawyers employed by the Department of the Army as executive agents for combatant commands, and for whom one of the four Senior Counsels serves as the Qualifying Authority under references AR 690-200 and AR 27-1, and appendix B, Rules 8.5 and 10.1.

(e) All other lawyers appointed by The Judge Advocate General to serve in billets or to provide legal services normally provided by Army Judge Advocates. This policy applies to officer and enlisted Reservists or Guardsmen, active duty personnel, and any other personnel who are licensed to practice law by any Federal or State authority but who are not members of the Judge Advocate General's Corps or Judge Advocate Legal Service or who do not hold the 27A, 270A, or 27D MOS designation in the Army.

(f) All qualified volunteer lawyers who have been certified as legal assistance lawyers by The Judge Advocate General or his/her designee, pursuant to reference AR 27–3.

(g) All non-Department of Defense civilian lawyers representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(h) All non-Department of Defense civilian lawyers who practice in proceedings that are under the supervision of one of the Senior Counsels.

(i) All local national lawyers employed overseas by the Department of the Army, to the extent these Rules are not inconsistent with their domestic law and professional standards.

(j) All Army nonlawyer personnel, military and civilian, who perform duty in an Army, or any other, legal office, as these Rules define the type of ethical conduct that the public and military community have a right to expect from Department of the Army legal personnel. Such nonlawyer legal personnel include, but are not limited to: legal administrators (MOS 270A), paralegal Soldiers (MOS 27D), court reporters, legal interns, and civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions.

(2) Professional or personal misconduct unrelated to an Army lawyer’s official activities may be reviewed under the procedures established in AR 27–1 or pursuant to appendix B, Rule 10.1, and may provide the basis for decisions by one or more of the four Senior Counsels regarding the lawyer’s continued qualification to provide legal services in Department of the Army matters.

*b. Army unique practice.* These Army Rules of Professional Conduct for Lawyers are adapted directly from the American Bar Association (ABA) Model Rules of Professional Conduct, with important contributions from the Navy Rules of Professional Conduct and the Air Force Rules of Professional Conduct.

(1) These Army Rules follow the paragraph numbering of the ABA Model Rules, but not necessarily the subparagraph numbering, with the exception of appendix B, Rule 1.0 due to the need to add additional terms unique to Army legal practice. Changes to some of the ABA Model Rules and associated comments were required to ensure that these Rules meet the needs of Army practice. Where an ABA Model Rule has been altered, the Army Rule indicates that it was modified. Where new material unique to Army practice is added and it has no counterpart in the ABA Model Rule, the new material is labeled as “augmented.” The term “substituted” indicates that a Rule has been entirely replaced. Some ABA Model Rules have been omitted as inapplicable to Army practice (for example, appendix B, Rule 7.2), while some Army Rules have no counterpart in the ABA Model Rules, such as appendix B, Rule 9.1. Simple terminology changes made to conform an ABA Model Rule to Army practice, without substantive changes, are not annotated as being modified.

(2) Although the comments to the ABA Model Rules have been incorporated in large part into the Army comments to the Rules, they are similarly modified, substituted, omitted, or added as new due to the unique needs and demands of Army practice, the need for guidance tailored to Army practice, differences in approach to the resolution of specific ethical issues for Army lawyers, or the fact that not all of the ABA Comments will be helpful. None of the Army Comments are labelled as modified, new, substituted, or omitted.

*c. Rules of reason.* 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.

(1) Some of these Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline.

(2) Others, generally cast in the term “may,” are permissive and define areas under these Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.

(3) Other Rules define the nature of relationships between the lawyer and others. These Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term “should.” Comments do not add obligations to these Rules but provide guidance for practicing in compliance with these Rules.

*d. Compliance.* These Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The comments are sometimes used to alert lawyers to their responsibilities under such other law.

(1) Compliance with these Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and, finally, when necessary, upon enforcement through disciplinary proceedings.

(2) These Rules do not, however, 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.

*e. Client-Lawyer relationships.*

(1) The executive agency to which the Army lawyer is assigned (Department of the Army in most cases) is the client served by the Army lawyer unless detailed or assigned to represent another client (for example, United States Central Command) by competent authority. Specific guidance is provided in appendix B, comment to Rule 1.13.

(2) Army lawyers will not establish client-lawyer relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority. Wrongfully establishing a client-lawyer relationship may subject the lawyer to discipline administered pursuant to appendix B, Rule 10.1.

(3) Employment of a non-government lawyer by an individual client does not alter the professional responsibilities of an Army lawyer detailed or otherwise assigned by competent authority to represent that client.

*f. Professional conduct discipline.* All lawyers subject to these Rules are subject to professional disciplinary action for violation of these Rules. Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.

(1) Violations may be addressed administratively, or through action to suspend practice or withdraw certification, qualification, or designation.

(2) These Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete information. Moreover, these Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willingness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

(3) Inquiries into allegations of professional misconduct will normally be held in abeyance until any related criminal or administrative investigation or criminal or administrative proceeding is complete. However, a pending investigation or proceeding does not bar the initiation or completion of a professional misconduct investigation stemming from the same or related conduct or prevent the appropriate Senior Counsel from imposing professional disciplinary sanctions as provided for pursuant to appendix B, Rule 10.1.

(4) Professional conduct disciplinary action on allegations of professional or personal misconduct undertaken per these Rules does not prevent other federal, state, or local bar associations or other lawyer licensing authorities from taking professional disciplinary or other administrative action for the same or similar conduct.

(5) Violation of a Rule should not itself give rise to a private cause of action against a lawyer or the Army nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through the disciplinary authority of the Senior Counsel concerned or of the lawyer's technical chain of legal supervision. They are not designed to be a basis for civil liability. Furthermore, the purpose of these Rules can be subverted when invoked by opposing parties or complainants as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in these Rules should be deemed to augment any substantive legal duty of lawyers or the extra disciplinary consequences of violating such duty.

*g. Privilege.* Moreover, these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under these Rules is required or permitted to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be compelled only in accordance with recognized exceptions to the attorney-client and work product privileges. The lawyer's exercise of discretion not to disclose information under appendix B, Rule 1.6(b), should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

*h. Notice of appearance.* All non-Department of Defense civilian lawyers must file a notice of appearance before making any appearance representing an individual in a matter for which a Senior Counsel is charged with supervising the provision of legal services. This notice of appearance must (1) state the jurisdiction(s) in which the lawyer is licensed and eligible to practice law, (2) certify that the lawyer is in good standing with at least one of those jurisdictions, (3) certify that the lawyer is not subject to any order disbaring, suspending, or otherwise restricting them in the practice of law, and (4) state that he or she understands that he or she is subject to the provisions of these Rules and the professional disciplinary action process prescribed by the applicable Senior Counsel. Each notice of appearance must be maintained in the official record of the proceeding.

*i. Reporting requirements.* Army lawyers will report promptly to their Senior Counsel, or designee (the Professional Responsibility Branch, Office of The Judge Advocate General, for Judge Advocates), upon learning or being notified that he or she is being investigated by any of his or her licensing authorities or federal, state, or local bar, under circumstances that could result in the lawyer receiving disciplinary or administrative action as a lawyer or judge, and upon receiving disciplinary or administrative action as a lawyer or judge by his or her licensing authority or federal, state, or local bar, or upon other disposition or case closure. Failure to report such discipline or administrative action may subject the Army lawyer to discipline administered by the appropriate Senior Counsel.

*j. Comments to Rules.* This and the preceding paragraphs provide general orientation. The comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The comments are intended as guides to interpretation, but the text of each Rule is authoritative.

## **Appendix A**

### **References**

#### **Section I**

##### **Required Publications**

###### **AR 27–1**

Judge Advocate Legal Services (Cited in para 7a.)

###### **Manual for Courts–Martial**

(Cited in title page.) (Available at <http://jsc.defense.gov/>.)

###### **Uniform Code of Military Justice**

(Cited in title page.) (Available at <http://www.ucmj.us/>.)

#### **Section II**

##### **Related Publications**

A related publication is a source of additional information. The user does not have to read it to understand this publication. USC and CFR material is available at <https://www.gpo.gov/fdsys/>.

###### **American Bar Association Model Rules of Professional Conduct**

(Available at [https://www.americanbar.org/groups/professional\\_responsibility/publications.html](https://www.americanbar.org/groups/professional_responsibility/publications.html))

###### **AR 11–2**

Managers' Internal Control Program

###### **AR 27–3**

The Army Legal Assistance Program

###### **AR 27–10**

Military Justice

###### **AR 690–200**

General Personnel Provisions

###### **DOD 5500.7–R**

Joint Ethics Regulation (JER) (Available at <http://dtic.mil/whs/directives/>)

###### **Executive Order 10631**

Code of Conduct for members of the Armed Forces of the United States (Available at <https://www.archives.gov/federal-register/codification/executive-order/10631.html>)

###### **5 CFR 2635.702**

Use of public office for private gain

###### **5 USC 552**

Freedom of Information Act

###### **5 USC 552a**

Records maintained on individuals (popularly known as the “Privacy Act”)

###### **10 USC 827**

Art. 27. Detail of trial counsel and defense counsel

###### **10 USC 1044**

Legal Assistance

###### **10 USC 1054**

Defense of certain suits arising out of legal malpractice

###### **10 USC 3037**

Judge Advocate General, Deputy Judge Advocate General, and general officers of Judge Advocate General's Corps: appointment; duties

**10 USC 3072**

Judge Advocate General's Corps

**18 USC 207**

Restrictions on former officers, employees, and elected officials of the executive and legislative branches

**18 USC 208**

Acts affecting a personal financial interest

**18 USC 209**

Salary of Government officials and employees payable only by United States

**28 USC 1346**

United States as defendant

**28 USC 2672**

Administrative adjustment of claims

**Section III**

**Prescribed Forms**

This section contains no entries.

**Section IV**

**Referenced Forms**

Unless otherwise indicated, DA forms are available on the Army Publishing Directorate website (<http://armypubs.army.mil/>).

**DA Form 11-2**

Internal Control Evaluation Certification

**DA Form 2028**

Recommended Changes to Publications and Blank Forms

## **Appendix B**

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- 10.1 Enforcement [not in ABA]
- 10.2 [Not used]

### Rule 1.0 Terminology

(a) [Augmented] “Army lawyer” denotes any lawyer, whether civilian or military, while employed by the Department of the Army to provide legal services. This includes lawyers detailed or assigned as defense counsel for individual clients and lawyers detailed or assigned to provide legal assistance to individual clients. In addition, it includes any Army Reserve Judge Advocate or Judge Advocate in the Army National Guard/Army National Guard of the United States, regardless of duty status. It also includes any lawyer under contract to the Department of the Army to provide legal advice or legal services within the scope of that contract. The term “lawyer” is synonymous with “attorney at law.”

(b) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed

consent. See paragraph (h) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(d) [Augmented] “Consult” or “consultation” denotes a communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(f) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(g) [Augmented] “General Counsel” as used in these Rules denotes the General Counsel of the U.S. Army.

(h) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(i) [Augmented] “Judge Advocate” denotes a commissioned officer in the Judge Advocate General’s Corps. See 10 USC 3072 and AR 27–1.

(j) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(k) [Augmented] “Law” as used in these Rules denotes statutes, case law, judicial precedents, regulations, directives, instructions, and orders.

(l) [Augmented] “Other adjudicative officer” denotes a person detailed to serve as a member (including a sole member) of a board or court of inquiry convened to determine facts and make recommendations.

(m) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(n) [Augmented] “Professional disciplinary proceeding” denotes all types of administrative proceedings (including investigations and inquiries) convened in accordance with applicable law to inquire into allegations of violations of these Rules of Professional Conduct, and those proceedings convened pursuant to the disciplinary body.

(o) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(p) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(q) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(r) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(s) [Modified] “Senior Counsel” denotes the General Counsel of the U.S. Army, The Judge Advocate General of the U.S. Army, the Command Counsel of the U.S. Army Materiel Command, and the Chief Counsel of the U.S. Army Corps of Engineers.

(t) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(u) [Augmented] “Supervisory lawyer” denotes a lawyer within an office or organization with authority over or responsibility for the direction, coordination, evaluation, or assignment of responsibilities and work of subordinate lawyers and nonlawyer assistants (for example, paralegals).

(v) [Augmented] “The Judge Advocate General” denotes The Judge Advocate General of the U.S. Army.

(w) [Augmented] “Tribunal” denotes a court, an Article 32, Uniform Code of Military Justice investigation, administrative separation boards or hearings, boards of inquiry, disability evaluation proceedings, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(x) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

**COMMENT:**  
**Confirmed in Writing**

(1) Confirmed in Writing. If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

**Firm**

(2) Whether two or more lawyers constitute a firm within paragraph (e) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

(3) With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

(4) Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

**Fraud**

(5) When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

**Informed Consent**

(6) Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (for example, a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, for example, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

(7) Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (x) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, for example, Rules 1.8(a) and (g). For a definition of "signed," see paragraph (x).

## **Screened**

(8) This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

(9) The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

(10) In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

## **CLIENT-LAWYER RELATIONSHIP**

### **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

#### **COMMENT:**

#### **Legal Knowledge and Skill**

(1) In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or consult with, a lawyer of established competence in the field in question. In most instances, the required proficiency is that generally afforded to clients by other lawyers in similar matters. Expertise in a particular field of law may be required in some circumstances.

(2) Initial determinations as to competence of an Army lawyer for a particular assignment will be made by supervisory lawyers prior to case or issue assignments; however, once assigned, Army lawyers may consult with supervisory lawyers concerning competence in a particular case or issue. See Rules 5.1 and 5.2.

(3) A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study or consultation with a lawyer of established competence in the field in question.

(4) A lawyer may become involved in representing a client whose needs exceed either the lawyer's competence or authority to act in the client's behalf. In such a situation, the lawyer should refer the matter to another lawyer who has the requisite competence or authority to meet the client's needs. For civilian lawyers practicing before tribunals conducted pursuant to

the Manual for Courts-Martial or the Uniform Code of Military Justice, competent representation may also be provided through the association of a lawyer of established competence in the field in question.

(5) A lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. However, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action can jeopardize the client's interest.

### **Thoroughness and Preparation**

(6) Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and an individual client regarding the scope of the representation (for example, in legal assistance) may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

### **Maintaining Competence**

(7) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

(8) In National Security cases or cases in which a review of the evidence would require reviewing classified information as defined in Military Rule of Evidence (MRE) 505(b)(1), competence includes having the appropriate security clearance to review the evidence. In such cases, a lawyer shall apply for the appropriate security clearance immediately upon taking on such representation.

### **CROSS REFERENCES:**

Rule 1.0(o)	“Reasonably”
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.3	Diligence
Rule 1.13	Department of the Army as Client
Rule 1.16	Declining or Terminating Representation
Rule 2.1	Advisor
Rule 3.1	Meritorious Claims and Contentions
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer

### **Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer**

(a) [Modified] Formation of client-lawyer relationships by Army lawyers with, and representation of, clients (whether the Army as client or individual clients) is permissible only when the lawyer is authorized to do so by competent authority. Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) [Modified] A lawyer may limit the scope of the representation if the client consents after consultation, or as required by law, regulation, or policy and communicated to the client. Generally, the subject-matter scope of an Army lawyer's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A lawyer shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the lawyer towards the client.

(d) [Modified] A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client

and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

**COMMENT:**

**Establishment of Representation**

(1) Formation of client-lawyer relationships and representation of clients by Army lawyers is permissible only when authorized by competent authority. For example, the Secretary of the Army or The Judge Advocate General may prescribe who is eligible for legal assistance, limit the scope of consultation when an individual is deciding whether to accept non-judicial punishment, or limit the scope of representation at a hearing to review pretrial confinement. Army lawyers must be careful not to enter, errantly or purposefully, into an unauthorized client-lawyer relationship. This is required so that lawyer resources can be adequately managed as dictated by the needs of the Department of the Army, and to serve individual clients better. Any communications that would require a person to reveal confidential information in order for an Army lawyer properly to represent or advise that person, consistent with these Rules, would involve the formation of a client-lawyer relationship and, absent proper authorization, must be avoided.

**Allocation of Authority between Client and Lawyer**

(2) Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives, and the lawyer may take such action as is impliedly authorized to carry out the representation. A lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical, legal, and tactical matters, such as which witnesses to call, whether and how to conduct cross-examination, which court members to challenge, and what motions to make. Except where precluded by Rule 4.4, the lawyer should defer to the client regarding such questions as any expense to be incurred in the representation, and concern for third persons who might be adversely affected by decisions resulting from the representation.

(3) At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, evoke such authority at any time.

(4) In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

(5) If a lawyer's representation is limited to a specific matter, the relationship terminates when the matter has been either concluded or resolved. Doubt about whether a client-lawyer relationship continues to exist should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

**Agreements Limiting Scope of Representation**

(6) The objectives or scope of services to be provided by a lawyer may be limited by agreement with the client or by the law, regulations, or policy terms governing the conditions under which the lawyer's services are made available to the client. When the objectives or scope of services provided by a lawyer are limited, the lawyer should ensure at the earliest opportunity that the client is aware of such limitations. Formation of lawyer-client relationships and representation of clients by Army lawyers is permissible only when authorized by competent authority. Thus, notwithstanding Rule 1.2(a) and (c), Army lawyers are subject to directions from officials at higher levels within the Department of the Army. When acting pursuant to properly delegated authority, these officials may authorize or require some variance in the scope of representation otherwise agreed upon between the Army lawyer and a lower level official. For example, the Secretary of the Army or The Judge Advocate General may: Prescribe who is entitled to legal assistance; limit the scope of consultation when an individual is deciding whether to accept nonjudicial punishment; or limit the scope of representation at a hearing to review pretrial confinement. When the objectives or scope of services provided by a lawyer are limited by law, the lawyer should ensure at the earliest opportunity that the client is aware of such limitations.

(7) If a lawyer is uncertain of the scope of services permitted by the law governing the conditions under which the lawyer's services are made available to a client, the lawyer should consult with the lawyer's supervisory lawyer concerning the matter. See Rule 5.2.

(8) An agreement concerning the scope of representation must accord with these Rules of Professional Conduct and other law and regulations. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to conclude a matter that the lawyer might wish to continue.

### **Criminal, Fraudulent, and Prohibited Transactions**

(9) Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. Furthermore, an Army lawyer, and any lawyer representing an individual client in any matter or proceeding governed by these Rules, is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly counsel or assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

(10) When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where required or permitted by Rule 1.6 or Rule 3.3. However, the lawyer is required to avoid furthering the wrongdoing, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper, but then discovers is criminal or fraudulent. Seeking to withdraw from the representation, therefore, may be appropriate.

(11) Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may include a course of action contrary to the terms of the statute or regulation or of the interpretation placed upon it by governmental authorities.

### **CROSS REFERENCES:**

Rule 1.0(f)	“Fraudulent”
Rule 1.0(h)	“Informed Consent”
Rule 1.0(j)	“Knows”
Rule 1.0(o)	“Reasonable”
Rule 1.1	Competence
Rule 1.6	Confidentiality of Information
Rule 1.13	Department of the Army as Client
Rule 1.14	Client with Diminished Capacity
Rule 2.1	Advisor
Rule 2.3	Evaluation for Use by Third Persons
Rule 3.3	Candor Toward the Tribunal
Rule 4.4	Respect for Rights of Third Persons
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer

### **Rule 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

### **COMMENT:**

(1) A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. Although a lawyer may be bound by court precedent to pursue certain matters on behalf of a client, see, for example, *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), a lawyer has professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4(b). A lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

(2) A lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled competently. See Rule 5.1.

(3) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

(4) Unless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law, regulation, or policy, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter, the relationship terminates when the matter has been either concluded or resolved. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. A lawyer who has handled a judicial or administrative proceeding that produced a result adverse to the client should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

#### **CROSS REFERENCES:**

Rule 1.0(o)	“Reasonable”
Rule 1.1	Competence
Rule 1.4	Communication
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.16	Declining or Terminating Representation
Rule 3.1	Meritorious Claims and Contentions
Rule 3.2	Expediting Litigation
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 4.1	Truthfulness of Statements to Others
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers

### **Rule 1.4 Communication**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in rule 1.0(h), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests from the client for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

#### **COMMENT:**

- (1) Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

#### **Communicating with Client**

(2) If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered pretrial agreement in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer. See Rule 1.2(a).

(3) Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to

act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

(4) A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

## **Explaining Matters**

(5) The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating a pretrial agreement on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from the government, and take other reasonable steps that permit the client to make a decision regarding the feasibility of further negotiation with the government. A lawyer representing the government who receives from the accused an offer for a pretrial agreement must communicate that offer, and should provide advice as to that offer, to the convening authority.

(6) Adequacy of communication depends in part on the kind of advice or assistance involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(h).

(7) Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is the Department of the Army, it is often impossible or inappropriate to inform every one of its authorized officials about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the Department of the Army. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigencies may limit the opportunity for consultation and also require a lawyer to act for a client without prior consultation.

## **Withholding Information**

(8) In some circumstances, a lawyer may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority. In other circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person, or where disclosure is required by Rule 3.8. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

### **CROSS REFERENCES:**

Rule 1.0(h)	"Informed Consent"
Rule 1.0(j)	"Knows"
Rule 1.0(o)	"Reasonably"
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.3	Diligence
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients

Rule 1.13	Department of the Army as Client
Rule 2.1	Advisor
Rule 3.2	Expediting Litigation
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness of Statements to Others

## Rule 1.5 Fees

(a) [Modified] Fees under this Rule depend on the lawyer's government or non-government status.

(1) [Augmented] An Army lawyer shall not accept:

(i) any salary, fee, compensation, or other payments or benefits, directly or indirectly, other than government compensation, for services provided in the course of the Army lawyer's official duties or employment.

(ii) any salary or other payments as compensation for legal services rendered by that Army lawyer in a private capacity, to a client who is eligible for assistance under the Department of the Army Legal Assistance Program, unless so authorized by The Judge Advocate General. This Rule does not apply to Army Reserve or Army National Guard lawyers not serving on extended active duty.

(iii) any fee, compensation, or other payments or benefits, actual or constructive, directly or indirectly, for making a referral of a client.

(2) [Augmented] An Army lawyer who has initially represented or interviewed a client or prospective client concerning a matter as part of the lawyer's official Army duties shall not accept any salary, fee, compensation, or other payments or benefits, directly or indirectly, as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity. However, an Army Reserve or Army National Guard lawyer, whether or not serving on extended active duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the lawyer's official Army duties may accept a salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity if specifically authorized to do so by The Judge Advocate General.

(3) [Modified] Non-government civilian lawyers representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(i) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(ii) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(iii) the fee customarily charged in the locality for similar legal services;

(iv) the amount involved and the results obtained;

(v) the time limitations imposed by the client or by the circumstances;

(vi) the nature and length of the professional relationship with the client;

(vii) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(viii) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing an accused in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
  - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
  - (3) the total fee is reasonable.

**COMMENT:**

- (1) This Rule is unusual in that it applies substantially to lawyers other than those employed by the Department of the Army.

**Army Lawyers**

(2) Army lawyers are prohibited by statute (see 18 USC 209) and regulations from accepting any salary or contribution to or supplementation of salary, as compensation for services as an officer or employee of the Department of the Army from any source other than the government of the United States. They may neither request nor accept any gratuity, salary, or other compensation from any source as payment for performance of official Army duties or incident thereto. For example, a legal assistance lawyer is prohibited from accepting a gift or loan from a client tendered as a result of assistance rendered. This prohibition extends to the Army lawyer using his or her position to seek or attain a benefit, even if initiated by the client. For example, a legal assistance lawyer may not draft himself or herself into a will as a beneficiary or as a person, such as an executor, to be later compensated.

(3) Additionally, all Army lawyers are prohibited from accepting any compensation or fee for making a referral of a client in the course of their official duties.

(4) This Rule generally precludes an Army lawyer (including a Reserve or National Guard lawyer) from referring a client originally seen in a legal assistance capacity to himself or herself or to the firm in which the lawyer works in a private capacity or has any interest, unless no fee or other compensation is charged. An Army lawyer (including a Reserve or National Guard officer) is prohibited from using an official position to solicit or obtain clients for a private practice. See Rule 1.8. However, this Rule recognizes that there may be instances in which a Reserve or National Guard lawyer sees an eligible client on an issue within the legal assistance program, but full representation would require services beyond the authorized scope of an Army lawyer's legal assistance role, for example, in-court representation. If the client makes a knowing and intelligent request for representation by that Reserve or National Guard lawyer in his or her private capacity, the lawyer may undertake representation of that client for a fee following specific approval of the representation by The Judge Advocate General.

(5) Army lawyers are prohibited from deriving financial benefit based upon the provision of legal services, in a private capacity, to members of the Army and their dependent Family Members unless so authorized by The Judge Advocate General.

(6) Reserve and National Guard Judge Advocates serving on extended active duty are bound by the same rules as their Regular Army counterparts in this regard. Reserve or National Guard Judge Advocates not serving on extended active duty are necessarily treated differently but are prohibited from accepting fees from members and dependent Family Members for matters in which the member or dependent Family Member was seen in the Reserve or National Guard Judge Advocate's official capacity. This Rule does not preclude the Reserve or National Guard Judge Advocate from representing military members or dependent Family Members in a private capacity concerning new matters, even though the relationship might have been first established in a military legal assistance capacity. For example, a Reserve Judge Advocate who sees a legal assistance client during a drill period regarding a divorce matter is prohibited from then representing that client in the divorce in a private capacity for a fee. If there is any question of whether the case concerns the same matter, the presumption should be that it is the same matter. A will and divorce may be two separate matters; however, they also may be part of the same general subject matter if the will is being drafted in conjunction with the divorce. For situations described in paragraph (a), The Judge Advocate General may grant exceptions.

(7) Rule 1.5 also applies to private civilian lawyers representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings. This Rule as it applies to private civilian lawyers is not so much to allow The Judge Advocate General to regulate fee arrangements between private civilian lawyers and their clients as it is to provide guidance to Army lawyers practicing with such lawyers and to supervisory Army lawyers who may be asked to inquire into alleged fee irregularities. Absent this Rule, such Army lawyers have no readily available standard with which to compare allegedly questionable conduct of a private civilian

lawyer. Rule 1.5 is the same as the ABA Model Rule of Professional Conduct 1.5 and thus reflects generally accepted professional standards.

### **Reasonableness of Fee and Expenses**

(8) A lawyer's fee must be reasonable under the circumstances. The factors specified in this Rule are not exclusive. Nor will each factor be relevant in each instance. This Rule also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

### **Basis or Rate of Fee**

(9) When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to the fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

(10) Contingent fees, like any other fees, are subject to the reasonableness standard established in this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law may also apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

### **Terms of Payment**

(11) A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

(12) An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

### **Prohibited Contingent Fees**

(13) This Rule prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

### **Division of Fee**

(14) A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. This Rule permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each

lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (h) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

(15) This Rule does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

### **Disputes over Fees**

(16) If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even, when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class, or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

### **CROSS REFERENCES:**

Rule 1.0(c) "Confirmed in Writing"

Rule 1.0(e) "Firm"

Rule 1.0(x) "Writing" and "Written" and "Signed"

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.16 Declining or Terminating Representation

### **Rule 1.6 Confidentiality of Information**

(a) [Modified] A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b)(1) or permitted by paragraph (b)(2).

(b) [Modified and Augmented] A lawyer:

(1) shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(i) to prevent reasonably certain death or substantial bodily harm; or

(ii) [Augmented] to prevent the client from committing a criminal act that the lawyer believes is likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(2) may reveal such information to the extent the lawyer reasonably believes necessary:

(i) to secure legal advice about the lawyer's compliance with these Rules;

(ii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(iii) to comply with other law or a court order;

(iv) [Modified] to detect and resolve conflicts of interest arising from the Army lawyer's change of duty position, assignment, or employment within the Army, or arising from the non-government lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(v) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or

(vi) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**COMMENT:**

(1) This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

(2) The identification of the client, for purposes of the Army lawyer, is important to the application of this Rule. Generally, the Department of the Army is the Army lawyer's client. Communications by an Army lawyer both inside and outside of the Army may or may not violate this Rule. An Army lawyer's duty under this Rule is affected by statutes, regulations, and other lawful directives. There are circumstances in which an Army lawyer may be assigned to provide an individual with counsel or representation in which it is clear that an obligation of confidentiality adheres to that individual and not the Department of the Army. Examples include Army lawyers who provide defense counsel or legal assistance services to individuals. It would also include Army lawyers who have been approved by their Senior Counsel or the Senior Counsel's designee to provide legal service to an individual with regard to a specific legal matter.

(3) A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(h) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(4) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. The client holds the attorney-client privilege and the right to client-lawyer confidentiality. A lawyer may not disclose such information except as authorized or required by these Rules of Professional Conduct or other lawful order, regulation, or law.

(5) Rule 1.6(a) prohibits a lawyer from disclosing any "information relating to the representation of a client" in the absence of implied or express consent or an applicable exception specified in the Rule. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

(6) The requirement of maintaining confidentiality of information relating to representation applies to Army lawyers representing the Department of the Army who may disagree with the policy goals that their representation is designed to advance. See Rule 1.13.

**Authorized Disclosure**

(7) Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. To the extent a lawyer reasonably believes necessary to facilitate the representation of a client, a lawyer may disclose information relating to a client to other lawyers in the same office, to those lawyers who are assigned to exercise supervision and/or support functions (either generally or specific to a particular client), and to paralegals and other support staff personnel subject to the direction and control of the lawyer, unless the client has instructed that particular information be confined to specified lawyers, or unless otherwise prohibited by these Rules of Professional Conduct or other lawful order, regulation, or statute. Where the client is the Department of the Army, the Army lawyer may be in doubt whether contemplated conduct will actually be carried out. Where necessary to

guide conduct in connection with this Rule, the lawyer may make inquiry within the Department of the Army as indicated in Rule 1.13.

(8) Where the client is the Department of the Army, the Army, acting through its authorized officials, has attorney-client privilege and client-lawyer confidentiality with its lawyers. See Rule 1.13 (Department of the Army as Client). The attorney-client privilege and client-lawyer confidentiality encourage full and free communication between a lawyer and the Army as the client, acting through its authorized officials, by requiring the lawyer to keep in confidence information relating to the representation. In order to realize the Army's legal rights and achieve compliance with laws and regulations, authorized officials must have the support of their lawyers, and must be free to discuss with and confide in their Army lawyers any aspect of official business fully, frankly, and with an assurance of confidentiality, except as to those higher authorities who have a legitimate right to disclosure as identified in Comment (9).

(9) Where the client is the Department of the Army, Army lawyers must obviously disclose a great deal of information relating to the representation of the Army simply to do their jobs. These disclosures are permissible when the client has expressly or impliedly authorized them. Like Rule 1.2(a), which allows a lawyer to "take such action on behalf of the client as is impliedly authorized to carry out the representation," paragraph (a) of this Rule specifically permits disclosure of client information when "impliedly authorized . . . to carry out the representation." Implied authority depends upon the particular circumstances of the representation and applies only when the lawyer reasonably perceives that disclosure is necessary to advance the representation of the Army. Where the client is the Department of the Army, not all Army officials have a right to access attorney-client privileged and/or client-lawyer confidential information merely because of their status as Army officials. Before an Army lawyer can disclose client information under implied authority, the lawyer must reasonably perceive that the Army official who seeks the information has an official need to know about the information sought. As general guidance, if an Army official's duties or responsibilities do not extend to the particular matter in which the lawyer is representing the Army, the Army official has no official need to know the client information. Thus, it would not be reasonable for the lawyer to believe there is implied authority to disclose the information to that particular Army official. Stated another way, this official need-to-know limitation permits the lawyer, in order to advance the lawyer's representation of the Army, to disclose client-privileged and client-confidential information only to Army officials who reasonably need to know the information in order to act for the organization in the matter. This official need to know concept properly extends to Army officials who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on the legal advice. This concept also extends to Army officials whose general management and supervisory responsibilities include wide areas of organizational activities, and to lower-echelon Army officials whose area of activity is relevant to the legal advice or service rendered. Other Army officials to whom this concept extends specifically include an appropriate Army lawyer in the lawyer's legal technical or legal supervisory chain, up to and including the Office of the General Counsel of the Army; the Office of The Judge Advocate General of the Army; the Office of the Command Counsel, Army Materiel Command; and the Office of the Chief Counsel, Army Corps of Engineers; an appropriate official in the organizational or command chain above the authorized official involved in the particular matter to which the client-privileged and client-confidential information pertains; and any Army official who has been directed by the Secretary of the Army or his designee, whether specifically or by statute or regulation, to investigate, inquire into, audit, or otherwise review the particular matter to which the client-privileged and client-confidential information pertains. In addition to disclosures under implied authority, an Army lawyer can also disclose client information when expressly authorized to do so by an appropriate authorized official of the Army. Express authority to disclose client information is not the same thing as waiver of privilege; see Comments (14) through (15) below.

(10) Where the client is the Department of the Army, an Army lawyer may be required to take steps to assure that attorney-client privileged and/or client-lawyer confidential information will be disseminated only to and among Army officials who have an official need to know to prevent unlawful command influence or a violation of 10 USC 3037(e), which states no officer or employee of the Department of Defense may interfere with - (1) the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army or the Chief of Staff of the Army; or (2) the ability of Judge Advocates of the Army assigned or attached to, or performing duty with, military units to give independent legal advice to commanders. Therefore, as a general rule, legal advice to commanders on military justice matters should ordinarily not be released by a lawyer under implied authority to any Army official other than those officials involved as participants in the particular military justice matter. For example, if a Soldier who received an Article 15 under the UCMJ files an Inspector General complaint against the commander who imposed the Article 15, and the Inspector General requests access to the legal advice provided to the commander, the request should ordinarily be denied.

(11) An Army lawyer, whether representing an individual client or the Department of the Army as client, who does not perceive that a requested disclosure of client information is reasonably necessary to facilitate the representation of his or her client must decline to disclose the information under implied authority. For example, a Trial Counsel who provided written legal advice to a court-martial convening authority concerning the merits of charges against a Soldier must decline a request from the Soldier's Trial Defense Counsel to release that client information if the Trial Counsel does not perceive

that the requested disclosure is reasonably necessary to facilitate his representation of the Army acting through its authorized official (the court-martial convening authority). An Army lawyer who does not perceive that a requested disclosure of client information is reasonably necessary to facilitate the representation of his or her client may, prior to declining to disclose the information under implied authority, seek guidance from and consult with senior Army lawyers at the same or higher levels of command and, when the Army is the client, from the Army's authorized official who received the legal advice. Using the same example immediately above, the Trial Counsel could seek guidance from and consult with his or her Chief of Military Justice, Staff Judge Advocate, and higher up the legal technical chain, concerning the Trial Counsel's implied authority in this particular circumstance. In addition to or instead of seeking guidance from the legal technical chain, the Trial Counsel could discuss with the Army's authorized official whether the requested disclosure is reasonably necessary to facilitate the Trial Counsel's representation of the Army.

(12) Where the client is the Department of the Army, an Army lawyer who perceives he or she is impliedly authorized to make disclosures of attorney-client privileged and/or client-lawyer confidential information in order to carry out the representation of the Army should ordinarily first coordinate with his or her supervisory lawyer or other senior Army lawyers at the same or higher levels of command, to include, if necessary or appropriate, the Office of the General Counsel of the Army; the Office of The Judge Advocate General of the Army; the Office of the Command Counsel, Army Materiel Command; and the Office of the Chief Counsel, Army Corps of Engineers. For example, the Chief of the Administrative Law office in an installation or command Staff Judge Advocate Office should ordinarily first coordinate with the Staff Judge Advocate before releasing client information under implied authority. Similarly, a civilian attorney advisor in the Army Materiel Command or Army Corps of Engineers should ordinarily first coordinate with his or her supervisory lawyer or other senior lawyers at the same or higher levels of command before releasing client information under implied authority. Disclosures that involve client information that is noteworthy, sensitive for other reasons, or implicates matters of Armywide interest, should definitely be coordinated with senior Army lawyers at the same or higher levels of command, to include, if necessary or appropriate, the Office of the General Counsel of the Army; the Office of The Judge Advocate General of the Army; the Office of the Command Counsel, Army Materiel Command; and the Office of the Chief Counsel, Army Corps of Engineers, before release under implied authority. In addition, the Army lawyer should instruct any Army official who receives such disclosures that further dissemination of the disclosed client information is prohibited. There may be circumstances where information within legal advice could be appropriately sanitized and released as an Information Paper for use by others who would not have an official need to know the actual legal advice.

(13) Where the client is the Department of the Army, neither an Army lawyer nor an authorized official of the Army may disclose attorney-client privileged and/or client-lawyer confidential information to anyone outside the Army without the informed consent of the appropriate Army official. This prohibition applies regardless of any argument presented by the individual outside of the Army. Requests for attorney-client privileged and/or client-lawyer confidential information submitted under the provisions of the Freedom of Information Act (see 5 USC 552) and the Privacy Act (see 5 USC 552a) must be analyzed and processed under the provisions of this Rule and Department of Defense and Army regulations governing the release of official information pursuant to those statutes. Discovery requests in civil or military litigation for attorney-client privileged and/or client-lawyer confidential information must be analyzed and processed under the provisions of this Rule, Department of Defense and Army regulations governing the release of official information in litigation, and other applicable law and court orders. All requests for attorney-client privileged and/or client-lawyer confidential information from members of Congress or Congressional committees must be analyzed and processed under the provisions of this Rule, Department of Defense and Army regulations governing the release of official information to the Congress or members of Congress, and other applicable law.

### **Invoking and Waiving the Privilege of the Department of the Army as Client**

(14) Rule 1.6(a) prohibits a lawyer from disclosing any "information relating to the representation of a client" in the absence of implied or express consent or an applicable exception specified in the Rule. See Comment (5). Express and implied authority to disclose client information is different from a waiver of the attorney-client privilege or client-lawyer confidentiality. Waiver of privilege or confidentiality applies when the covered disclosure is made to persons who are not otherwise covered by the privilege or confidentiality. In the situation where the Department of the Army is the client, when client information covered by the attorney-client privilege or client-lawyer confidentiality is properly disclosed to the Army's authorized officials who have an official need to know the information, whether the disclosure is made under implied or express authority, those officials are considered privileged persons and no waiver of privilege or confidentiality has occurred.

(15) Where the Department of the Army is the client, communications involving the Army's authorized officials as described in this Rule may qualify as privileged or confidential, but not every Army official has authority to invoke or waive the privilege or confidentiality on behalf of the Army. The attorney-client privilege and client-lawyer confidentiality for

the Army can be invoked and waived only by a responsible official acting for the Army for this purpose. The Secretary of the Army is the ultimate responsible official for invoking and waiving the privilege and confidentiality where the Department of the Army is the client. Below the Secretary of the Army, responsible officials for this purpose will depend on the circumstances, but heads of Army organizational elements generally may invoke or waive the attorney-client privilege or the rule of client-lawyer confidentiality. See Rule 1.13(a)(1). No responsible official acting where the Army is the client may invoke or waive the attorney-client privilege or the rule of client-lawyer confidentiality for the official's own personal benefit, but they may invoke or waive them for the benefit of the Army. See Rule 1.13(a)(1). In so waiving either the attorney-client privilege or client-lawyer confidentiality on behalf of the Department of the Army, the head of the organization or other responsible officials are subject to being overruled by higher appropriate authority in the Army. Similarly, invocation and waiver of privilege and confidentiality might automatically require referral to a higher level depending on the circumstances. For example, if a corps commander decides to become involved in a division-level matter that includes legal advice, the authority to waive privilege and confidentiality would ordinarily be exercised by the corps commander.

### **Disclosure Adverse to Client**

(16) Rule 1.6 applies equally to defense counsel and lawyers performing legal assistance duties. Once a prospective client has consulted with a defense counsel or legal assistance lawyer, and once a client-lawyer relationship has been established, information concerning the client's whereabouts usually constitutes information protected from disclosure. This confidential information includes whether the prospective, or actual, client has been to defense counsel or legal assistance office spaces and, if so, the time the prospective, or actual, client was there. By virtue of Rule 5.3, this Rule also applies to all other Army nonlawyer personnel, military and civilian, who perform duty in an Army, or any other, legal office in support of Army lawyers.

(17) Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1)(i) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take the necessary action to eliminate the threat. Under paragraph (b)(1)(i), a lawyer's duty to disclose ("shall reveal information") is not limited to acts of commission or omission by the client. Thus, a lawyer must report a client's threat to harm a judge. Similarly, a lawyer must report information from a divorce client regarding the client's spouse's history of and interest in soliciting minors for sex, which constitutes "substantial bodily harm" within the meaning of Rule 1.6.

(18) Paragraph (b)(1)(ii) is a limited exception to the rule of confidentiality that imposes, as a professional obligation, the requirement on a lawyer who learns that a client intends prospective conduct that is criminal and likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system, to reveal information to the extent the lawyer reasonably believes necessary to prevent such consequences. Examples of conduct likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system include: divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft could not conduct an assigned mission, or that the vessel or aircraft and crew could be lost; and compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b)(1)(ii) is not intended to, and does not mandate, the disclosure of conduct that may have a slight impact on the readiness or capability of a unit, vessel, aircraft, or weapon system. Examples of such conduct are: absence without authority from a peacetime training exercise; intentional damage to an individually assigned weapon; and intentional minor damage to military property.

(19) Paragraph (b)(2)(i) recognizes that a lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2)(i) permits such disclosure because of the importance of a lawyer's compliance with these Rules of Professional Conduct.

(20) Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when the claim or

charge has been made. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client in the case of a third party's assertion and request that the client respond appropriately. Paragraph (b)(2)(ii) does not require the lawyer to await the commencement of an action or proceeding. The right to defend also applies, of course, where a proceeding has been commenced. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate the lawyer's innocence; the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it; and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

(21) A lawyer entitled to a fee is permitted by paragraph (b)(2)(ii) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

(22) Other law may require that a lawyer disclose information about a client. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4 and with his or her supervisory lawyers. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(2)(iii) of this Rule permits the lawyer to make such disclosures as are necessary to comply with the law.

(23) Paragraph (b)(2)(v) is a limited exception to the rule of confidentiality that permits a lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(f), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2)(v) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2. See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(b) and (c), which permit the lawyer, where the client is the Department of the Army, to reveal information relating to the representation in limited circumstances.

(24) Paragraph (b)(2)(vi) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected persons can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(2)(vi) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

(25) A lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer owes a duty of candor to the court and has a duty under Rule 3.3(a) not to use false evidence. There may be a situation in which the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d) because to "counsel or assist" criminal or fraudulent conduct requires knowledge that the conduct is of that character.

(26) In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

### **Detection of Conflicts of Interest**

(27) Paragraph (b)(2)(iv) recognizes that Army lawyers who change duty assignments or non-government lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when an Army lawyer moves from a legal assistance office to the Trial Defense Service, or when a non-government civilian lawyer is considering an association with another firm or two or more firms are considering a merger. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once an Army lawyer's change in duty assignment has been approved by competent authority or, in the case of non-government civilian lawyers, substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (for example, the fact that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse, or that a person has consulted a lawyer about a criminal investigation that has not led to prefferal of a charge or a public charge, as appropriate). Under those circumstances (that

is, compromise of the privilege or prejudice), paragraph (a) prohibits disclosure unless the client or former client gives informed consent.

(28) Any information disclosed pursuant to paragraph (b)(2)(iv) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(2)(iv) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(2)(iv). Paragraph (b)(2)(iv) also does not affect the disclosure of information within an Army legal office or civilian law firm when the disclosure is otherwise authorized (see Comments (7) through (12) to this Rule), such as when a lawyer in a military legal office or civilian firm discloses information to another lawyer in the same military legal office or firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

(29) The attorney-client privilege is defined by MRE 502. A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For example, a lawyer may be called as a witness to give testimony concerning a client. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(2)(iii) permits the lawyer to comply with the court's order.

(30) Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

(31) Unlike paragraph (b)(1), paragraph (b)(2) permits, but does not require, the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraph (b)(2). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b)(2) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1, and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

### **Acting Competently to Preserve Confidentiality**

(32) Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (for example, by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

(33) When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. See ABA Comm. on

Ethics and Professional Responsibility, Formal Op. 99–413 (1999) (holding a lawyer may transmit confidential client information through unencrypted email sent through the Internet).

(34) The preservation of client confidentiality also may be affected by the nature of the facilities available. Army lawyers should have enclosed private offices which afford the degree of privacy necessary to preserve confidentiality. Under any circumstances, an Army lawyer must strive to avoid allowing unauthorized persons to overhear confidential conversations. Control or access by others to the Army’s communications and storage networks, platforms, and equipment utilized by the lawyer also must be considered. Control or access by personnel who are not subject to the Rules, or supervised by those subject to these Rules, may lead to a violation of the confidentiality required by this Rule.

### **Former Client**

(35) The duty of confidentiality continues after the client-lawyer relationship has terminated, and even after the client dies. This duty is specifically addressed in Rule 1.9(c)(2) (lawyer may not “reveal information relating to the representation except as these Rules would permit or require with respect to a client”). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

### **CROSS REFERENCES:**

Rule 1.0(e)	“Firm”
Rule 1.0(f)	“Fraud”
Rule 1.0(h)	“Informed Consent”
Rule 1.0(o)	“Reasonable” and “Reasonably”
Rule 1.0(p)	“Reasonably Believes”
Rule 1.0(t)	“Substantial”
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.4	Communication
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 1.9	Duties to Former Clients
Rule 1.13	Department of the Army as Client
Rule 1.16	Declining and Terminating Representation
Rule 1.18	Duties to Prospective Client
Rule 2.1	Advisor
Rule 2.3	Evaluation for Use by Third Persons
Rule 3.3	Candor Toward the Tribunal
Rule 4.1	Truthfulness in Statements to Others
Rule 5.1	Responsibilities of Senior Counsel and Supervisor Lawyers
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.4	Professional Independence of a Lawyer
Rule 8.1	Bar Admission and Disciplinary Matters
Rule 8.3	Reporting Professional Misconduct

### **Rule 1.7 Conflict of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law or regulation;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

**COMMENT:**  
**General Principles**

(1) Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18.

(2) Resolution of a conflict of interest problem under this Rule requires the lawyer to: (i) clearly identify the client or clients; (ii) determine whether a conflict of interest exists; (iii) decide whether the representation may be undertaken despite the existence of a conflict, that is, whether the conflict is consentable; and (iv) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

(3) A conflict of interest may exist before representation is undertaken, in which event an Army lawyer must notify his or her supervisory lawyer immediately and decline the representation unless, with the supervisory lawyer's approval, the lawyer obtains the informed consent of each client under the conditions of paragraph (b). A lawyer is not required to undertake the representation even if both clients provide informed consent. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the Comments to Rules 1.2 and 1.3.

(4) If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions provided in paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9.

**Identifying Conflicts of Interest: Directly Adverse**

(5) Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the representation may be materially limited by the lawyer's interest in retaining the current client. See, however, Comment (25). Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

(6) Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

**Identifying Conflicts of Interest: Material Limitation**

(7) Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. These conflicting responsibilities or interests can be professional, commercial, or personal. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

## **Lawyer's Responsibilities to Former Clients and Other Third Persons**

(8) In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor, or corporate director.

## **Personal Interest Conflicts**

(9) A pre-existing personal, professional, or commercial relationship with any other party, witness, judge, or lawyer—whether pre-existing the client's proceeding or contemplated during the course of a proceeding—involved in a proceeding creates a strong appearance of a potential conflict of interest that must be disclosed to the client to permit the client to make an informed decision regarding the potential conflict of interest. During the pendency of any proceeding governed by these Rules, a lawyer shall not enter into a personal or commercial relationship with any other party, witness, judge, or lawyer involved in the case, unless full compliance with paragraph (b) occurs. Consideration should be given to whether the client wishes to accommodate the other interest involved.

(10) The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a military lawyer's desire to take leave or transfer duty stations should not motivate the lawyer to recommend a pretrial agreement in a case. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See 18 USC 208 (which makes it a criminal offense for any Federal officer to participate personally and substantially in an official capacity in any particular matter in which the officer, or others whose interests are imputed to the officer, including potential employers, has a financial interest). See also Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients; and Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

(11) When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence, and implications of, the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer (Lawyer A) related to another lawyer (Lawyer B), for example, as parent, child, sibling, or spouse, ordinarily may not represent a client in a matter where that lawyer (Lawyer B) is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

(12) Rule 1.7 has always prohibited a lawyer from representing a client when the lawyer's ability to represent the client competently may be impaired by the lawyer's personal or professional commitments. A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j), and its Comments (18) and (19). Sexual relationships between a lawyer and another lawyer, or judge, or other person involved in a particular case, may constitute a material limitation on the lawyer's ability to represent the client without impairment of the exercise of independent professional judgment. For example, if a lawyer (Lawyer A) engages in a sexual relationship with another lawyer (Lawyer B) currently representing a party whose interests are adverse to those of a client currently represented by the lawyer (Lawyer A), the lawyer (Lawyer A) may be materially limited in his or her ability to represent the client without impairment of the exercise of independent professional judgment. The same material limitation may apply if a lawyer engages in a sexual relationship with a judge who is presiding or who is likely to preside over any proceeding in which the lawyer will appear in a representative capacity, or if a lawyer engages in a sexual relationship with other persons involved in the particular case, judicial or administrative proceeding, or other matter for which representation has been established, including but not limited to witnesses, victims, co-accused, and court-martial or board members.

## **Interest of Person Paying for a Lawyer's Service**

(13) A non-government civilian lawyer representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services (to include non-government civilian lawyers practicing before courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings) may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the

arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). For example, an accused Soldier's Family may pay a civilian attorney to represent the Soldier at a court-martial. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

### **Prohibited Representations**

(14) Ordinarily, a client, including an organization (for example, the Army), may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

(15) Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

(16) Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law or regulation. For example, under Federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client.

(17) Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding.

### **Informed Consent**

(18) Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(h) (Informed Consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege and the advantages and risks involved. See Comments (30) and (31) (effect of common representation on confidentiality).

(19) Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party obtains separate representation.

### **Consent Confirmed in Writing**

(20) Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(c) (confirmed in writing) and (x) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(c). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

### **Revoking Consent**

(21) A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer

from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result.

### **Consent to Future Conflict**

(22) Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the text paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

### **Conflicts in Litigation**

(23) Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-accused, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for a conflict of interest in representing multiple accused in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-accused. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

(24) Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

(25) Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, Army lawyers who normally represent the Army as the client in some circumstances may be authorized to represent Army employees in proceedings in which the Department of the Army or another government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

### **Nonlitigation Conflicts**

(26) Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation and may sometimes be difficult to assess. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the

lawyer, the likelihood that disagreements will arise, and the likely prejudice to the client from the conflict. The question is often one of the proximity and degree of conflict. See Comment (7).

(27) For example, conflict questions may also arise in estate planning. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

(28) Whether a conflict is consentable depends on the circumstances. For example, a legal assistance lawyer may not represent multiple parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis, for example, in advising a buyer and seller of an automobile and preparing a bill of sale. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation. Given this and other relevant factors, the clients may prefer that the lawyer act for all of them.

### **Special Considerations in Common Representation**

(29) In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be embarrassment, re-priming, and perhaps additional delay and costs. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent all parties on a continuing basis and whether the situation involves creating or terminating a relationship between or among the parties.

(30) A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

(31) As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

(32) When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

(33) Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

### **Conflict Charged by an Opposing Party**

(34) While the lawyer must be careful to avoid conflict of interest situations, resolving questions of conflict of interest involving lawyers to whom these Rules apply is primarily the responsibility of the supervisory lawyer or the military judge. See also Rule 5.1. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple co-accused. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing

counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Rule 1.2.

### **Reserve Component Judge Advocates**

(35) These conflict of interest Rules apply to Army Reserve and Army National Guard Judge Advocates only while they are on active duty, actually drilling, on active-duty-for-training, or when performing other duties subject to The Judge Advocate General's supervision. Therefore, unless otherwise prohibited by criminal conflict of interest statutes, Reserve or National Guard Judge Advocates providing legal services in their civilian capacity may represent clients, or work in firms whose lawyers represent clients, with interests adverse to the United States. Reserve or National Guard Judge Advocates who, in their civilian capacities, represent persons whose interests are adverse to the Department of the Army should provide written notification to their Army supervisory lawyer, detailing their involvement in the matter. Reserve or National Guard Judge Advocates shall refrain from undertaking any official action or representation of the Department of the Army with respect to any particular matter in which they are providing representation or services to other clients.

#### **CROSS REFERENCES:**

Rule 1.0(c)	“Confirmed in Writing”
Rule 1.0(h)	“Informed Consent”
Rule 1.0(x)	“Writing”
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.3	Diligence
Rule 1.4	Communication
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 1.9	Duties to Former Clients
Rule 1.12	Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
Rule 1.13	Department of the Army as Client
Rule 1.16	Declining or Terminating Representation
Rule 2.3	Evaluation for Use by Third Persons
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.4	Professional Independence of a Lawyer

### **Rule 1.8 Conflict of Interest: Current Clients: Specific Rules**

(a) [Modified] Army lawyers shall adhere strictly to current Department of Defense ethics regulations. Additionally, a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) [Modified] A lawyer shall not provide any financial assistance to a client or otherwise serve in a financial or proprietary fiduciary or bailment relationship with a client, unless otherwise specifically authorized by competent authority.

(f) [Modified] A non-government civilian lawyer representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) [Modified] A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) [Omitted]

(i) [Modified] A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) [Omitted]

(l) [Augmented] A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a matter directly adverse to a person whom the lawyer knows is represented by the other lawyer, unless each client gives informed consent after consultation regarding the relationship.

#### **COMMENT:**

##### **Army Lawyers**

(1) Army lawyers will strictly adhere to the Department of Defense Joint Ethics Regulation, and other statutes and ethics regulations that apply to Army lawyers, in all dealings with clients. Such regulations generally prohibit entering into business transactions with clients, deriving financial benefit from representations of clients, and accepting compensation or gifts in any form from a client or other person or entity, other than the U.S. Government, for the performance of official duties. Such regulations also prohibit profiting, directly or indirectly, from knowledge acquired in the course of the Army lawyer's official duties. This Rule does not authorize conduct otherwise prohibited by such regulations. An Army lawyer will not make any referrals of legal or other business to any private civilian lawyer or enterprise with whom the Army lawyer has any present or expected direct or indirect personal interest. Special care will be taken to avoid giving preferential treatment to Reserve or National Guard Judge Advocates or other government lawyers acting in their private capacities.

##### **Business Transactions between Client and Lawyer**

(2) As a general principle, any and all business transactions between clients and Army lawyers should be carefully reviewed by supervisory lawyers. All transactions must comply with promulgated standards of conduct and other statutes, lawful orders, and regulations.

(3) A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule does not apply, however, to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, and products manufactured or distributed by the client. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

(4) Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented

by the lawyer's involvement, and the existence of reasonably available alternatives, and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(h) (definition of informed consent).

(5) The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal advisor and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

(6) If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

### **Use of Information Related to Representation**

(7) Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. This Rule does not prohibit uses that do not disadvantage the client. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3.

### **Gifts to Lawyers**

(8) Except as otherwise prohibited or regulated differently in the Department of Defense Joint Ethics Regulation and other statutes and ethics regulations that apply to Army lawyers, a lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

### **Literary Rights**

(9) An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Even after the representation has concluded, Army lawyers may be restricted in teaching, speaking, and writing activities, and receiving compensation therefor, by applicable statutes and regulations.

### **Financial Assistance**

(10) Rule 1.8(e) does not prohibit de minimis financial assistance to a client such as a Trial Defense Counsel's purchase of an authorized ribbon for wear on the accused's uniform during court-martial proceedings.

### **Person Paying for a Lawyer's Services**

(11) A non-government civilian lawyer may be asked to represent a client, in a matter for which The Judge Advocate General is charged with supervising the provision of legal services (to include non-government civilian lawyers practicing before courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings), under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative, or friend, for example. Because third person payers frequently have interests that differ from those of the

client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representation unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

(12) Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third person payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third person payer (for example, when the third person is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

### **Aggregate Settlements**

(13) Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(h) (definition of informed consent).

### **Limiting Liability and Settling Malpractice Claims**

(14) ABA Model Rule 1.8(h) is not adopted into Army Rule 1.8 because it is doubtful that Army lawyers would find it necessary to obtain prospective malpractice liability releases from clients such as the ones provided for in ABA Model Rule 1.8(h). See 10 USC 1054 and 28 USC 1346(b) and 2672, limiting remedies for malpractice by Army lawyers, in connection with providing legal services while acting within the scope of the person's legal duties or employment, to actions against the United States.

### **Acquiring Proprietary Interest in Litigation**

(15) Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e). This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

### **Client-Lawyer Sexual Relationships**

(16) The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal, particularly in the military context, given differences in rank and status; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and dominant position and influence. If a lawyer permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the lawyer violates one of the most basic of ethical obligations, not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that lawyers do not take financial advantage of their clients. See Rules 1.6 and 1.8.

(17) In addition, a sexual relationship between lawyer and client presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent

professional judgment. This emotional involvement has the potential to undercut the objective detachment necessary for competent representation. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

(18) Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

(19) A prior but now over sexual relationship that predated the client-lawyer relationship does not preclude subsequent representation by the lawyer. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

(20) Except when representing an individual client pursuant to Army Rule 1.13(h), an Army lawyer (or a lawyer for the Army) represents the Department of the Army acting through its authorized officials. See Rule 1.13. When the client is the Department of the Army, paragraph (j) of this Rule prohibits a lawyer from having a sexual relationship with an authorized official of the Army (for example, an officer, employee, or member of the Army) who supervises, directs, or regularly consults with that lawyer concerning the Army's legal matters.

(21) Notwithstanding this Rule, additional statutes and regulations may further prohibit sexual relationships between lawyers and clients, including, for example, regulations that govern fraternization, relationships between Soldiers of different ranks, inappropriate or other unprofessional relationships, adultery, conduct unbecoming an officer, and misuse of official position, and may constitute separate grounds for disciplinary or administrative action.

(22) Sexual relationships between a lawyer and another lawyer, or judge, or other person involved in a particular case may constitute a material limitation on the lawyer's ability to represent the client without impairment of the exercise of independent professional judgment. See Rule 1.7(a)(2) and Comment (12) to that Rule.

## **Family Relationships Between Lawyers**

(23) Paragraph (l) applies to related lawyers who are in different offices, for example, one lawyer is a Staff Judge Advocate to a court-martial convening authority and another lawyer is a civilian defense counsel with potential involvement in a case referred to court-martial by the convening authority served by that same Staff Judge Advocate. Related lawyers in the same office are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(l) is personal and is not imputed to other lawyers in the offices with whom the lawyer performs duty or practices.

### **CROSS REFERENCES:**

Rule 1.0(h)	"Informed Consent"
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.5	Fees
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.9	Duties to Former Clients
Rule 1.13	Department of the Army as Client
Rule 1.16	Declining or Terminating Representation
Rule 3.3	Candor Toward the Tribunal
Rule 4.1	Truthfulness in Statements to Others
Rule 5.4	Professional Independence of a Lawyer
Rule 8.1	Bar Admission and Disciplinary Matters
Rule 8.3	Reporting Professional Misconduct

## Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client—

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

### COMMENT:

(1) After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has defended an accused at trial could not properly act as appellate government counsel in the appellate review of the accused's case. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent, confirmed in writing. Current and former Army lawyers must comply with this Rule to the extent required by Rule 1.11.

(2) The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Thus, the reassignment of military lawyers between defense, prosecution, court-martial review, claims, and legal assistance functions within the same military jurisdiction is not precluded by this Rule. See, for example, *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987). The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. When an Army lawyer is representing the Department of the Army (for example, as Staff Judge Advocate or Trial Counsel), the lawyer must take reasonable steps to avoid participating in decision-making or information-sharing that would have an adverse effect on a former client (for example, a former defense client). See also 18 USC 207 (for related post-government service employment restrictions).

(3) Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. Where the Department of the Army is the client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation of a non-Army client; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. See 18 USC 207 (for related post-government service employment restrictions). A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

(4) When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients

after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

(5) Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

(6) Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not to information of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

(7) Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c). For Army lawyers, this continuing duty applies not just to individual clients but to the Department of the Army as client.

(8) Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

(9) The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(h).

(10) Paragraphs (b) and (c) make clear that the foregoing applies to Army lawyers with respect to the clients whom they previously served while in private practice.

#### **CROSS REFERENCES:**

Rule 1.0(h)	"Informed Consent"
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 1.16	Declining or Terminating Representation

#### **Rule 1.10 Imputation of Conflicts of Interest: General Rule**

(a) [Substituted] Army lawyers working in the same Army or other military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.

(b) [Modified] When an Army lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

**COMMENT:**  
**Definition of “Firm”**

(1) For purposes of the Army Rules of Professional Conduct for Lawyers, the term “firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(e). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments (2) through (4).

**Principles of Imputed Disqualification**

(2) The circumstances of military (or government) service may require representation of opposing sides by Army lawyers working in the same law office. Such representation is permissible so long as conflicts of interest are avoided and independent judgment, zealous representation, and protection of confidences are not compromised. Thus, the principle of imputed disqualification is not automatically controlling for Army lawyers. The knowledge, actions, and conflicts of interest of one Army lawyer are not imputed to another simply because they operate from the same office. For example, the fact that a number of defense lawyers operate from one office and normally share clerical assistance would not prohibit them from representing co-accused at trial by court-martial. Army policy, however, may address imputed disqualification in certain contexts. For example, Army policy discourages representation by one legal assistance office of both spouses involved in a domestic dispute. Imputed disqualification rules for non-government civilian lawyers are established by their individual licensing authorities and may well proscribe all lawyers from one law office from representing a co-accused, or a party with an adverse interest to an existing client, if any lawyer in the same office were so prohibited.

(3) Whether an Army lawyer is disqualified requires a functional analysis of the facts in a specific situation. The analysis should include consideration of whether the following will be compromised: preserving client-lawyer confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client. See, for example, *United States v. Stubbs*, 23 M.J. 188 (C.M.A. 1987).

(4) Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in a particular circumstance, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which Army lawyers work together. An Army lawyer may have general access to files of all individual clients of a military law office (for example, legal assistance lawyer) and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the office’s individual clients. In contrast, another Army lawyer (for example, military defense counsel) may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not to information of other clients. Additionally, an Army lawyer changing duty stations or changing assignments within a military office has a continuing duty to preserve confidentiality of information about a client formerly represented, whether the client was an individual or the Department of the Army. See Rules 1.6 and 1.9.

(5) In military practice, where Army lawyers representing adverse interests are sometimes required to share common spaces, equipment, and clerical assistance, inadvertent disclosure of confidential or privileged material may occur. An Army lawyer who mistakenly receives any such confidential or privileged materials should refrain from reviewing them (except for the limited purpose of ascertaining ownership or proper routing), notify the lawyer to whom the material belongs that he or she has such material, and either follow instructions of the lawyer with respect to the disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. A lawyer’s duty to provide his or her client zealous representation does not justify a rule allowing the receiving lawyer to take advantage of inadvertent disclosures of privileged and/or confidential materials. This policy recognizes and reinforces the principles of: confidentiality and the attorney-client privilege; analogous principles governing the inadvertent waiver of the attorney-client privilege; the law governing bailments and missent property; and considerations of common sense, reciprocity, and professional courtesy.

(6) Maintaining independent judgment allows a lawyer to consider, recommend, and carry out any appropriate course of action for a client without regard to the lawyer’s personal interests or the interests of another. When such independence is lacking or unlikely, representation cannot be zealous.

(7) Another aspect of loyalty to a client is the general obligation of any lawyer to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation normally requires abstention from adverse representation by the individual lawyer involved, but, in the military legal office, abstention is not required by other Army lawyers through imputed disqualification.

(8) Paragraph (b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

(9) Paragraph (c) removes the imputation proscribed in paragraph (b) with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent.

#### **CROSS REFERENCES:**

Rule 1.0(e)	“Firm”
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 1.9	Duties to Former Clients
Rule 1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees

#### **Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees**

(a) [Modified] Except as law or regulations may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 1.9(c); and
- (2) shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) [Modified] Except as law or regulations may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law or regulations from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) [Modified] Except as law or regulations may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

- (1) is subject to Rules 1.7 and 1.9; and
- (2) shall not:
  - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or non-governmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
  - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially.

(e) [Modified] As used in this Rule, the term “matter” includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the Department of Defense, Department of the Army, or other appropriate government agency.

**COMMENT:**

(1) This Rule prevents a former Army lawyer from exploiting public office for the advantage of a private client.

(2) An Army lawyer who has served or is currently serving as a public officer or employee representing the Department of the Army, a joint or unified command within the Department of Defense or the Department of Defense itself, or another government agency, whether employed or specially retained by the government, is personally subject to these Army Rules of Professional Conduct for Lawyers, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to this Rule and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which a government agency may give informed consent under this Rule. See Rule 1.0(h) for the definition of informed consent.

(3) Paragraphs (a)(1), (a)(2), and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it would be prudent to screen such lawyers.

(4) Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

(5) This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. See 18 USC 207 (related statutory restrictions on post-government service employment). A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

(6) When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do.

(7) Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(r) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

(8) Notice under paragraph (b)(2), including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with this Rule and to take appropriate action if it believes the lawyer is not complying.

(9) Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

(10) For purposes of paragraph (e) of this Rule, a “matter” may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

**CROSS REFERENCES:**

Rule 1.0(h)	“Informed Consent”
Rule 1.0(r)	“Screened”
Rule 1.5	Fees
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.9	Duties to Former Clients
Rule 1.10	Imputation of Conflicts of Interest: General Rule

**Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral**

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) [Modified] A lawyer shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

**COMMENT:**

(1) This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. See also 18 USC 207 (related statutory restrictions on post-government service employment). The term “adjudicative officer” includes such officials as hearing officers, legal advisors to administrative boards, Article 32 (Uniform Code of Military Justice) investigating officers, summary court–martial officers, and also lawyers who serve as part-time judges.

(2) Like former judges, lawyers who have served as arbitrators, mediators, or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(h) and (c). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

(3) Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

(4) Requirements for screening procedures are stated in Rule 1.0(r). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

(5) Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

## **CROSS REFERENCES:**

Rule 1.0(c)	“Confirmed in Writing”
Rule 1.0(h)	“Informed Consent”
Rule 1.0(r)	“Screened”
Rule 1.6	Confidentiality of Information
Rule 1.11	Special Conflicts of Interest for Former and Current Government Officers and Employees
Rule 2.4	Lawyer Serving as Third-Party Neutral

### **Rule 1.13 Department of the Army as Client [Modified Title]**

(a) [Modified and Augmented] Except when representing an individual client pursuant to paragraphs (g) and (h) below, an Army lawyer (or a lawyer retained by the Army) represents the Department of the Army (or the executive agency to which assigned) acting through its authorized officials. These officials include the heads of organizational elements within the Army, such as the commanders of armies, corps, divisions, and brigades, and the heads of other Army agencies or activities. The term Army as used in this and related Rules will be understood to mean the Department of the Army or the organizational element involved.

(1) When an Army lawyer is assigned to or employed by such an organizational element and designated to provide legal services to the head of the organization, to include his or her subordinate commanders or staff, the client-lawyer relationship exists between the lawyer and the Department of Army as represented by the head of the organization as to matters within the scope of the official business of the organization.

(i) The head of the organization may not invoke the attorney-client privilege or the rule of client-lawyer confidentiality for the head of the organization's own personal benefit, but may invoke either for the benefit of the Department of the Army. In so invoking either the attorney-client privilege or client-lawyer confidentiality on behalf of the Department of the Army, the head of the organization is subject to being overruled by higher appropriate authority in the Army.

(ii) Similarly, the head of the organization may not waive the attorney-client privilege or the rule of client-lawyer confidentiality for the head of the organization's own personal benefit, but may waive either for the benefit of the Department of the Army. In so waiving either the attorney-client privilege or client-lawyer confidentiality on behalf of the Department of the Army, the head of the organization is subject to being overruled by higher appropriate authority in the Army.

(2) An Army lawyer shall not form a client-lawyer relationship or represent a client other than the Army unless specifically assigned or authorized to do so by competent authority. Unless so authorized, the Army lawyer will advise the individual that there is no client-lawyer relationship between them.

(b) [Modified and Augmented] If a lawyer for the Army knows that an officer, employee, or member of, or other person associated with, the Army is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the Army, adverse to the legal interests or obligations of the Army, or a violation of law that reasonably might be imputed to the Army, then the lawyer shall proceed as is reasonably necessary in the best interests of the Army. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the Army and the apparent motivation of the person involved, the policies of the Army concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption or prejudice to the interests of the Army and the risk of revealing information relating to the representation to persons outside the Army. Such measures may include, among others:

(1) asking for reconsideration of the matter by the acting official;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the Army;

(3) advising the acting official that the lawyer is ethically obligated to preserve the interests of the Army and, as a result, must consider discussing the matter with supervisory lawyers within the Army lawyer's office or at a higher level within the Army;

(4) referring the matter to, or seeking guidance from, higher authority in the technical chain of supervision, including, if warranted by the seriousness of the matter, referral to the supervisory lawyer assigned to the staff of the acting official's next superior in the chain of command; or

(5) advising the acting official, or others who can act on behalf of the Army, up to and including the head of the organization, that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest for the lawyer and the lawyer's responsibility is to the organization.

(c) [Modified] If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act concerning the matter insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of a legal obligation to the Army, adverse to the legal interests or obligations of the Army, or a violation of law,

the lawyer may consult with senior Army lawyers at the same or higher levels of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid any violation of legal interests or obligations, or of the law, by the Army. The lawyer may also terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

(d) [Omitted]

(e) [Modified] A lawyer who, pursuant to paragraph (c), terminates representation with respect to the matter in question shall report any such termination of representation to the lawyer's supervisory lawyer or lawyer representing the next superior in the chain of command.

(f) [Modified] In dealing with the Army's officers, employees, or members, or other persons associated with the Army, a lawyer shall explain that the Department of the Army is the client when the lawyer knows or reasonably should know that the Army's interests are adverse to those of the officers, employees, members, or other persons with whom the lawyer is dealing.

(g) [Modified] A lawyer representing the Army may also represent any of its officers, employees, or members acting on behalf of the Army, subject to the provisions of Rule 1.7 and other applicable authority. If the Army's consent to such dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the Army other than the individual who is to be represented.

(h) [Augmented] An Army lawyer who has been duly assigned to represent an individual who is subject to criminal or disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a client-lawyer relationship with that individual.

#### **COMMENT:**

##### **Department of the Army as Client**

(1) The Department of the Army and its commands, units, agencies, and activities are legal entities, but they cannot act except through their authorized officials (that is, their appropriate officers, employees, and members). Officers, employees, and members are the constituents of the organizational client, that is, the Department of the Army as the client. For purposes of these Rules, an Army lawyer normally represents the Army acting through its officers, employees, or members in their official capacities. It is to that client (the Army) when acting as a representative of the Army that a lawyer's immediate professional obligation and responsibility exists absent assignment or designation by competent authority within the Department of the Army to represent a specific individual client.

(2) Where the client is the Department of the Army, the Army, acting through its authorized officials, has attorney-client privilege and client-lawyer confidentiality with its lawyers. When one of the officers, employees, or members of the Department of the Army communicates in that person's official capacity with an Army lawyer on a matter relating to the lawyer's representation of the organization on the organization's official business, the communication is protected by Rule 1.6 from disclosure to anyone outside the Department of the Army and to anyone inside the Army who does not have an official need to know. (For guidance with respect to privileged persons who have an official need to know, see Comment (9) to Rule 1.6.) This does not mean, however, that the officer, employee, or member is the client of the lawyer. It is the Army, and not the officer, employee, or member, that benefits from Rule 1.6 confidentiality. Further, an Army lawyer may not disclose information relating to the representation, even to other lawyers in the Army, except for disclosures explicitly or impliedly authorized in order to carry out the representation or as otherwise permitted by Rule 1.6. The Department of the Army's entitlement to confidentiality may not be asserted by an officer, employee, or member as a basis to conceal personal misconduct from Army authorities. See Rule 1.6 and its Comments for extensive guidance on authorized disclosures and invoking and waiving privilege and confidentiality when the Department of the Army is the client.

(3) When the officers, employees, or members of the Department of the Army make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not, as such, in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows or has reason to know that an Army officer, employee, or member is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the Army, adverse to the legal interests or obligations of the Army, or a violation of law that reasonably might be imputed to the Army, then the lawyer must proceed as is reasonably necessary in the best interests of the Army. As defined in Rule 1.0(j), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

(4) In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the Army and the apparent motivation of the person involved, the policies of the Army concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the official to reconsider the matter; for example, if the circumstances involve an acting

official's innocent misunderstanding of law or regulation and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the Army does not require that the matter receive a separate legal opinion, or that supervisory lawyers within the Army lawyer's office or at a higher level within the Army be consulted, or that the matter be referred to higher authority. If the acting official persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organizational element involved. If the matter is of sufficient seriousness and importance or urgency to the Army, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the acting official. Army lawyers should refer such matters through their legal supervisory channels. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside not just the Department of the Army, but the chain of command or supervision of the Army organizational element involved. Even in circumstances where a lawyer is not obliged by Rule 1.13 to proceed, a lawyer may bring to the attention of an Army client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the Department of the Army.

(5) Loyalty and confidentiality are ethical obligations owed by an Army lawyer to the Army and cannot be compromised. Nevertheless, in a matter involving the conduct of Army officials, an Army lawyer has authority under applicable laws and ethics regulations to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the Army is the client, a different balance is appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. Determining whether to reveal communications with an Army organizational element client, for example, a commander or activity head, to higher Army authority requires mature judgment and common sense. If a lawyer perceives a conflict between his or her professional commitments to the commander and his or her ethical obligations to the Army, he or she may, and in most cases should, consult with or refer the matter to a supervisory lawyer (see Rules 5.1 and 5.2). If the situation cannot be resolved at that level, the senior supervisory lawyer should consult with appropriate lawyers at the next higher level of legal supervision. In extreme cases it may be necessary to refer the matter to the appropriate Senior Counsel.

(6) Paragraph (a)(2) specifies that a client-lawyer relationship is not formed between an Army lawyer and an individual unless specifically authorized by competent authority, such as a statute, Executive Order, directive, regulation, or, on a case-by-case basis, by the appropriate Senior Counsel or their designee. Further, the rule affirmatively requires an Army lawyer to advise an individual with whom they are dealing that, absent express authorization from competent authority, no client-lawyer relationship exists.

(7) An Army lawyer assigned, attached, or detailed outside the Department of the Army, such as to a joint or unified command or another executive agency, owes loyalty to that organization or agency. It is to that client that an Army lawyer's immediate professional obligation and responsibility exists, absent assignment or designation by the organization to represent a specific individual client.

(8) Paragraph (h) recognizes that an Army lawyer who is duly designated to represent an individual against whom proceedings are brought of a criminal, disciplinary, administrative, or personal character, establishes a client-lawyer relationship with its privilege and professional responsibility to protect and defend the interest of the individual represented. This is also applicable to Army lawyers representing individuals before military commissions or tribunals, as well as those providing civil legal assistance. But see Rule 1.2. Representation of members of the Army, Government employees, and other individuals in accordance with paragraph (h) and the assumption of the traditional client-lawyer relationship with such individuals is not inconsistent with the lawyer's duties to the Department of the Army, so long as no other conflict exists.

## **Relation to Other Rules**

(9) The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b). Under paragraph (c) the lawyer may reveal such information only when the highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of a legal obligation to the Army, adverse to the legal interests or obligations of the Army, or a violation of law, and then only to the extent the lawyer reasonably believes necessary in the best interests of the Army. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the Army. Further, if the lawyer's services are being used by an Army organizational element acting through an authorized official to further a crime or fraud by the organization, Rule 1.6(b)(2)(v)-(vi) permits the lawyer to disclose confidential information. In such circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16 may be required.

## Clarifying the Lawyer's Role

(10) There are times when the Department of the Army's interest may be or becomes adverse to those of one or more of its officers, employees, or members. In such circumstances, the lawyer should advise the officer, employee, or member that the lawyer cannot represent or advise such person on those matters in which the person's interests are adverse to those of the Army, and that such person may wish to obtain independent representation from an Army lawyer authorized to provide such representation or advice, or from other personal counsel. Care must be taken to assure that such person understands that, when there is such adversity of interest, the Army lawyer represents the Army and cannot provide legal representation for or advice to such person on the matter in which the person's interests are adverse to those of the Army, and that discussions between the lawyer for the Army and such person will not be privileged under Rule 1.6.

(11) Whether such a warning should be given by the lawyer for the Army to any such officer, employee, or member of the Army may turn on the specific facts of each case. See also paragraph (a)(2) of this Rule.

## Dual Representation

(12) Paragraph (g) recognizes that a lawyer for the Army may also represent an officer, employee, or member of the Army whose official interests are consistent with those of the Department of the Army. Client-lawyer confidentiality with the officer, employee, or member of the Department of the Army only extends to matters within the scope of the authorized representation.

### CROSS REFERENCES:

Rule 1.0(j)	"Knowledge"
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.8	Conflict of Interest: Current Clients: Specific Rules
Rule 1.16	Declining or Terminating Representation
Rule 2.1	Advisor
Rule 3.3	Candor Toward the Tribunal
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness in Statements to Others
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.4	Professional Independence of a Lawyer

## Rule 1.14 Client With Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

### COMMENT:

(1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's

own well-being. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

(2) The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

(3) The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

(4) If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor, for example, as a Special Victim Counsel. If the lawyer represents the guardian as distinct from the minor, and is aware that the guardian is acting adversely to the minor's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

### **Taking Protective Action**

(5) If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. For example, a client expression of intent to take his or her own life may be indicative that the client lacks sufficient capacity to make adequately considered decisions in connection with the representation. Protective measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

(6) In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician, recognizing that military law does not recognize a doctor-patient privilege.

(7) If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

### **Disclosure of the Client's Condition**

(8) Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the

appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. See also Rule 1.6(b)(1)(i) (lawyer shall reveal information relating to representation of a client to the extent lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm to anyone, including the client).

### **Emergency Legal Assistance**

(9) In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, an Army lawyer may take legal action on behalf of such a person, if duly authorized by competent authority to represent individual clients or that individual client in particular, even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

(10) A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

### **CROSS REFERENCES:**

Rule 1.2            Scope of Representation and Allocation of Authority between Client and Lawyer  
Rule 1.3            Diligence  
Rule 1.6            Confidentiality of Information

### **Rule 1.15 Safekeeping Property**

(a) [Substituted] Army lawyers will hold the property of clients or third persons that is in a lawyer's possession in connection with a representation only when doing so is necessary to further the representation of the client. When it is necessary for a lawyer to hold property, the lawyer must exercise the care of a fiduciary. Such property shall be clearly labeled or otherwise identified, kept separate from the lawyer's own personal property and from government property, and appropriately safeguarded. The lawyer should promptly return property to the client or third person when its retention by the lawyer is no longer necessary to further the representation of the client. When property of a client or third person is admitted into evidence or otherwise included in the record of an administrative or criminal proceeding, the lawyer should take reasonable action to ensure its prompt return to the client or third person.

(b) [Omitted]

(c) [Omitted]

(d) [Modified] Upon receiving property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law, regulation, or policy or by agreement with the client, a lawyer shall promptly deliver to the client or third person any property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

### **COMMENT:**

(1) Army lawyers normally will not hold or safeguard property of clients or third persons. Nevertheless, on occasion legal assistance lawyers and trial defense counsel will need to receive documents and other items from clients or third persons in order to properly investigate, research, and complete legal matters. For example, a trial defense counsel will need his or her client's original award certificates, not copies. Should an Army lawyer find it necessary to hold such property, care

will be taken to ensure that the Army does not become responsible for any claims for the property. This Rule does not authorize Army lawyers to hold property of clients or third persons when otherwise prohibited from doing so.

(2) Army lawyers should hold the property of others with the care required of a professional fiduciary. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's own personal property and from government property.

(3) When it is necessary to use a client's property as evidence, a lawyer should seek to obtain court or other appropriate authority permission to withdraw the property as an exhibit and to substitute a description or photograph after trial or other proceeding. Paragraph (a) requires a lawyer to take reasonable steps to secure the return of property used as evidence to the client or third person from whom it was received, keeping in mind that return may not be possible until appellate review is completed.

(4) If an Army lawyer is offered contraband property, the lawyer should refer to Rule 3.4 and its Comment for guidance.

(5) If an Army lawyer finds it necessary to hold money or securities for a client or third person, the lawyer should first consult with his or her supervisory lawyer in order to explore options to avoid holding money or securities. In any case in which a lawyer does hold such money or securities, the lawyer should consult the Rules of their state licensing authority, and ABA Model Rule 1.15, for guidance regarding this issue.

(6) Paragraph (e) recognizes that third persons may have lawful claims against property in a lawyer's custody, such as a client's roommate, landlord, or a co-accused. A lawyer may have a duty under applicable law to protect such third person claims against wrongful interference by the client. In such cases, when the third person claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third person.

#### **CROSS REFERENCES:**

Rule 1.8            Conflict of Interest: Current Clients: Specific Rules

Rule 3.4            Fairness to Opposing Party and Counsel

#### **Rule 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if:

(1) the representation will result in violation of these Rules of Professional Conduct or other law or regulation;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) [Modified] the lawyer is discharged by the client.

(b) Except as stated in paragraph (c), a lawyer may seek to withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will seek to withdraw unless the obligation is fulfilled;

(6) [Modified] the representation has been rendered unreasonably difficult by the client or, in the case of a non-government lawyer, the representation will result in an unreasonable financial burden on the lawyer; or

(7) other good cause for withdrawal exists.

(c) [Modified] A lawyer must comply with applicable law or regulation requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) [Modified] Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for assignment or employment of other counsel, surrendering papers and property to which the client is entitled and, where a non-government lawyer provided representation, refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law or regulation.

**COMMENT:**

(1) A lawyer should not represent a client in a matter unless the representation can be performed competently, promptly, without improper conflict of interest, and to completion.

**Mandatory Withdrawal**

(2) A lawyer ordinarily must decline or seek to withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates these Rules of Professional Conduct or other law or regulation. The lawyer is not obliged to decline or seek to withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

(3) When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of competent authority, for example, the appointing or detailing authority. Similarly, court approval or notice to the court is often required by applicable law or regulation before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations both to clients and the court under Rules 1.6 and 3.3.

**Discharge by the Client**

(4) A client has a right to discharge a lawyer at any time, with or without cause, subject, in the case of a non-government lawyer, to liability for payment of the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

(5) Whether a client can discharge appointed counsel may depend on applicable law or regulation. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing or detailing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

(6) If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event, the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

**Optional Withdrawal**

(7) A lawyer may seek to withdraw from representation in some circumstances. The lawyer has the option of seeking to withdraw if it can be accomplished without material adverse effect on the client's interests. Seeking to withdraw is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Seeking to withdraw is also permitted if the lawyer's services were misused in the past, even if withdrawal would materially prejudice the client. The lawyer also may seek to withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

(8) A non-government lawyer may seek to withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or an agreement limiting the objectives of the representation.

(9) The scope of a lawyer's representation may be limited by the law, regulations, and policies under which the lawyer's services are made available to the client. See Rule 1.2 Comment. Good cause to seek withdrawal exists when a lawyer changes duty stations or changes duties within an office. For example, a legal assistance lawyer or Special Victim Counsel has good cause to seek withdrawal from further representation of a current legal assistance client, to include a Special Victim Counsel client, when the lawyer is reassigned to new duties, for example, as a trial counsel, defense counsel, administrative law lawyer, or operational law lawyer, whether the new duties are within the same or a different legal office and whether the new duties are on the same or a different installation. In such a circumstance, the change of assignment duties constitutes not just good cause but also permission for the legal assistance lawyer or the Special Victim Counsel to withdraw from representation of current legal assistance or special victim clients by virtue of reassignment to new duties. Withdrawal from representation of current individual clients should be perfected prior to the lawyer's assumption of his or her new duties. If a question arises as to whether a lawyer has permission to withdraw from a particular representation, the lawyer should consult with the supervisory lawyer who has the authority to grant permission to withdraw from the representation. If the supervisory lawyer will not authorize withdrawal from representing a client but the lawyer's new supervisory lawyer for his new duties believes that the continued representation will present a conflict with the new duties,

the question of withdrawal will be resolved by appropriate higher authority. In no event may a client contravene the decision of competent authority to withdraw a lawyer from representation of the client. A client's desire to continue to be represented by a lawyer who has been assigned to new duties that would not otherwise permit such representation is a factor that can be considered by appropriate competent authority, who will balance the client's preference against the lawyer's new duties and responsibilities to his new client(s), potential conflicts of interest, the efficient and effective delivery of legal services within the office and the Army, and the professional development of Army lawyers.

### **Continued Representation Notwithstanding Good Cause**

(10) Addition of the language "or other competent authority" in paragraph (c) recognizes that Army lawyers are not always free to withdraw from representation. Notwithstanding the existence of good cause for terminating representation, a lawyer appointed or detailed to represent a client shall continue such representation until properly relieved by competent authority. Who is competent authority will differ with the circumstances. For example, in a trial by court-martial, the authority who originally appointed or detailed the lawyer to represent the client would be competent authority prior to trial; the military judge would be competent authority once trial begins. After trial, representation may be terminated pursuant to regulation. A lawyer representing the Department of the Army may be authorized to withdraw from the representation by the lawyer's supervisory lawyer chain or by the appropriate Senior Counsel (see Rules 1.0(s) and 5.1). Difficulty may be encountered where competent authority requires an explanation for the termination, while the lawyer may be bound to keep confidential under Rule 1.6 the facts that would constitute such an explanation. See also Comment (3). The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient in those situations where the competent authority is not privy to the client's confidentiality privilege. Where necessary and practicable, a lawyer should seek the advice of a supervisory lawyer. The decision by one authority to continue representation does not prevent the lawyer from seeking withdrawal from other competent authority, such as a military judge.

### **Assisting the Client upon Withdrawal**

(11) A lawyer who has been discharged by a client or who has otherwise withdrawn from representation must take all reasonable steps to mitigate the consequences to the client. Such steps may include referral of the client to another lawyer who is able to represent the client further. A lawyer making such a referral should ensure that these Rules and any Army policy governing referral of clients are followed. If a lawyer must refer a client to another lawyer due to a conflict of interest, the referring lawyer should be careful not to disclose confidential information relating to representation of another client.

(12) Whether or not a lawyer representing the Army may under certain unusual circumstances have a legal obligation to the Army after withdrawing or being released by the Army's highest authority is beyond the scope of these Rules.

### **CROSS REFERENCES:**

Rule 1.0(s)	"Senior Counsel"
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.13	Department of the Army as Client
Rule 1.14	Client with Diminished Capacity
Rule 3.1	Meritorious Claims and Contentions
Rule 3.3	Candor Toward the Tribunal
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers

### **Rule 1.17 Sale of Law Practice [Omitted]**

### **Rule 1.18 Duties to Prospective Client [Modified]**

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) [Modified] A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). In the case of non-government lawyers, if a non-government lawyer, who was consulted by a prospective client for representation in any matter for which The Judge Advocate General is charged with supervising the provision of legal services, for example, a court-martial, administrative separation board, or disability evaluation proceeding, is disqualified from representation under this paragraph, no lawyer in a firm with which that non-government lawyer is associated may knowingly undertake or continue representation in such a matter.

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) [Modified] the disqualified lawyer is timely screened from any participation in the matter and, in the case of a non-government lawyer, is also apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

**COMMENT:**

(1) Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

(2) A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See Comment (4). In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

(3) It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is able to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

(4) In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

(5) A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(h) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

(6) Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

(7) With respect to non-government lawyers, under paragraph (c) the prohibition in this Rule is imputed to other lawyers in the non-government lawyer's firm but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective client and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written

notice is promptly given to the prospective client. See Rule 1.0(r) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but the lawyer may not receive compensation directly related to a matter in which the lawyer is disqualified.

(8) Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

(9) For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

#### **CROSS REFERENCES:**

Rule 1.0(c)	“Confirmed in Writing”
Rule 1.0(e)	“Firm”
Rule 1.0(h)	“Informed Consent”
Rule 1.0(k)	“Knowingly”
Rule 1.0(o)	“Reasonable” and “Reasonably”
Rule 1.0(r)	“Screened”
Rule 1.0(x)	“Written”
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.9	Duties to Former Clients
Rule 1.15	Safekeeping Property

#### **COUNSELOR**

##### **Rule 2.1 Advisor**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

#### **COMMENT:**

##### **Scope of Advice**

(1) A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

(2) Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

(3) A client may expressly or impliedly ask the lawyer for purely technical legal advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

(4) Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

##### **Offering Advice**

(5) In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's

duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

#### **CROSS REFERENCES:**

Rule 1.4	Communication
Rule 1.6	Confidentiality of Information
Rule 1.13	Department of the Army as Client
Rule 3.1	Meritorious Claims and Contentions
Rule 5.4	Professional Independence of a Lawyer

#### **Rule 2.2 Intermediary [Deleted 2002]**

[Model Rule 2.2 was deleted by the ABA in 2002. Issues relating to lawyers acting as intermediaries are dealt with in the Comment to Rule 1.7. Intermediation and the conflict of interest issues it raises are no longer treated separately from any other multiple-representation conflicts. For further explanation of the deletion of Rule 2.2, see American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982–2013*, at 419–22 (2013).]

#### **Rule 2.3 Evaluation for Use by Third Persons**

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent, confirmed in writing.

(c) [Modified] Except as disclosure is required or authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

#### **COMMENT:**

##### **Definition**

(1) An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties. For example, an Army lawyer is asked to prepare a brief setting forth the Department of the Army's position on a situation for use by another governmental agency or the U.S. Congress.

(2) Army lawyers may be called upon to evaluate action contemplated by the Army and then give a formal opinion on the legality of the contemplated action. In making such an evaluation, the lawyer acts at the behest of the Department of the Army as the client but for the purpose of establishing the limits of the Army's authorized activity. Such an opinion may be confidential legal advice depending on whether the Army intended it to be confidential.

(3) A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, an Army lawyer detailed to conduct a foreign claims investigation of a traffic accident between a foreign national and a Soldier in accordance with applicable Army regulations does not have a client-lawyer relationship with the Soldier. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer represents the person whose affairs are being examined. When the lawyer does represent that person, the general rules concerning loyalty to client and preservation of confidences apply. For this reason, it is essential to identify the client. The identity of the client should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

##### **Duty to Third Person**

(4) When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the

client. For example, if the lawyer is acting as an advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

### **Access to and Disclosure of Information**

(5) The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

### **Obtaining Client's Informed Consent**

(6) Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests; the lawyer should also consult with his or her supervisory lawyer for advice and guidance. See Rules 1.6(a) and 1.0(h).

### **CROSS REFERENCES:**

Rule 1.0(h)	"Informed Consent"
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.9	Duties to Former Clients
Rule 1.13	Department of the Army as Client
Rule 1.16	Declining or Terminating Representation
Rule 4.1	Truthfulness in Statements to Others
Rule 4.2	Communication with Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons

### **Rule 2.4 Lawyer Serving as Third-Party Neutral**

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

### **COMMENT:**

(1) Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator, or evaluator, who assists the parties, represented or unrepresented, in the resolution of a

dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator, or decision-maker depends on the particular process that is either selected by the parties or mandated by a court.

(2) The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitrators in Commercial Disputes prepared by a joint committee of the ABA and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the ABA, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

(3) Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under paragraph (b) will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

(4) A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

(5) Lawyers who represent clients in alternative dispute-resolution processes are governed by these Rules of Professional Conduct and those of their licensing authorities. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(w)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

#### **CROSS REFERENCES:**

Rule 1.0(j) "Knows"

Rule 1.0(q) "Reasonably Should Know"

Rule 1.0(w) "Tribunal"

Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

Rule 3.3 Candor Toward the Tribunal

Rule 4.1 Truthfulness in Statements to Others

#### **ADVOCATE**

##### **Rule 3.1 Meritorious Claims and Contentions**

[Modified] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, may nevertheless so defend the proceeding as to require that every element of the case be established.

#### **COMMENT:**

(1) The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

(2) The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the

lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

(3) A lawyer does not violate this Rule by raising issues in good faith reliance on court precedent. See, for example, *United States v. Grostefon*, 12 M. J. 431 (C.M.A. 1982).

**CROSS REFERENCES:**

Rule 1.3	Diligence
Rule 1.4	Communication
Rule 1.6	Confidentiality of Information
Rule 3.2	Expediting Litigation
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel

**Rule 3.2 Expediting Litigation**

[Modified] A lawyer shall make reasonable efforts to expedite litigation and other proceedings consistent with the interests of the client.

**COMMENT:**

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

**CROSS REFERENCES:**

Rule 1.4	Communication
Rule 3.1	Meritorious Claims and Contentions
Rule 3.3	Candor Toward the Tribunal

**Rule 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (3) [Modified] offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of an accused in a criminal matter, that the lawyer reasonably believes is false; or
- (4) [Augmented] disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

## **COMMENT:**

(1) This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(w) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

(2) This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a case, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### **Representations by a Lawyer**

(3) An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

### **Misleading Legal Argument**

(4) Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. The term “legal authority in the controlling jurisdiction” in paragraph (a)(2) refers to Army or Department of Defense regulations or directives, the Manual for Courts-Martial, opinions by military appellate courts, or similar authorities. A lawyer should not knowingly fail to disclose to the tribunal legal authority from a non-controlling jurisdiction, known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, if the legal issue being litigated has not been decided by a controlling jurisdiction and the judge would reasonably consider such authority important to resolving the issue being litigated.

### **False Evidence**

(5) Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

(6) If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows to be false. For more on false testimony by the client, see Comments (10) through (14), below.

(7) The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(j). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

(8) Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.

(9) For purposes of these Rules, "reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances. A "reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. Knowledge may be inferred from circumstances. See Rule 1.0 (b), (j), (o), and (p).

### **False Evidence - Client Perjury**

(10) The duties stated in paragraphs (a) and (b) apply to all lawyers, including trial and appellate defense counsel and Special Victim Counsel in criminal cases.

(11) The accused has the right to testify on his/her own behalf and a lawyer cannot prohibit an accused from testifying even when the lawyer knows that such testimony will be false. For example, if an accused confesses his guilt to his lawyer, yet insists on testifying on his own behalf as to his innocence, the lawyer has actual knowledge of his client's guilt yet cannot refuse his client's right to testify. In such cases, when an accused insists on exercising his right to testify and the lawyer knows that the testimony is false, the lawyer must advise the accused against taking the witness stand to testify falsely. The lawyer should thoroughly explain the lawyer's duty of candor to the tribunal as required by this Rule. If prior to trial the accused continues to insist on testifying, the lawyer may seek to withdraw from the case. See Rule 1.16. If that is not permitted or if the situation arises during the trial or other proceedings and the accused insists upon testifying falsely, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. While a criminal accused has the right to the assistance of a lawyer, the right to testify, and a right of confidential communications with his lawyer, the accused does not have the right to assistance of counsel in committing perjury. Further, a lawyer has an obligation, not only in professional ethics but under the law, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(e).

(12) If during the trial the accused takes the stand in his own defense, and testifies with information that the lawyer knows to be false, the lawyer must take remedial action to rectify the situation. The lawyer should immediately advise the accused of the lawyer's duties under this Rule and seek the accused's cooperation in correcting the false statement. If the accused refuses to cooperate, the lawyer must make such disclosure to the tribunal as reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. The disclosure of an accused's false testimony can result in grave consequences to the accused, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. It may also require the lawyer to withdraw from representing the accused. See paragraph (c) and Comment (19). But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process that the adversary system is designed to implement. See Rule 1.2(d). Further, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the accused can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, an accused could in effect coerce the lawyer into being a party to fraud on the court.

(13) Because of the special protections historically provided to an accused at a court-martial, this Rule does not permit a lawyer to refuse to offer the testimony of an accused where the lawyer reasonably believes but does not know that the testimony will be false. For example, if an accused confessed to a crime to investigators and then subsequently recanted, and now desires to testify on his/her own behalf as to his/her innocence, the lawyer may have a reasonable belief that the accused's testimony may be false as to innocence, but does not have actual knowledge, absent any other information provided by the client. Thus, the lawyer cannot refuse the accused his/her right to testify.

(14) The obligations in this Rule also apply to counsel for witnesses and victims, including Special Victim Counsel.

### **Remedial Measures**

(15) Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when his/her client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, the lawyer's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the lawyer must take further remedial action. If

withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done: making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing.

### **Preserving Integrity of Adjudicative Process**

(16) Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, panel or court member, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law or regulation to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

### **Duration of Obligation**

(17) A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

### **Ex Parte Proceedings**

(18) Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as a hearing before an initial review officer, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge, magistrate, or other official has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

### **Withdrawal**

(19) Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

### **CROSS REFERENCES:**

Rule 1.0(b)	"Belief," "Believes"
Rule 1.0(j)	"Knowingly," "Known," "Knows"
Rule 1.0(o)	"Reasonable," "Reasonably"
Rule 1.0(p)	"Reasonable Belief," "Reasonably Believes"
Rule 1.0(w)	"Tribunal"
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.16	Declining or Terminating Representation
Rule 3.1	Meritorious Claims and Contentions
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness in Statements to Others

Rule 8.4 Misconduct  
Rule 8.5 Jurisdiction

### Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel, or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
  - (1) the person is a relative or an employee or other agent of a client; and
  - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

#### COMMENT:

- (1) The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
- (2) The actions of lawyers who are not considered a party to litigation have the potential to affect the litigation process. These situations may arise in matters where a Special Victim Counsel represents a victim who, although a client, is not a party to the litigation. These situations also arise in cases where the Department of the Army is not a party to the litigation, but lawyers are assigned to facilitate access for the parties to Army information, evidence, and witnesses. The prohibitions of this Rule apply equally to lawyers whether or not the Department of the Army is a party to the litigation.
- (3) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions, including the Uniform Code of Military Justice, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.
- (4) A lawyer who receives (that is, in the lawyer's possession) an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities when required by law or court order. Thus, if a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law. The appropriate disposition of such physical evidence is a proper subject to discuss confidentially with a supervisory lawyer. When a client informs the lawyer about the existence of material having potential evidentiary value adverse to the client or when the client presents but does not relinquish possession of such material to the lawyer, the lawyer should inform the client of the lawyer's legal and ethical obligations regarding evidence. Frequently, the best course for the lawyer is to refrain from either taking possession of such material or advising the client as to what course of action should be taken regarding it. See Rules 1.6 and 1.7. If a lawyer discloses the location of or delivers an item of physical evidence to proper authorities, such action should be done in the way best designed to protect the client's interest. The lawyer should consider methods of return or disclosure which best protect: (a) the client's identity; (b) the client's words concerning the item; (c) other confidential information; and (d) the client's privilege against self-incrimination.

(5) With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law and regulation. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

(6) Paragraph (f) permits a lawyer to advise relatives, employees, or other agents of a client to refrain from giving information to another party, for such persons may identify their interests with those of the client. See also Rule 4.2.

#### **CROSS REFERENCES:**

Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 3.3	Candor Toward the Tribunal
Rule 4.1	Truthfulness in Statements to Others
Rule 4.2	Communication with Person Represented by Counsel
Rule 4.4	Respect for Rights of Third Persons
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.4	Professional Independence of a Lawyer

#### **Rule 3.5 Impartiality and Decorum of the Tribunal**

A lawyer shall not:

- (a) [Modified] seek to influence a judge, court or board or tribunal member, prospective court or board or tribunal member, or other official by means prohibited by law;
- (b) [Modified] communicate ex parte with a judge, court or board or tribunal member, prospective court or board or tribunal member, or other official during the proceeding unless authorized to do so by law, regulation, or court order;
- (c) [Modified] communicate with a court or board or tribunal member, or prospective court or board or tribunal member, after discharge of the court, board, or tribunal if:
  - (1) the communication is prohibited by law, regulation, or court order;
  - (2) such member or prospective member has made known to the lawyer a desire not to communicate; or
  - (c) the communication involves misrepresentation, coercion, duress, or harassment; or
- (d) [Modified] engage in conduct intended to disrupt a court, board, or tribunal.

#### **COMMENT:**

- (1) Many forms of improper influence upon a tribunal are proscribed by law or regulation. Others are specified in the Code of Judicial Conduct for Army Trial and Appellate Judges, with which a lawyer should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.
- (2) During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, board presidents, hearing officers, or court or board or tribunal members, unless authorized to do so by law, regulation, or court order.
- (3) A lawyer may on occasion want to communicate with a court or board or tribunal member, or such prospective member, after the court, board, or tribunal has been discharged. The lawyer may do so unless the communication is prohibited by law, regulation, or court order but must respect the desire of the member not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.
- (4) The lawyer's function is to present evidence and argument so that the cause may be decided according to law or regulation. Refraining from abusive or obstreperous conduct is a corollary of the lawyer's right to speak on behalf of litigants. A lawyer is required to be respectful to military judges, court-martial members, administrative board members, opposing counsel, victims, witnesses, spectators, and other tribunal personnel. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's departure from the expected demeanor is no justification for similar dereliction by a lawyer. A lawyer can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

#### **CROSS REFERENCES:**

Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel

### **Rule 3.6 Tribunal Publicity [Modified Title]**

(a) [Modified] A lawyer who is participating or has participated in the investigation or litigation of a matter, to include adverse administrative or disciplinary proceedings, shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter or an official review process thereof. An extrajudicial statement ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, and that statement relates to:

- (1) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;
- (2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;
- (6) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or
- (7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense. This does not preclude the lawyer from commenting on such matters in a representational capacity.

(b) [Modified] Notwithstanding paragraph (a), a lawyer, to include a lawyer involved in the investigation or litigation of a matter, may state without elaboration:

- (1) [Modified] the general nature of the claim, offense, or defense involved and, except when prohibited by law, regulation, or policy, the identity of the persons involved;
- (2) information contained in a public record;
- (3) [Modified] that an investigation of a matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, regulation, or policy, the identity of the persons involved;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) [Modified] in a criminal case, in addition to subparagraphs (1) through (6):
  - (i) the identity, duty station, occupation, and family status of the accused;
  - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
  - (iii) the fact, time, and place of apprehension; and
  - (iv) the identity of investigating and apprehending officers or agencies and the length of the investigation.

(c) [Omitted]

(d) [Modified] No lawyer associated in a firm or government agency, to include the Department of the Army, with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e) [Augmented] The protection and release of information in matters pertaining to the Department of the Army is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (for example, regulations of the Department of Defense, the Department of the Army, The Judge Advocate General of the Army, the U.S. Army Corps of Engineers, and the U.S. Army Materiel Command).

#### **COMMENT:**

(1) It is difficult to strike a balance between protecting the right to a fair trial or proceeding and safeguarding the right of free expression. Preserving the right to a fair trial or proceeding necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury or members is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of

information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

(2) Special rules of confidentiality may validly govern proceedings involving classified material, juveniles, domestic relations and mental disability, and perhaps other types of litigation and proceedings. Rule 3.4(c) requires compliance with such Rules.

(3) This Rule sets forth a basic general prohibition against a lawyer making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been, involved in the investigation or litigation, and their associates in a firm or government agency, including the Department of the Army.

(4) Paragraph (a) sets forth the general prohibition against release of extrajudicial statements on certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action. Paragraph (a) identifies a non-exclusive list of subjects that presumptively result in material prejudice and must be considered specifically prohibited absent unique or compelling circumstances. These subjects relate to:

(a) the character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(b) in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of an accused or suspect in a criminal case or proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action;

(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and that would, if disclosed, create a substantial risk of prejudicing an impartial trial or proceeding;

(f) the fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(g) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense. This does not preclude the lawyer from commenting on such matters in a representational capacity.

(5) Paragraph (a)(7) makes clear that the prohibition on extrajudicial statements does not preclude comment about the credibility, reputation, motives, or character of Department of Defense personnel by a lawyer properly acting in a representational capacity, for example, before an administrative hearing where such matters are relevant.

(6) Another relevant factor in determining prejudice is the nature of the proceeding involved. Court-martial trial by members and military commission trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Administrative board hearings and arbitration proceedings may be even less affected. This Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

(7) Paragraph (b) identifies a non-exclusive list of specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not, in most instances, be considered prohibited by the general prohibition of paragraph (a).

(8) See Rule 3.8(f) for additional duties of prosecutors (Trial Counsel) in connection with extrajudicial statements about criminal proceedings.

(9) Paragraph (e) acknowledges that an Army lawyer's release of information is governed not only by this Rule but also by Federal statutes and regulations. Army members must comply with applicable laws, regulations, and organizational policy in making public statements of any kind. Public statements include comments made through social media. Although not a party, Special Victim Counsel must comply with this Rule; based on their position, any extrajudicial statements they make could prejudice a proceeding. Prior to releasing any information, an Army lawyer should consult the appropriate statute, directive, regulation, or policy guideline.

#### **CROSS REFERENCES:**

Rule 1.6 Confidentiality of Information

Rule 3.4 Fairness to Opposing Party and Counsel

Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel

### **Rule 3.7 Lawyer as Witness**

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case; or
  - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

#### **COMMENT:**

- (1) Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

#### **Advocate-Witness Rule**

(2) The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

(3) To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

(4) Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9, and 1.10 have no application to this aspect of the problem.

(5) Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

#### **Conflict of Interest**

(6) In determining if it is permissible to act as advocate in a trial or proceeding in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer

will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(c) for the definition of "confirmed in writing" and Rule 1.0(h) for the definition of "informed consent."

(7) Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

#### **CROSS REFERENCES:**

Rule 1.0(c)	"Confirmed in Writing"
Rule 1.0(h)	"Informed Consent"
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflict of Interest: Current Clients
Rule 1.9	Duties to Former Clients
Rule 3.4	Fairness to Opposing Party and Counsel

### **Rule 3.8 Special Responsibilities of a Trial Counsel and Other Army Counsel [Modified Title]**

[Modified] A Trial Counsel in a criminal case shall:

- (a) [Modified] recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) [Modified] not seek to obtain from an unrepresented accused a waiver of important pretrial rights;
- (d) [Modified] make timely disclosure to the defense of all evidence or information known to the Trial Counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the Trial Counsel, except when the Trial Counsel is relieved of this responsibility by a protective order or regulation;
- (e) [Omitted]; and
- (f) [Modified] except for statements that are necessary to inform the public of the nature and extent of the Trial Counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the Trial Counsel in a criminal case from making an extrajudicial statement that the Trial Counsel would be prohibited from making under Rule 3.6 or this Rule.
- (g) [Substituted] When a Trial Counsel or other Army lawyer learns of new, credible, and material evidence or information creating a reasonable likelihood that a convicted accused did not commit an offense of which the accused was convicted at court-martial, the Trial Counsel or other Army lawyer shall process that evidence as follows:
  - (1) After final adjournment but before convening authority initial action:
    - (i) Any Trial Counsel who learns of such evidence or information shall promptly disclose that evidence to the accused through counsel and make reasonable efforts to cause an investigation to determine whether the evidence substantially affects any finding of guilty or the sentence.
    - (ii) Any other Army lawyer who learns of such evidence or information shall promptly disclose that evidence to the Staff Judge Advocate of the convening authority who referred the case to trial. The Staff Judge Advocate will then ensure such evidence is processed in accordance with subparagraph (g)(1)(i) above.
  - (2) After convening authority initial action but before final action: Any Army lawyer who learns of such evidence or information shall promptly notify the Clerk of Court for the U.S. Army Court of Criminal Appeals. If the case is pending review under Article 66, Uniform Code of Military Justice, the Clerk of Court shall forward the notice to the appellate defense counsel of record or, if none has been assigned, the Chief, Defense Appellate Division, U.S. Army Legal Services Agency. If the case is pending review under Article 69, Uniform Code of Military Justice, the Clerk of Court shall forward the notice to the Criminal Law Division in the Office of The Judge Advocate General.
  - (3) After final action: Any Army lawyer who learns of such evidence or information shall promptly notify the Criminal Law Division in the Office of The Judge Advocate General.

(h) [Modified] When a Trial Counsel or other Army lawyer learns of clear and convincing evidence establishing that an accused was convicted of an offense that the accused did not commit, the Trial Counsel or other Army lawyer shall seek to remedy the conviction by disclosing the evidence to the appropriate court or authority per paragraph (g).

**COMMENT:**

(1) The Trial Counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), Uniform Code of Military Justice; see also Rule for Courts-Martial 103(16), 405(d)(3)(A), and 502(d)(5). Accordingly, a Trial Counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph (a) recognizes that the Trial Counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial Counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See *United States v. Howe*, 37 M.J. 1062 (NMCMR 1993). Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also Rule 3.3(d) (governing *ex parte* proceedings). Applicable law may require other measures by the Trial Counsel. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

(2) Paragraph (c) does not apply to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph (d) recognizes that a Trial Counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a Trial Counsel's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. A Trial Counsel can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements that a Trial Counsel may make that comply with Rule 3.6.

(5) Like other lawyers, Trial Counsel are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the Trial Counsel of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a Trial Counsel to exercise reasonable care to prevent persons assisting or associated with the Trial Counsel from making improper extrajudicial statements, even when such persons are not under the direct supervision of the Trial Counsel. Ordinarily, the reasonable care standard will be satisfied if the Trial Counsel issues the appropriate cautions to law enforcement personnel and other relevant individuals. A Trial Counsel may comply with paragraph (f) in a number of ways. These include personally informing others of the lawyer's obligations under Rule 3.6, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the Trial Counsel.

(6) The "ABA Standards for Criminal Justice: The Prosecution Function," (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide Trial Counsel in the prosecution of criminal cases. See *United States v. Howe*, 37 M.J. 1062 (NMCMR 1993); *United States v. Dancy*, 38 M.J. 1 (CMA 1993); *United States v. Hamilton*, 41 M.J. 22 (CMA 1994); *United States v. Meek*, 44 M.J. 1 (CMA 1996).

(7) The reference to "other Army counsel" in the title to this Rule pertains only to paragraphs (g) and (h). Those paragraphs should apply not only to Trial Counsel, but also to other Army counsel (lawyers) (for example, Chiefs of Military Justice, Staff Judge Advocates and their assistants or deputies, and Legal Assistance lawyers).

(8) When a Trial Counsel learns of new, credible, and material evidence or information creating a reasonable likelihood that an accused did not commit an offense of which the accused was convicted at court-martial, paragraph (g) requires prompt disclosure by the Trial Counsel and other Army lawyers to different persons or authorities, depending on the status of the case. For the purposes of this Rule, "new evidence" is defined as evidence discovered after the trial. Any Trial Counsel who learns of such evidence or information after final adjournment but before convening authority initial action is required to promptly disclose that evidence to the accused through counsel and make reasonable efforts to cause an investigation to determine whether the evidence substantially affects any finding of guilty or the sentence. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented accused must be made through the accused's counsel. Any other Army lawyer who learns of such evidence or information after final adjournment but before convening authority

initial action is required to promptly disclose that evidence to the Staff Judge Advocate of the convening authority who referred the case to trial. The Staff Judge Advocate will then ensure such evidence is processed in accordance with subparagraph (g)(1)(i). Any Army lawyer who learns of such evidence or information after convening authority initial action but before final action is required to promptly notify the Clerk of Court for the U.S. Army Court of Criminal Appeals. If the case is pending review under Article 66, Uniform Code of Military Justice, the Clerk of Court is required to forward the notice to the appellate defense counsel of record or, if none has been assigned, the Chief, Defense Appellate Division, U.S. Army Legal Services Agency. If the case is pending review under Article 69, Uniform Code of Military Justice, the Clerk of Court is required to forward the notice to the Criminal Law Division in the Office of The Judge Advocate General. Any Army lawyer who learns of such evidence or information after final action is required to promptly notify the Criminal Law Division in the Office of The Judge Advocate General.

(9) Under paragraph (h), once the Trial Counsel or other Army lawyer learns of clear and convincing evidence that the accused was convicted of an offense that the accused did not commit, the Trial Counsel or other Army lawyer must seek to remedy the conviction by disclosing the evidence to the appropriate court or authority per paragraph (g).

(10) A Trial Counsel's or other Army lawyer's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

#### **CROSS REFERENCES:**

Rule 1.0(o) "Reasonable"

Rule 1.0(t) "Substantial"

Rule 1.0(w) "Tribunal"

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

Rule 3.1 Meritorious Claims and Contentions

Rule 3.3 Candor Toward the Tribunal

Rule 3.4 Fairness To Opposing Party and Counsel

Rule 3.5 Impartiality and Decorum of the Tribunal

Rule 3.6 Tribunal Publicity

Rule 3.9 Advocate in Nonadjudicative Proceedings

Rule 4.2 Communication with Person Represented by Counsel

Rule 4.3 Dealing with Unrepresented Person

Rule 4.4 Respect for Rights of Third Persons

Rule 5.4 Professional Independence of a Lawyer

Rule 8.4 Misconduct

#### **Rule 3.9 Advocate in Nonadjudicative Proceedings**

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

#### **COMMENT:**

(1) In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

(2) Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

(3) This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income tax returns. Nor does it apply to the representation of a client in connection

with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

#### **CROSS REFERENCES:**

Rule 1.1	Competence
Rule 1.6	Confidentiality of Information
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 4.1	Truthfulness in Statements to Others
Rule 4.4	Respect for Rights of Third Persons
Rule 5.4	Professional Independence of a Lawyer

### **TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS**

#### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

#### **COMMENT:**

##### **Misrepresentation**

(1) A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act, or by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentation by a lawyer other than in the course of representing a client, see Rule 8.4.

##### **Statements of Fact**

(2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

##### **Crime or Fraud by Client**

(3) Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) of this Rule (Rule 4.1) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation, or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing the information, then under paragraph (b) of this Rule the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

**CROSS REFERENCES:**

Rule 1.0(f)	“Fraudulent”
Rule 1.0(j)	“Knowingly”
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.6	Confidentiality of Information
Rule 3.3	Candor Toward the Tribunal
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 4.1	Truthfulness in Statements to Others
Rule 8.4	Misconduct

**Rule 4.2 Communication with Person Represented by Counsel**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

**COMMENT:**

(1) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

(2) This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

(3) This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(4) This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

(5) Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. The “authorized by law” exception to this Rule is also satisfied by a constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel, such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises. Directives issued by an agency can qualify as “law” for the purposes of this Rule when embodied in formal regulations that have been properly promulgated pursuant to statutory or constitutional authority that contemplates regulation of the character in question.

(6) Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, an Army lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

(7) In the case of an organization represented by counsel, this Rule prohibits communications with a constituent of the organization (that is, an officer, employee, or member of the organization) who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization’s lawyer is not required for communication with a former constituent. Compare

Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

(8) This Rule does not prohibit a lawyer representing one party in a matter from communicating concerning the matter with the commanding officer of another party to the matter. For example, a legal assistance lawyer representing the spouse of a Soldier may write to the commanding officer of the Soldier-sponsor concerning a disputed matter of financial support to the spouse.

(9) The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(j). Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

(10) In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

#### **CROSS REFERENCES:**

Rule 1.0(j)	“Knowingly,” “Known,” or “Knows”
Rule 3.4	Fairness to Opposing Party and Counsel
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness in Statements to Others
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons
Rule 8.4	Misconduct

#### **Rule 4.3 Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

#### **COMMENT:**

(1) An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

(2) This Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

#### **CROSS REFERENCES:**

Rule 1.0(j)	“Knows”
Rule 1.0(o)	“Reasonable”
Rule 1.0(q)	“Reasonably should know”
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.13	Department of the Army as Client

Rule 3.4	Fairness to Opposing Party and Counsel
Rule 4.1	Truthfulness in Statement to Others
Rule 4.4	Respect for Rights of Third Persons

#### **Rule 4.4 Respect for Rights of Third Persons**

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

#### **COMMENT:**

(1) Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. The duty of a lawyer to represent the client with zeal does not militate against the lawyer's concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

(2) Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or deleting electronically stored information, is a matter beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

(3) Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

#### **CROSS REFERENCES:**

Rule 1.0(j)	"Knows"
Rule 1.0(o)	"Reasonable"
Rule 1.0(q)	"Reasonably should know"
Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 1.4	Communication
Rule 3.2	Expediting Litigation
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness in Statements to Others
Rule 4.2	Communication with Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person

## LEGAL OFFICES

### Rule 5.1 Responsibilities of Senior Counsel and Supervisory Lawyers [Modified Title]

(a) [Modified] The General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers, are the Senior Counsels in the Army for purposes of these Rules of Professional Conduct. The Senior Counsels, and the civilian and military supervisory lawyers under their respective legal technical supervision, shall make reasonable efforts to ensure that Army legal offices under their legal technical supervision have in effect measures giving reasonable assurance that all lawyers in such respective offices conform to the Rules of Professional Conduct. This requirement also applies to Army lawyers who supervise the professional work of a legal office in a joint or unified command.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) [Augmented] A supervisory Army lawyer is responsible for making appropriate efforts to ensure that a subordinate lawyer is properly trained and is competent to perform the duties to which a subordinate lawyer is assigned.

#### COMMENT:

(1) This Rule was modified in order to conform to the practice of law in the U.S. Army and recognize The Judge Advocate General's specific authority under Article 6, Uniform Code of Military Justice, and Rule for Courts-Martial 109.

(2) Paragraph (a) applies to the Senior Counsel and lawyers who have supervisory authority over the professional work of a legal office or legal organization (such as the Army Trial Defense Service). Paragraph (a) recognizes the responsibilities of the Senior Counsel and supervisory lawyers to implement and ultimately enforce the Rules of Professional Conduct. See Rule 1.0(s) for the definition of Senior Counsel. Paragraph (a) requires lawyers with supervisory authority over the professional work of a legal office or legal organization to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the legal office or legal organization, as appropriate, will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, and ensure that inexperienced lawyers are properly supervised.

(3) Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers. Paragraph (b) requires all lawyers who directly supervise other lawyers to take reasonable measures to ensure that such subordinates conform their conduct to these Rules. The measures required to fulfill the responsibility prescribed in paragraph (b) can depend on the office's structure and the nature of its practice. In a small office of experienced lawyers, informal supervision and periodic review of a subordinate lawyer's legal work ordinarily might be sufficient. In a large office, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some offices, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a senior lawyer. See Rules 1.13 and 5.2. Offices, regardless of size, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of an office can influence the conduct of all its members, and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

(4) Supervisory lawyers must be careful to avoid conflicts of interest in providing advice to subordinate lawyers. For example, the chief of administrative law in an office may be the supervisory lawyer for both an administrative law lawyer and a legal assistance lawyer. Both subordinate lawyers may seek advice concerning an appeal to an adverse action handled by the administrative law lawyer and now being challenged by the client of the legal assistance lawyer. In another example, the Senior Trial Defense Counsel may be the supervisory lawyer for two Trial defense Counsel representing clients with adverse interests. In both situations, the supervisory lawyer should not advise both subordinate lawyers. Depending on the circumstances, the supervisory lawyer may advise one subordinate lawyer and refer the other subordinate lawyer to another supervisory lawyer in the office, or the supervisory lawyer may refer both subordinate lawyers to separate supervisory lawyers in the office.

(5) Paragraph (c) expresses a general principle of supervisory responsibility for acts of another. See also Rule 8.4(a).

(6) Ratification as used in paragraph (c)(1) means approval of or consent to another lawyer's conduct. For example, a chief of legal assistance ratifies the unauthorized disclosure of a client confidence by a subordinate legal assistance lawyer when the subordinate informs the chief of legal assistance of his intention to disclose the confidence and the chief consents to the subordinate's doing so.

(7) Paragraph (c)(2) defines the duty of a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Appropriate remedial action by a lawyer who has direct supervisory authority over another lawyer would depend on the immediacy of the supervisory lawyer's involvement and the seriousness of the misconduct. Apart from the responsibility that may be incurred for ordering or ratifying another lawyer's conduct under paragraph (c)(1), the supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervisory lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

(8) Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification, or knowledge of the violation.

(9) Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability under these Rules for the conduct of subordinate lawyers. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

(10) The duties imposed by this Rule on Senior Counsel and supervisory lawyers do not alter the personal duty of each lawyer to whom these Rules apply to abide by the Rules of Professional Conduct.

#### **CROSS REFERENCES:**

Rule 1.0( <i>s</i> )	“Senior Counsel”
Rule 1.0( <i>u</i> )	“Supervisory Lawyer”
Rule 1.0( <i>v</i> )	“The Judge Advocate General”
Rule 1.13	Department of the Army as Client
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.4	Professional Independence of a Lawyer
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct

#### **Rule 5.2 Responsibilities of a Subordinate Lawyer**

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

#### **COMMENT:**

(1) Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous motion at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

(2) When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

#### **CROSS REFERENCES:**

Rule 1.0( <i>u</i> )	“Supervisory Lawyer”
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.4	Professional Independence of a Lawyer
Rule 8.4	Misconduct

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants [Modified Title]**

[Modified] With respect to a nonlawyer acting under the authority, supervision, or direction of a lawyer:

(a) [Modified] the senior supervisory lawyer in a legal office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer. This requirement also applies to an Army lawyer who is the senior supervisory lawyer in a legal office in a joint or unified command;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. This requirement also applies to an Army lawyer in a legal office in a joint or unified command; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

#### **COMMENT:**

(1) This Rule was modified slightly in order to conform to the practice of law in the U.S. Army.

(2) Paragraph (a) requires the senior supervisory lawyer in a legal office (or, as appropriate, a legal organization, such as the Army Trial Defense Service) to make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that nonlawyers in the office and nonlawyers outside the legal office who work on legal office matters act in a way compatible with the professional obligations of the lawyer. See Comment (2) to Rule 5.1 (responsibilities with respect to lawyers within a legal office). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers in a legal office. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within a legal office that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

(3) Lawyers generally employ assistants in their practice, including paralegals, secretaries, clerks, investigators, law student interns, and others. Such assistants act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their performance, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

#### **CROSS REFERENCES:**

Rule 1.0(u)	“Supervisory Lawyer”
Rule 1.6	Confidentiality of Information
Rule 3.8	Special Responsibilities of a Trial Counsel and Other Army Counsel
Rule 4.1	Truthfulness in Statements to Others
Rule 4.4	Respect for Rights of Third Persons
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 5.5	Unauthorized Practice of Law

### **Rule 5.4 Professional Independence of a Lawyer**

(a) [Substituted] Notwithstanding a Judge Advocate's status as a commissioned officer subject, generally, to the authority of superiors, a Judge Advocate detailed or assigned to represent an individual member or employee of the Department of the Army is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

(b) [Substituted] Notwithstanding a civilian lawyer's status as a Federal employee subject, generally, to the authority of superiors, a civilian lawyer detailed or assigned to represent an individual member or employee of the Department of the Army is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client.

(c) [Modified] A non-government civilian lawyer representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services shall not permit a person who recommends, employs,

or pays that lawyer to render legal services for another person to direct or regulate or interfere in any way with that lawyer's professional judgment in rendering such legal services.

(d) [Substituted] The exercise of professional judgment in accordance with paragraphs (a) or (b) above shall not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

#### **COMMENT:**

##### **General**

(1) Where someone other than the client pays a non-government civilian lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment.

(2) This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See Rule 1.8(f) and its Comment (11) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

##### **Judge Advocates**

(3) This Rule recognizes that a Judge Advocate is a commissioned military officer required by law to obey the lawful orders of superior officers. This Rule also recognizes the similar status of civilian Army lawyers. Nevertheless, the practice of law requires the exercise of judgment solely for the benefit of the client and free of compromising influences and loyalties. Thus, when a Judge Advocate or civilian Army lawyer is assigned to represent an individual client, neither the lawyer's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(4) Not all direction given to a subordinate lawyer is an attempt to improperly influence the lawyer's professional judgment. Each situation must be evaluated by the facts and circumstances, giving due consideration to the subordinate's training, experience, and skill. A lawyer subjected to outside pressures should make full disclosure of them to his or her supervisory lawyer(s) and to the client. If the lawyer or the client believes that the effectiveness of the representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

(5) Additionally, an Army lawyer has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM.

#### **CROSS REFERENCES:**

Preamble

Rule 1.1 Competence

Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

Rule 1.3 Diligence

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.13 Department of the Army as Client

Rule 5.1 Responsibilities of Senior Counsel and Supervisory Lawyers

Rule 5.2 Responsibilities of a Subordinate Lawyer

#### **Rule 5.5 Unauthorized Practice of Law [Modified Title]**

(a) [Modified] A lawyer shall not:

(1) except as authorized by an appropriate military department, practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(3) engage in the practice of law outside the Department of the Army without receiving prior and proper written authorization from the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, or the Chief Counsel, Army Corps of Engineers).

(b)-(e) [Omitted]

(f) [Augmented] A nonlawyer assistant shall not practice law and shall comply with the applicable legal authorities governing the nonlawyer assistant's responsibilities under these Rules and this regulation.

**COMMENT:**

(1) A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

(2) The definition of the practice of law varies from one jurisdiction to another. Determining what conduct constitutes the practice of law defies mechanistic formulation, although it encompasses not only court appearances but also services rendered out of court and includes the giving of any advice or rendering any service requiring the use of legal knowledge. For the purpose of these Rules of Professional Conduct, the practice of law would specifically include, but not be limited to, the providing of any advice, opinion, document, or instrument that construes or interprets law, legal authority, or legal rights, or is legal in nature (such as a contract, will, lease, power of attorney, and so forth, or any advice or opinion that purports to render a legal evaluation of such). Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of nonlawyer assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

(3) A lawyer's performance of legal duties pursuant to a military department's authorization, however, is considered a Federal function and not subject to regulation by the States. Thus, 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. Likewise, this Rule does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, social workers, accountants, and persons employed in Government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se (for himself; in his own behalf) or nonlawyers authorized by law or regulation to appear and represent themselves or others in military proceedings.

(4) The practice of law outside the Department of the Army is defined as any single or regular provision of legal advice, counsel, assistance, or representation, with or without compensation, that is not performed pursuant or incident to duties as an Army lawyer, military or civilian (including while on transition/terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of these Rules.

(5) An Army lawyer's primary professional responsibility is to the client, whether the client is an individual or the Department of the Army, and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of these Rules and other regulations concerning the provision of legal services within the Department of the Army. The practice of law outside the Department of the Army, therefore, must be carefully monitored. Army lawyers who seek to engage in the practice of law outside the Army must first obtain permission from the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, or the Chief Counsel, Army Corps of Engineers, or their respective designees). This requirement does not apply to Reserve Component members of the Judge Advocate General's Corps unless they are ordered to active duty for more than 30 consecutive days.

(6) Nonlawyer assistants may conduct any law-related services at which they are competent, supervised, and authorized by appropriate authority, provided they do not engage in the unauthorized practice of law. A nonlawyer assistant engages in the unauthorized practice of law if he or she does not hold a current law license or, if he or she holds such a current law license, has not been authorized by the appropriate Senior Counsel to practice law in the Department of the Army.

(7) Misrepresentation of one's status is a form of unauthorized practice of law. The ultimate purpose of all rules of professional conduct is the protection of the public. If a client is misled to believe that a nonlawyer assistant in a legal office is a lawyer, the client will expect the nonlawyer assistant to be able to take certain actions to advance his or her case that the nonlawyer assistant may either be insufficiently knowledgeable to undertake or expressly prohibited from taking. Such misunderstandings, whether occurring innocently or as the result of deliberate deception, may result in harm to the client and damage to the reputation of the legal profession. In order to prevent such misunderstandings from occurring, the nonlawyer assistant should always disclose the fact that he or she is not a lawyer during initial contact with clients or potential clients.

**CROSS REFERENCES:**

Rule 1.0(s) "Senior Counsel"

Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 8.5	Jurisdiction

**Rule 5.6 Restrictions on Right to Practice [Omitted]**

**Rule 5.7 Responsibilities Regarding Non-Law and Law-Related Duties [Modified Title]**

[Substituted] An Army lawyer, military or civilian, shall also be subject to these Rules of Professional Conduct with respect to non-law but official, and law-related but official, duties performed as an Army lawyer.

**COMMENT:**

This Rule is derived, but different, from ABA Model Rule 5.7, Responsibilities Regarding Law-Related Services. The practice of law in the Department of the Army is similar (but not identical) to a corporate in-house practice of law in that a lawyer performs a combination of non-law, law-related, and purely legal activities for a single employer. Examples of non-law official duties include an Army lawyer, military or civilian, serving as an Executive Officer, Chief of Staff, aide-de-camp, or plans officer. Examples of law-related official duties include an Army lawyer, military or civilian, serving as an Article 32 investigating officer or other type of investigating or inquiry officer, or a law instructor/trainer. The non-law and law-related official duties performed by an Army lawyer, military or civilian, meet the definition of “law-related services” found in paragraph (b) of ABA Model Rule 5.7 because every Army lawyer’s employment by the Army as an Army lawyer is predicated on being qualified (or certified, as appropriate) to practice law in the Army by one of the four Senior Counsels. Thus, Army lawyers are always accountable, as Army lawyers, to their respective Senior Counsel as the qualifying (or certifying) authority. These non-law and law-related official duties are commingled within Army law practice and are not otherwise independent, separate, or distinguishable.

**CROSS REFERENCES:**

Rule 1.0(a) “Army Lawyer”

**PUBLIC SERVICE**

**Rule 6.1 Voluntary Pro Bono Publico [Omitted]**

**Rule 6.2 Accepting Appointments [Omitted]**

**Rule 6.3 Membership in Legal Services Organization [Omitted]**

**Rule 6.4 Law Reform Activities Affecting Client Interests [Omitted]**

**Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs [Omitted]**

**INFORMATION ABOUT LEGAL SERVICES**

**Rule 7.1 Communications Concerning a Lawyer's Services**

(a) [Modified] A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement not materially misleading when considered as a whole.

(b) [Augmented] An Army lawyer may engage in communications as provided under this Rule only if:

- (1) the lawyer complies with the rules of the lawyer’s state and other licensing authorities regarding such communications; and
- (2) the lawyer adheres strictly to the Department of Defense Joint Ethics Regulation and other statutes and ethics regulations that apply to Army lawyers, which may impose more stringent standards depending on the circumstances.

**COMMENT:**

(1) This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

(2) Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.

(3) An advertisement that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

(4) Notwithstanding paragraph (a), paragraph (b) provides that an Army lawyer may engage in communications as provided under this Rule only if such communications comply with the rules of the lawyer’s state and other licensing authorities regarding such communications, and only if the lawyer adheres strictly to the Department of Defense Joint Ethics Regulation and other statutes and ethics regulations that apply to Army lawyers, which may impose more stringent standards depending on the circumstances.

(5) Publicizing the availability of government–provided legal services to authorized clients is not “advertising” for the purposes of these Rules.

(6) See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

#### **CROSS REFERENCES:**

Rule 1.2	Scope of Representation and Allocation of Authority between Client and Lawyer
Rule 4.1	Truthfulness in Statement to Others
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 8.4	Misconduct

#### **Rule 7.2 Advertising [Omitted]**

#### **Rule 7.3 Solicitation of Clients [Omitted]**

#### **Rule 7.4 Communication of Fields of Practice and Specialization**

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation “Admiralty,” “Proctor in Admiralty,” or a substantially similar designation.

(d) [Substituted] An Army lawyer, and any other lawyer subject to these Army Rules, may communicate the fact that the lawyer has other certifications and specialties if such communication is consistent with the Rules of the lawyer’s state or other licensing authorities. Such communication could include the fact that the lawyer:

(1) has been certified by The Judge Advocate General of the United States Army under the provisions of Article 27(b), Uniform Code of Military Justice, as competent to perform duties as a Trial Counsel (prosecutor) or Defense Counsel for a General Court-Martial.

(2) has been awarded a Professional Development Proficiency Code (PDPC) and/or Additional Skill Identifier (ASI) that identifies the lawyer as having specialized expertise and proficiency in certain core legal disciplines in accordance with Department of the Army policy.

(e) [Augmented] An Army lawyer who communicates facts under this Rule, to include under paragraph (d), must ensure that such communication is in compliance not only with the rules of the lawyer’s state or other licensing authorities regarding such communications but also with the Department of Defense Joint Ethics Regulation and other statutes and ethics regulations that apply to Army lawyers, any of which may impose more stringent standards depending on the circumstances.

#### **COMMENT:**

(1) Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer’s services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is

permitted to so indicate. Any communications under this Rule are subject to the “false or misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.

(2) Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

(3) Paragraph (d) permits an Army lawyer, and any other lawyer subject to these Army Rules, to communicate the fact that the lawyer has other certifications and specialties so long as such communication is consistent with the Rules of the lawyer’s state or other licensing authorities. Such communication could include the fact that the lawyer has been certified by The Judge Advocate General of the United States Army under the provisions of Article 27(b), Uniform Code of Military Justice, as competent to perform duties as a Trial Counsel (prosecutor) or Defense Counsel for a General Court-Martial (see also 10 USC 827(b)), and the fact that the lawyer has been awarded a PDPC and/or ASI that identifies the lawyer as having specialized expertise and proficiency in certain core legal disciplines in accordance with Department of the Army policy. Any statement that creates a false impression about certification or expertise remains prohibited.

(4) Paragraph (e) places an Army lawyer who communicates facts under this Rule on notice that the lawyer must ensure that such communication is in compliance with the rules of the lawyer’s state or other licensing authorities regarding such communications, and also in compliance with the Department of Defense Joint Ethics Regulation and other statutes and ethics regulations that apply to Army lawyers, any of which may impose more stringent standards depending on the circumstances.

**CROSS REFERENCES:**

Rule 1.2            Scope of Representation and Allocation of Authority between Client and Lawyer  
Rule 4.1            Truthfulness in Statement to Others  
Rule 7.1            Communications Concerning a Lawyer's Services

**Rule 7.5 Army Letterhead [Modified Title]**

[Substituted] An Army lawyer shall not use official Army letterhead when communicating in a private capacity.

**COMMENT:**

(1) Army lawyers must avoid the appearance of governmental sanction or endorsement of personal activities. See the Department of Defense Joint Ethics Regulation.

(2) This Rule also applies to an Army lawyer who is currently serving as a public officer or employee representing or serving in a joint or unified command within the Department of Defense or the Department of Defense itself, or another government agency, whether employed or specially retained by the government, with regard to that organization’s official letterhead.

(3) This Rule is not meant to prevent the use of official letterhead for letters of recommendation in the circumstances authorized by 5 CFR 2635.702(b).

**CROSS REFERENCES:**

Rule 7.1            Communications Concerning a Lawyer's Services

**Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges [Omitted]**

**MAINTAINING THE INTEGRITY OF THE PROFESSION**

**Rule 8.1 Bar Admission and Disciplinary Matters**

[Modified] An applicant or a lawyer, in connection with any application for bar admission, employment with the Department of the Army or any other part of the Federal government as a lawyer, appointment as a Judge Advocate, assignment to the Judge Advocate General’s Corps, certification as a Judge Advocate by The Judge Advocate General or his or her designee, qualification as a civilian lawyer by the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General, the Command Counsel of the U. S. Army Materiel Command, and the Chief Counsel of the U. S. Army Corps of Engineers, or their respective designees), or in connection with any disciplinary matter, shall not:

- (1) knowingly make a false statement of material fact; or
- (2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

**COMMENT:**

(1) The duty imposed by this Rule extends to persons or lawyers seeking admission to a bar or employment with the Department of the Army or any other part of the Federal government as a lawyer, appointment as a Judge Advocate, assignment to the Judge Advocate General's Corps, certification as a Judge Advocate by The Judge Advocate General or his or her designee, qualification as a civilian lawyer by the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General, the Command Counsel of the U. S. Army Materiel Command, and the Chief Counsel of the U. S. Army Corps of Engineers, or their respective designees), or in connection with any disciplinary matter. Hence, if a person makes a material false statement in connection with an application for admission, employment as a lawyer, or certification (for example, misstatement by a civilian lawyer before a military judge regarding qualifications under Rule for Courts-Martial 502), it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions, certification, or disciplinary authority of which the person involved becomes aware.

(2) This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article 31, Uniform Code of Military Justice. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

(3) A lawyer representing or sponsoring an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

**CROSS REFERENCES:**

Rule 1.6	Confidentiality of Information
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.5	Jurisdiction

**Rule 8.2 Judicial and Legal Officials**

(a) [Modified] A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) [Omitted]

**COMMENT:**

(1) Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for or already performing legal duties. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine confidence in the administration of justice.

(2) To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

**CROSS REFERENCES:**

Rule 1.0(j)	"Knows"
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### Rule 8.3 Reporting Professional Misconduct

(a) [Modified] A lawyer who knows that another lawyer has committed a violation of these Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall report such a violation in accordance with Army Rule 10.1 and implementing regulations or policies promulgated or established by the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers).

(b) [Modified] A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall report such a violation in accordance with Army Rule 10.1 and implementing regulations or policies promulgated or established by the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers).

(c) [Modified] This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) [Augmented] This Rule does not affect any reporting requirements a lawyer may have under other rules of professional conduct to which the lawyer is subject.

#### COMMENT:

(1) Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Lawyers have a similar obligation with respect to judicial misconduct. An apparent isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

(2) A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interests.

(3) If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. See Rule 1.0(t) ("Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance). Any report should be made in accordance with regulations and/or policies promulgated by the appropriate Senior Counsel (that is, the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers). Similar considerations apply to the reporting of judicial misconduct.

(4) The duty to report professional misconduct does not apply to a lawyer appointed, detailed, or retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

#### CROSS REFERENCES:

Rule 1.0(j)	"Knows"
Rule 1.0(t)	"Substantial"
Rule 5.1	Responsibilities of Senior Counsel and Supervisory Lawyers
Rule 8.4	Misconduct
Rule 8.5	Jurisdiction
Rule 10.1	Enforcement

### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

**COMMENT:**

(1) This Rule reaches conduct, to include criminal conduct, whether or not the lawyer was acting as a lawyer at the time. All Army lawyers, civilian and military (whether Regular Army, Army National Guard/Army National Guard of the United States, and Army Reserve), are expected to demonstrate model behavior and exemplary integrity at all times. The appropriate Senior Counsel may consider any and all derogatory or beneficial information about the lawyer for purposes of determining the lawyer's qualification, professional competence, or fitness to practice law in Department of the Army matters, or to administer professional conduct discipline in accordance with pertinent authorities.

(2) Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

(3) Paragraph (b) subjects a lawyer to discipline for criminal conduct that reflects adversely on the lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects." Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving violence, dishonesty, fraud, breach of trust, serious interference with the administration of justice, and the offense of willful failure to file an income tax return. A pattern of repeated offenses, even ones of minor significance when considered separately, can also indicate indifference to ethical and/or legal obligations. It is not necessary for a lawyer to be convicted of, or even charged with, a crime to violate this Rule. Crimes of a sexual nature violate paragraph (b). Violent crimes, including acts of domestic violence, are among those covered by paragraph (b). Criminal conduct that violates paragraph (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) can also violate paragraph (b) if it reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Other types of criminal acts could reflect adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, depending on the nature of the act and the circumstances of its commission. Examples of criminal acts that could, depending on the facts of the case, violate paragraph (b) are a Judge Advocate who violates the elements of Article 134 (Adultery), Uniform Code of Military Justice; a Judge Advocate who violates the elements of Article 133 (Conduct unbecoming an officer and gentleman); and an Army lawyer (military or civilian) who makes false statements or reckless allegations.

(4) Some criminal offenses, such as driving while intoxicated, public intoxication, and gambling, while not usually linked directly to the practice of law, could, depending on the facts and circumstances of the case, violate paragraph (b) if such conduct demonstrates a general indifference or disrespect for the law or to legal standards of conduct or denigrates the legal profession.

(5) Paragraph (c)'s prohibition of "conduct involving dishonesty, fraud, deceit, or misrepresentation" is broad and, like the other provisions of Rule 8.4, encompasses conduct outside the practice of law. A lawyer may not mislead or lie to a client. A lawyer can violate paragraph (c) by deceiving an adverse party or opposing counsel. Dishonesty to a lawyer's own office, colleagues, supervisors, or subordinates may violate paragraph (c). Paragraph (c) also extends to dishonesty in dealings with the world at large. Criminal conduct involving dishonesty, fraud, deceit, or misrepresentation that violates paragraph (b) also violates paragraph (c).

(6) An Army lawyer who advises on a lawful investigative activity, including providing guidance on undercover activity that involves the lawful use of subterfuge or misrepresentation by investigators, does not violate this Rule.

(7) Paragraph (d) prohibits a lawyer from engaging in "conduct that is prejudicial to the administration of justice." Application of this Rule is not limited to conduct connected with proceedings before a tribunal. This Rule can also be applied to a lawyer's criminal conduct; to conduct that does not involve the representation of a client; to conduct that is abusive or disruptive or that impedes the proper functioning of the legal system; to threats to press criminal charges or to file a disciplinary grievance to gain advantage in a matter; to abusive or uncivil behavior toward opposing counsel, parties, and witnesses; and to failure to comply with court rules and orders. Conduct that violates paragraph (c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) can also violate paragraph (d).

(8) Pursuant to paragraph (e), a lawyer may not "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." The proscription against implying an ability to use influence improperly extends to lawyers who serve or have served as judges.

(9) Paragraph (f) prohibits a lawyer from knowingly assisting a judicial officer in conduct that violates the applicable rules of judicial conduct.

(10) A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law also apply to challenges of legal regulation of the practice of law.

(11) Judge Advocates hold a commission as an officer in the United States Army and assume legal responsibilities going beyond those of other citizens. A Judge Advocate's abuse of such commission can suggest an inability to fulfill the professional role of judge advocate and lawyer. This concept has similar application to civilian Army lawyers.

#### **CROSS REFERENCES:**

Rule 1.0(f)	“Fraud”
Rule 1.0(j)	“Knowingly”
Rule 8.3	Reporting Professional Misconduct
Rule 8.5	Jurisdiction

#### **Rule 8.5 Jurisdiction [Substituted Title]**

[Substituted Rule in its Entirety]

(a) Lawyers (as defined in these Rules of Professional Conduct and as identified in paragraph 7 of this regulation) shall be governed by these Rules of Professional Conduct. A lawyer admitted to practice in this (Department of the Army) jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

(b) Pursuant to the authority of The Judge Advocate General under 10 USC 3037, these Rules apply to Judge Advocates in the Regular Army, the Army National Guard/Army National Guard of the United States, and the U. S. Army Reserve, regardless of whether serving in a legal billet or performing legal services, and not just when performing duty in a Title 10 or Title 32 status.

(c) Pursuant to the authority of The Judge Advocate General under Rule for Courts–Martial 109, these Rules apply to all lawyers who practice in Army courts or tribunals and other proceedings governed by the Uniform Code of Military Justice and the Manual for Courts-Martial, including, but not limited to, non-Department of Defense civilian defense counsel with no connection to the Army.

(d) Pursuant to the authority of The Judge Advocate General under these Rules of Professional Conduct and this regulation, these Rules apply to all non-Department of Defense civilian lawyers representing individuals in any matter for which The Judge Advocate General is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, boards of inquiry, and disability evaluation proceedings.

(e) Pursuant to the authority of The Judge Advocate General under these Rules of Professional Conduct and this regulation, these Rules apply to all qualified volunteer lawyers who have been certified as legal assistance lawyers by The Judge Advocate General or his/her designee.

(f) Pursuant to the authority of The Judge Advocate General under these Rules of Professional Conduct and this regulation, these Rules apply to all other lawyers appointed by The Judge Advocate General to serve in billets or to provide legal services normally provided by Army Judge Advocates. This policy applies to officer and enlisted Reservists or Guardsmen, active duty personnel, and any other personnel who are licensed to practice law by and Federal or State authority but who are not members of the Judge Advocate General's Corps or Judge Advocate Legal Service or who do not hold the 27A, 270A, or 27D MOS designation in the Army.

(g) Pursuant to the authority of the General Counsel of the Army, The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers, in their capacities as qualifying authorities for the civilian Army lawyers in their respective organizations, these Rules apply to all civil service and contracted Army lawyers who in their official capacity practice law or perform legal, legal-related, or non-law services under the cognizance and supervision of their respective Senior Counsel. Official capacity includes providing legal assistance or other representation or legal counseling as part of a lawyer's official duties even though the client may not be the Department of the Army. This includes civilian lawyers employed by the Department of the Army as executive agent for combatant commands, and for whom one of the four Senior Counsels serves as the Qualifying Authority.

(h) Pursuant to these Rules of Professional Conduct and this regulation, these Rules apply to:

(1) All other military personnel who are lawyers and are called upon to deliver legal services within the Department of the Army as a part of their duties.

(2) All local national lawyers employed overseas by the Department of the Army, to the extent these Rules are not inconsistent with their domestic law and professional standards.

(3) All non-Department of Defense civilian lawyers who practice in proceedings that are under the supervision of one of the Senior Counsels.

(4) All Army nonlawyer personnel, military and civilian, who perform duty in an Army, or any other, legal office in support of Army lawyers, as these Rules define the type of ethical conduct that the public and military community have a right to expect from Department of the Army legal personnel. Such nonlawyer legal personnel include, but are not limited to: legal administrators (MOS 270A), paralegal Soldiers (MOS 27D), court reporters, legal interns, and civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and other personnel holding similar positions.

(i) An Army lawyer subject to these Rules who receives adverse disciplinary action from a commander or supervisor for misconduct may be subject to the disciplinary authority of the appropriate Senior Counsel in the Army for the same misconduct if such misconduct also constitutes a violation of these Rules of Professional Conduct.

(j) Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her state and other licensing authorities, and may be subject to the disciplinary authority of the appropriate Senior Counsel in the Army and another licensing authority for the same professional misconduct. In the case of a conflict between these Rules and the rules of the lawyer's licensing authority, the lawyer should attempt to resolve the conflict with the assistance of a supervising lawyer. If the conflict is not resolved:

(1) these Rules will govern the conduct of the lawyer in the performance of the lawyer's official responsibilities.

(2) the more restrictive of the two Rules will govern the conduct of Judge Advocates in the Army National Guard/Army National Guard of the United States in the performance of official duties or while in a duty status, but not if the Guard Judge Advocate is in a Title 10 status, in which case the Army Rule will govern.

(3) the rules of the appropriate licensing authority will govern the conduct of the lawyer in the private practice of law unrelated to the lawyer's official responsibilities.

#### **COMMENT:**

(1) It is longstanding law that the conduct of a lawyer admitted or authorized to practice law in a jurisdiction is subject to the disciplinary authority of that jurisdiction. Extension of the disciplinary authority of this Army jurisdiction to other lawyers who provide or offer to provide legal services in this Army jurisdiction is for the protection of the clients in this Army jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions help further advance the purposes of this Rule.

(2) A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

(3) Almost all lawyers (as defined by these Rules) practice outside the territorial limits of the jurisdiction in which they are licensed. While lawyers remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to these Rules.

(4) When Army lawyers are engaged in the conduct of Army legal functions, whether serving the Department of the Army as the client or serving an individual as the client as authorized by the Army, these Rules are regarded as superseding any conflicting rules applicable in jurisdictions in which the lawyer may be licensed. However, lawyers practicing in State or Federal civilian court proceedings will abide by the rules adopted by that State or Federal civilian court during the proceedings.

(5) Every lawyer subject to these Rules is also subject to rules promulgated by his state licensing authority or, if applicable, other licensing authorities. This raises the possibility of a conflict in the governing rules. While these Rules may pre-empt State Rules in the event of a conflict, lawyers and their supervising lawyers should avoid such conflicts whenever possible. If a conflict does arise, the lawyer is advised to attempt to resolve the conflict with the assistance of a supervising lawyer. In most cases, the conflict can be resolved by a change of assignment or withdrawal from the matter that gives rise to it. If such assistance is not effective in resolving the conflict, then paragraph (j) of this Rule provides clear guidance.

(6) Non-Army civilian lawyers, U.S. Army Reserve lawyers, Army National Guard/Army National Guard of the United States lawyers, and retired Army lawyers (acting in their civilian capacity) who seek to provide legal services in any Department of the Army matter, whether practicing in courts, tribunals, or other proceedings conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice, or practicing in other proceedings or programs under the professional supervision of one of the Senior Counsels, may be precluded from such practice of law if, in the opinion of the Senior Counsel concerned (as exercised through these Rules and Army Regulation 27-1) the lawyer has violated any of these Rules of Professional Conduct or the lawyer's conduct in any venue renders that lawyer unable or unqualified to practice in Department of the Army programs or proceedings.

#### **CROSS REFERENCES:**

Rule 5.1 Responsibilities of Senior Counsel and Supervisory Lawyers

Rule 8.3 Reporting Professional Misconduct  
Rule 10.1 Enforcement

## INTERPRETATION

### Rule 9.1 Interpretation [Augmented]

(a) Authoritative Army interpretations of these Rules shall be provided by a Department of the Army (DA) Professional Conduct Council. The purpose of the Council is to provide uniform interpretation of these Rules of professional Conduct for the Army.

(b) The Department of the Army (DA) Professional Conduct Council shall consist of the General Counsel of the Army who shall act as chairman, The Judge Advocate General of the Army, the Command Counsel of the U. S. Army Materiel Command, and the Chief Counsel of the U. S. Army Corps of Engineers. These Council member duties may be delegated by any of the above named members to a deputy who is either a general officer or member of the Senior Executive Service.

(c) The DA Professional Conduct Council shall meet as often as necessary. The Chairman will decide whether to call the Council into session and whether to accept a request for an interpretation of these Rules by the Council. The Council shall, at its discretion, issue written opinions interpreting these Rules. Such opinions shall be considered the authoritative Army interpretation of these Rules. In arriving at its opinion in any case in which a Senior Counsel has special expertise in the issue(s) presented, the Council normally will adopt for the Army the opinion of that Senior Counsel, for example, The Judge Advocate General with respect to military justice matters. The Council may, at its discretion, issue advisory opinions.

(d) Each Senior Counsel will establish as necessary a professional conduct committee within his or her jurisdiction or qualifying authority to assist him or her with respect to questions before the DA Professional Conduct Council.

(e) Army lawyers are encouraged to first seek interpretations of these rules from their legal supervisory chain. Any lawyer subject to these Rules, however, may request an opinion from the Council. To do so, the lawyer must submit a complete description of the factual situation that is the subject of contention under the Rules, subject to Rule 1.6 and Rule 8.5(j), a discussion of the relevant law, and the lawyer's opinion as to the correct interpretation. For Army lawyers, the request must be submitted through their legal supervisory chain and the professional responsibility committee established by the lawyer's Senior Counsel. For non-Army lawyers, the Council Chairman may direct that the request for a Council opinion be processed first through the committee of the Senior Counsel under whose qualifying authority or jurisdiction the issue arose or, when appropriate, another Senior Counsel's committee.

(f) The actions of the DA Professional Conduct Council are not disciplinary in nature nor are its opinions to be considered as disciplinary. The Council's opinions may, however, be used by others invested with disciplinary authority as authoritative Army interpretations of these Rules.

(g) The written opinions of the DA Council shall be open to the public.

#### COMMENT:

(1) The term "qualifying authority" has significance only with respect to civilian lawyers. It refers to the authority to approve a civilian lawyer's qualifications. Judge Advocates are directed in their duties by The Judge Advocate General of the Army (see 10 USC 3037(c)(2)), and are not restricted to specific positions within an Army organization as are civilian lawyers. Therefore, "jurisdiction" refers only to Judge Advocates. They are under the jurisdiction of The Judge Advocate General no matter where they are assigned, attached, or detailed, to include when they are assigned, attached, or detailed to the offices of the other three Senior Counsels or to another federal government agency. An example of the distinction: The Judge Advocate General has jurisdiction over Army Judge Advocates, but has qualifying authority (and serves as the Qualifying Authority) over civilian lawyers (excluding Senior Executive Service members) in the Judge Advocate Legal Service.

### Rule 9.2 [Not Used]

## ENFORCEMENT

### Rule 10.1 Enforcement [Augmented]

(a) The Judge Advocate General of the Army, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers, will:

- (1) establish procedures for reporting, processing, investigating, and taking appropriate action on allegations of violations of these Rules by lawyers under their qualifying authority or jurisdiction;
  - (2) notify the General Counsel of the Army immediately upon learning of an allegation of a violation of these Rules by any general officer or Senior Executive Service member under their jurisdiction or working in their organization.
- (b) Any allegation of a violation of these Rules by a lawyer while assigned to the Office of the General Counsel of the Army, or by The Judge Advocate General of the Army, the Command Counsel of the Army Materiel Command, or the Chief Counsel of the Army Corps of Engineers, will be reported to the General Counsel of the Army.
- (1) The General Counsel of the Army will conduct an inquiry into such allegations as he/she deems necessary. This may include appointing an individual to conduct an investigation, enlisting the aid of the Inspector General, and reviewing reports of investigations conducted by others. In the event the General Counsel does conduct an inquiry, he/she will, as a minimum, solicit a written response to the allegations from the lawyer who is the subject of the allegations.
  - (2) Upon completion of his/her inquiry, the General Counsel of the Army will take appropriate action with respect to lawyers from his/her office, or will advise the Secretary of the Army or the Chief of Staff of the Army of the action that should be taken, if any, with respect to the Senior Counsel who is the subject of the allegations.
  - (c) Any person having knowledge of an apparent violation of these Rules by the General Counsel of the Army should advise the Secretary of the Army of the alleged violation.

**COMMENT:**

- (1) This Rule assigns to the Senior Counsel general responsibility for establishing systems for investigation and discipline of violations of these Rules. Because of the significant differences in the legal work forces under the jurisdiction of the four Senior Counsel, it is desirable to have complementary investigatory and disciplinary systems for each work force.
- (2) Subparagraph (a)(2) requires reporting to the General Counsel only those allegations involving a general officer or member of the Senior Executive Service. Subparagraph (b)(1) also provides that in the case of the Senior Counsel, other than the General Counsel, the General Counsel of the Army will conduct the inquiry into allegations as he/she deems necessary. This eliminates the potential problem of the Senior Counsel being subject to the investigatory and disciplinary processes and procedures of their own creation and subject to their control.
- (3) The term “qualifying authority” has significance only with respect to civilian lawyers. It refers to the authority to approve a civilian lawyer’s qualifications. Judge Advocates are directed in their duties by The Judge Advocate General of the Army (see 10 USC 3037(c)(2)), and are not restricted to specific positions within an Army organization as are civilian lawyers. Therefore, “jurisdiction” refers only to Judge Advocates. They are under the jurisdiction of The Judge Advocate General no matter where they are assigned, attached, or detailed, to include when they are assigned, attached, or detailed to the offices of the other three Senior Counsels or to another federal government agency. An example of the distinction: The Judge Advocate General has jurisdiction over Army Judge Advocates, but has qualifying authority (and serves as the Qualifying Authority) over civilian lawyers (excluding Senior Executive Service members) in the Judge Advocate Legal Service.

**Rule 10.2 [Not Used]**

## **Appendix C**

### **Internal Control Evaluation**

#### **C–1. Function**

The function covered by this evaluation is compliance with the Army Rules of Professional Conduct for Lawyers pursuant to AR 27–26 and the administration of the Managers’ Internal Control Program.

#### **C–2. Purpose**

The purpose of this evaluation is to assist Senior Counsel and supervisor lawyers in evaluating their key management controls. It is not intended to cover all controls.

#### **C–3. Instructions**

Answers must be based on the actual testing of key internal controls (for example, document analysis, direct observation, positive control). Answers that indicate deficiencies must be explained and corrective action indicated in supporting documentation. These internal controls must be evaluated at least once every five years. Certification that the evaluation has been conducted must be accomplished on DA Form 11–2 (Internal Control Evaluation Certification).

#### **C–4. Test questions**

*a.* Have lawyers and nonlawyer assistants been appropriately trained on the Army Rules of Professional Conduct for Lawyers (see AR 27–26)?

*b.* Have the Senior Counsels, and the civilian and military supervisory lawyers under their respective legal technical supervision, made reasonable efforts to ensure that Army legal offices under their legal technical supervision have in effect measures giving reasonable assurance that all lawyers in such respective offices conform to the Rules of Professional Conduct for Lawyers?

*c.* With respect to a nonlawyer acting under the authority, supervision, or direction of a lawyer, has the senior supervisory lawyer in a legal office made reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer?

*d.* Have Army lawyers been asked to self-certify every other fiscal year, in accordance with their Senior Counsel’s schedule, that they are in good standing with their state or federal licensing authority?

*e.* In a manner that does not violate client-lawyer confidentiality and/or attorney-client privilege under Army Rule 1.6 (see app B), do supervisor lawyers regularly monitor legal opinions of subordinate lawyers to ensure that subordinate lawyers are properly trained and are competent to perform the duties to which the subordinate lawyers are assigned?

#### **C–5. Supersession**

No previous internal control evaluation exists for this program.

#### **C–6. Comments**

Help make this a better tool for evaluating management controls. Submit comments to the Office of The Judge Advocate General, Professional Responsibility Branch, 2200 Army Pentagon, Washington, DC 20310–2200.

## **Glossary**

### **Section I**

#### **Abbreviations**

**ABA**

American Bar Association

**AR**

Army regulation

**ASI**

Additional Skill Identifier

**CFR**

Code of Federal Regulations

**CMA**

Court of Military Appeals

**DA**

Department of the Army

**MCM**

Manual for Courts-Martial

**MOS**

military occupational specialty

**MRE**

Military Rule of Evidence

**NMCMR**

Navy-Marine Corps Court of Military Review

**PDPC**

Professional Development Proficiency Code

**RCM**

Rule for Courts-Martial

**UCMJ**

Uniform Code of Military Justice

**USC**

United States Code

### **Section II**

#### **Terms**

**Good standing**

While each licensing authority granting the certification or privilege to practice law within the jurisdiction defines the phrase “in good standing” based on its own rules, at a minimum, for purposes of these Rules of Professional Conduct in this regulation, it means that an individual has been admitted to practice law before the highest court of that state, territory, commonwealth, or the District of Columbia; is subject to the jurisdiction’s disciplinary review process; has not been suspended or disbarred from the practice of law within the jurisdiction; is up-to-date in the payment of all required fees; has met applicable continuing legal education requirements which the jurisdiction has imposed (or the cognizant authority has waived those requirements in the case of the individual); and has met such other requirements as the cognizant authority has set to remain eligible to practice law.

**Lawyer**

A person who is a member of the bar of a Federal court, or the highest court of a state or territory, or occupies a comparable position before the courts of foreign jurisdiction. This includes all Army lawyers, military and civilian, and non-Department of Defense civilian lawyers appearing before Army tribunals and other proceedings governed by the UCMJ or the MCM or under the supervision of one of the Senior Counsels (as defined in appendix B, Rule 1.0(s)).

**Reserve Components**

For the purposes of this regulation, the Army National Guard/Army National Guard of the United States and the United States Army Reserve.

**Section III****Special Abbreviations and Terms**

See appendix B, Rule 1.0.

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