

Legal Services

# Rules of Professional Conduct for Lawyers

Headquarters  
Department of the Army  
Washington, DC  
1 May 1992

**Unclassified**

# ***SUMMARY of CHANGE***

AR 27-26

Rules of Professional Conduct for Lawyers

This regulation--

- o Designates certain officials as 'senior counsel' (para 4a).
- o Defines proper conduct for the purposes of professional discipline (para 6).
- o Parallels the structure of the American Bar Association's Rules of Professional Conduct for Lawyers (app B).

Effective 1 June 1992

Legal Services

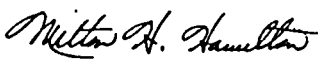
Rules of Professional Conduct for Lawyers

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By Order of the Secretary of the Army:

GORDON R. SULLIVAN  
*General, United States Army*  
*Chief of Staff*

Official:

  
MILTON H. HAMILTON  
*Administrative Assistant to the*  
*Secretary of the Army*

**History.** This UPDATE printing publishes a new Army regulation.

**Summary.** This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and of non-government lawyers appearing before Army tribunals in accordance with the Manual for Courts-Martial. It establishes the Department of the Army Professional Conduct Council to provide authoritative interpretations of these rules.

**Applicability.**

*a.* This regulation applies to all judge advocates of the Active Army, the Army National Guard, and the U.S. Army Reserve, all

other military personnel who are attorneys and are called upon to deliver legal services as a part of their duties, to all civilian attorneys employed by the Department of the Army to provide legal services, and to non-government attorneys who practice in proceedings governed by the Manual for Courts-Martial. It also applies to all other Army personnel, military and civilian, who perform duty in an Army legal office in support of Army lawyers.

*b.* Penalties for violations of imperative rules by Army lawyers include all administrative sanctions prescribed by law and regulation. Violations by non-government attorney's may result in imposition of sanctions pursuant to RCM 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.** Not applicable

**Army management control process.** This regulation is not subject to the requirements of AR 11-2.

**Supplementation.** Supplementation of this

regulation is prohibited without the prior approval of the General Counsel of the Army. Proposed supplements will be submitted to HQDA (DAJA-SC), WASH DC 20310-2200.

**Interim changes.** Interim changes to this regulation are not official unless they are authenticated by the Administrative Assistant to the Secretary of the Army. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

**Suggested Improvements.** The proponent agency of this regulation is the Office of The Judge Advocate General. Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to HQDA (DAJA-SC), WASH DC 20310-2200, with a copy to HQDA (SAGC), WASH DC 20310-0104.

**Distribution.** Distribution of this publication is made in accordance with DA Form 12-09-E, block number 4066, intended for command level C for Active Army, the Army National Guard, and the U.S. Army Reserve.

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\*This regulation supersedes DA Pamphlet 27-26, 31 December 1987.

**RESERVED**

## 1. Purpose

This regulation provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and, pursuant to RCM 109, Manual for Courts–Martial, of non–government lawyers appearing before Army tribunals.

## 2. References

Related publications are listed in appendix A.

## 3. Explanation of abbreviations and terms

Explanation of abbreviations and special terms (definitions within the scope of the Rules of Professional Conduct) used in this regulation are explained in the glossary.

## 4. Responsibilities

*a.* The General Counsel of the Army, The Judge Advocate General of the Army, the Chief Counsel, U.S. Army Corps of Engineers, and the Command Counsel, U.S. Army Materiel Command, will serve as senior counsel. They will be responsible for—

(1) The issuance of enforcement procedures required by appendix B, Rule 10.1(a)(1).

(2) Serving on the Department of the Army Professional Conduct Council, or appointing an appropriate designee.

(3) Ensuring general compliance with the Rules of Professional Conduct for Lawyers by personnel under their qualifying authority and/or jurisdiction.

*b.* Other civilian 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 attorney's legal supervisory chain, except that a request by a non–government attorney subject to RCM 109, Manual for Courts–Martial, will be submitted through the Chief, U.S. Army Trial Defense Service.

## 6. Preamble: A Lawyer's Responsibilities

*a.* A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

*b.* As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with informed understanding of the client's 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 dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

*c.* 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.

*d.* A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's personal affairs. A lawyer should use the law's procedures only for their lawfully intended 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.

*e.* 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.

*f.* 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.

*g.* 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 a 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.

*h.* 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 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.

## 7. Purpose of the Rules

*a.* These Rules of Professional Conduct are intended to govern the ethical conduct of lawyers as defined in these Rules. These Rules are intended to be used in conjunction with law which controls the practice of lawyers. Such law includes but is not limited to the Uniform Code of Military Justice and Army regulations (ARs), including AR 27–1 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 9.1.

*b.* While the American Bar Association (ABA) Model Rules of Professional Conduct were the basis of these rules, changes to some of the ABA Rules and associated Comment were required to ensure that these Rules met the needs of Army practice. In addition, some ABA Rules were omitted. Rules on public interest, for example, were omitted because judge advocates and lawyers employed by the Army already serve the public interest and need no further inducement for such service. Reasons for the changes include but are not limited to:

(1) An ABA Rule's inapplicability to Army practice.

(2) The need for guidance tailored to Army practice.

(3) Differences in approach to the resolution of specific ethical issues for Army lawyers.

*c.* 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. Some of these Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under these Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act within the bounds of such discretion. 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.* These Rules presuppose a larger legal context shaping the lawyer's role. That context includes statutes and court rules relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. 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. 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.* Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules may determine whether a client-lawyer relationship exists.

*f.* Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. 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 evidence of the situation. Moreover, these Rules presuppose that whether or not discipline should be imposed for a violation, and 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.

*g.* Violation of a Rule should not give rise to a private cause of action nor should it create a presumption that a legal duty has been breached. 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 attorney's chain of command or 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 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.

*h.* 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.

*i.* 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.

*j.* This and the preceding paragraph 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**

**Manual for Courts—Martial, United States,**  
(Cited in paras 1, 5, and app B, Rules 1.1, 1.5, 1–7, 1.8, 5.4, and 7.2.)

**Uniform Code of Military Justice.**  
(Cited in para 7a and app B, Rules 1.1, 1.5, 1.7, 1.8, and 7.2.)

### **Section II Related Publications**

**American Bar Association Rules of Professional Conduct**

**Federal Bar Association Rules of Professional Conduct**

**AR 27–1**  
Judge Advocate Legal Service

**AR 27–3**  
Legal Assistance

**AR 27–10**  
Military Justice

**Section III  
Prescribed Forms**  
This section contains no entries.

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This section contains no entries.

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## 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

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.

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.

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.

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.

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

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 elaborate treatment than matters of lesser consequence.

##### Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. Civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice for whom a system of peer review has been established should consider making use of the peer review system in appropriate circumstances.

### CROSS REFERENCES:

Rule 1.2 Scope of Representation

Rule 1.3 Diligence

Rule 1.13 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 the Senior Counsel and Supervisory Lawyers

Rule 5.2 Responsibilities of a Subordinate Lawyer

### RULE 1.2 Scope of Representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), (e), and (f), and shall consult with the client as to the means by which these decisions are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, and to the extent applicable in administrative hearings, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to choice of counsel as provided by law, a plea to be entered, selection of trial forum, whether to enter into a pretrial agreement, and whether the client will testify.

(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) A lawyer may limit the objectives of the representation if the client consents after consultation, or as required by law and communicated to the client.

(d) 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.

(e) When a lawyer knows that a client expects assistance not permitted by these Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) An Army lawyer's authority and control over decisions concerning the representation may, by law, be expanded beyond the limits imposed by paragraphs (a) and (c).

#### COMMENT:

##### Scope of Representation

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. At the same time, 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 and legal tactical issues, such as what witnesses to call, whether and how to conduct cross-examination, what 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 and concern for third persons who might be adversely affected.

In a case in which the client appears to be suffering mental



disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

### **Service Limited in Objectives or Means**

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the law governing the conditions under which the lawyer's services are made available to the client. Formation of attorney-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. 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 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.

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.

An agreement concerning the scope of representation must accord with these Rules of Professional Conduct and other law. 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**

A lawyer 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 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.

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 purpose, 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.

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 1.1 Competence
- Rule 1.6 Confidentiality of Information
- Rule 1.13 Army as Client
- Rule 1.14 Client Under a Disability
- Rule 2.1 Advisor
- Rule 2.3 Evaluation for use by Third Person

Rule 3.3 Candor Toward the Tribunal

Rule 4.4 Respect for Rights of Third Persons

Rule 5.1 Responsibilities of the 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 and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation.

### **COMMENT:**

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound 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 e.g. *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, 1.4b. A lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled adequately. See Rule 5.1.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest 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.

Unless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law, 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 resolved. Doubt about whether a client-lawyer relationship 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 1.1 Competence
- Rule 1.4 Communication
- Rule 1.2 Scope of Representation
- Rule 1.16 Declining or Terminating Representation
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.2 Expediting Litigation
- Rule 3.4 Candor Toward the Tribunal
- Rule 4.1 Truthfulness of Statements to Others
- Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

### **RULE 1.4 Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably

necessary to permit the client to make informed decisions about the representation.

**COMMENT:**

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.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, 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 might injure or coerce others. On the other hand, a lawyer ordinarily cannot 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.

When the client is the Army, it is often impossible or inappropriate to inform everyone of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials 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.

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 where disclosure would be favorable to the defense of a criminal accused. 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 1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.13 Army as Client
- Rule 2.1 Advisor
- Rule 2.2 Intermediary
- Rule 3.2 Expediting Litigation
- Rule 3.8 Special Responsibilities of Trial Counsel
- Rule 4.1 Truthfulness of Statements to Others
- RULE 1.5 Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the

questions involved, and the skill requisite to perform the legal service properly;

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing in representation.

(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 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. 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 a defendant in a criminal case.

(e) A division of 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, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(f) A lawyer who has initially represented a client concerning a matter as part of the attorney's official Army duties shall not accept any 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.

(g) A lawyer shall not accept any payments or benefits, actual or constructive, directly or indirectly for making a referral of a client.

(h) An Army lawyer, in connection with the Army lawyer's official duties, may not request or accept any compensation from any source other than that provided by the United States for the performance of duties.

**COMMENT:**

**Army Lawyers**

Army lawyers are prohibited by statute from accepting any salary or contribution to or supplementation of salary, as compensation for services as an officer or employee of the Army from any source other than the Government of the United States. Rule 1.5(a)-(e), therefore, applies only to private civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice. The inclusion of Rule 1.5(a)-(e) as applicable to such private civilian lawyers is not so much to allow The Judge Advocate General to regulate fee arrangements

between such lawyers and their clients as it is to provide guidance to judge advocates practicing with such lawyers and to supervisory judge advocates who may be asked to inquire into an alleged fee irregularities. Absent Rule 1.5(a)-(e), such judge advocates have no readily available standard with which to consider allegedly questionable conduct of a private civilian lawyer. Rule 1.5(a)-(e) is the same as the American Bar Association Model Rule of Professional Conduct 1.5 (a)-(e) and thus reflects generally accepted professional standards.

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

When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge, a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of fee is set forth.

#### **Terms of Payment**

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(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

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. Where there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

#### **Division of Fee**

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. Paragraph (e) permits the lawyer to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

#### **Disputes over Fees**

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, 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.

#### **Military Representation and Referral**

Army lawyers may neither request nor accept any gratuity, salary or other compensation from any source as payment for performance of official Army duties. For example, a legal assistance officer is prohibited from accepting a gift or a loan from a client tendered as a result of assistance rendered.

Army lawyers may not request or accept any gratuity, salary, or other compensation from a client obtained incident to the performance of duties as an officer or employee of the Army. For example, a legal assistance officer (including a reservist being utilized as a legal assistance officer such as during drills or as a Special Legal Assistance Officer) may not receive any actual or constructive compensation or benefit for or in connection with referring to private practice (including one in which the referring lawyer engages during off-duty hours) a matter the lawyer first become involved with in a military legal assistance capacity. This rule precludes the legal assistance officer 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 concerning the same general matter for which the client was seen in legal assistance unless no fee or other compensation is charged. It does not preclude the lawyer from representing military personnel or dependents in a private capacity concerning new matters, even though the relationship might have been first established in a military legal assistance capacity. The rule prohibits a lawyer from using an official position to solicit or obtain clients for a private practice.

#### **CROSS REFERENCES:**

- Rule 1.2 Scope of Representation
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.8 Conflict of Interest: Prohibited Transactions
- Rule 1.16 Declining or Terminating Representation

#### **RULE 1.6 Confidentiality of Information.**

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary 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.

(d) An Army lawyer may reveal such information when required or authorized to do so by law.

#### **COMMENT:**

The lawyer is part of a judicial system charged with upholding

the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that most clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies 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 applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by these Rules of Professional Conduct or other lawful order, regulation or statute.

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 automated data processing systems or 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.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

#### **Authorized Disclosure**

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers may disclose to supervisory lawyers and to paralegals, subject to the direction and control of the lawyer or the lawyer's supervisory lawyer, information relating to a client, 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.

#### **Disclosure Adverse to Client**

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of

action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Several situations must be distinguished.

First, the 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)(3) not to use false evidence. These duties are essentially special instances of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, 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 knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm, or significant impairment of national security or of the readiness or capability of a military unit, vessel, aircraft, or weapon system. As stated in paragraph (b), the lawyer has a professional obligation to reveal information to the extent that lawyer reasonably believes necessary to prevent such consequences.

Examples of conduct likely to result in the significant impairment of 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 and crew will be lost; compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph (b) is not intended to and does not mandate the disclosure of conduct which 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.

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

#### **Withdrawal**

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must seek to withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidence, except as otherwise provided in Rule 1.6. Nothing in this Rule, Rule 1.8(b) or Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is the Army, the lawyer may be in doubt whether contemplated conduct will actually be carried out. Where necessary to guide conduct in connection with the Rule, the lawyer may make inquiry within the Army as indicated in Rule 1.13(c).

#### **Dispute Concerning a Lawyer's Conduct**

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. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably

believes is necessary to vindicate innocence, the disclosure should be made in a manner which 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.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A non-government lawyer entitled to a fee is permitted by paragraph (b)(2) 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. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

#### **Disclosure Otherwise Required or Authorized**

The attorney-client privilege is defined by Military Rule of Evidence 502. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

These Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

#### **Former Client**

The identification of the client, for purposes of the Army Lawyer, is important to the application of this rule. Generally the agency is the Army lawyer's client. Communications by an Army lawyer both inside and outside of the agency may or may not violate this rule. An Army Lawyer's duty under this rule is affected by statutes, regulations and other lawful directives.

Paragraph (d) permits disclosures that the agency authorizes its lawyers to make in connection with the performance of their duties to the agency. These disclosures may be required by statute, Executive Order, regulation or directive, depending upon the authority of the agency to issue such order. An attorney may reveal information when authorized by law and must reveal information when required to do so by law.

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 agency. Examples include judge advocates 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.

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

#### **CROSS REFERENCES:**

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.8 Conflict of Interest: Prohibited Transactions
- Rule 1.13 Army as Client

#### **Rule 1.16 Declining and Terminating Representation**

- Rule 2.1 Advisor
- Rule 2.2 Intermediary
- Rule 2.3 Evaluation for Use by Third Persons
- Rule 3.3 Candor toward the Tribunal
- Rule 4.1 Truthfulness of Statements to Others
- Rule 5.4 Professional Independence of a Lawyer

#### **RULE 1.7 Conflict of Interest: General Rule.**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless;

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

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

#### **COMMENT:**

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should seek to withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer is permitted to withdraw because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also 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. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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. Consideration should be given to whether the client wishes to accommodate the other interest involved.

#### **Consultation and Consent**

A client including an organization (see Rule 1.13c)(b), may consent to representation notwithstanding a conflict. However, as indicated in Rule 1.7(a)(1) with respect to representation directly adverse to a client, and Rule 1.7(b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement to provide representation on the basis of the

client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is 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.

### **Lawyer's Interests**

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 propriety 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. 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 interest.

### **Conflicts of Litigation**

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible 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 conflict of interest in representing multiple accused in a criminal case is so grave that ordinarily a lawyer should not represent more than one co-accused. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as 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 advocate against a client. For example, Government lawyers in some circumstances may represent Government employees in proceedings in which a 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.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily proper 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.

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

A civilian lawyer practicing before a tribunal conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice may be paid from a source other than the client, if the client is informed of that fact, consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, an accused soldier's family may pay a civilian lawyer to represent the soldier at a court-martial.

### **Other Conflict Situations**

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of the proxim-

ity and degree.

For example, a legal assistance attorney may not represent both 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. Such cases of common interest might include advising a buyer and seller of an auto and preparing a bill of sale for them.

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 arise.

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

While the lawyer must be careful to avoid conflict of interest situations, resolving questions of conflict of interest 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 coaccused. 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.

### **CROSS REFERENCES:**

- Rule 1.1 Competence
- Rule 1.2 Scope
- Rule 1.4 Communication
- Rule 1.8 Conflict of Interest: Prohibited Transactions
- Rule 1.9 Conflict of Interest: Former Client
- Rule 1.12 Former Judge or Arbitrator
- Rule 1.13 Army as Client
- Rule 1.16 Declining or Terminating Representation
- Rule 2.2 Intermediary
- Rule 2.3 Evaluation for Use by Third Person
- Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers
- Rule 5.4 Professional Independence of a Lawyer

### **RULE 1.8 Conflict of Interest: Prohibited Transactions**

(a) 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 which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) While representing 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) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a civilian lawyer practicing before a tribunal conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military

Justice representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless;

(1) the client consents after consultation;

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

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

(g) 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 aggregate agreement as to guilty pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) 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.

#### **COMMENT:**

##### **Army Lawyers**

Army lawyers will strictly adhere to Department of the Army standards of conduct regulations in all dealings with clients. Such regulations generally prohibit entering into business transactions with clients, deriving financial benefit from representations of clients, and accepting gifts from clients or other entities for the performance of 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 judge advocates or other government lawyers in their private capacities.

##### **Transactions Between Client and Lawyer**

As a general principle, all business transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply 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, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. All transactions must comply with promulgated standards of conduct and other lawful orders and regulations. See also Rule 1.5.

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.

#### **Literary Rights**

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.

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

Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest.

#### **Family Relationships Between Lawyers**

Rule 1.8(i) applies to related lawyers who are in different offices, e.g., one lawyer is a trial counsel in a staff judge advocate office and one lawyer is a trial defense counsel serving the same staff judge advocate office. Related lawyers in the same office are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in Rule 1.8(i) is personal and is not imputed to other lawyers in the offices with whom the lawyer performs duty.

#### **Acquisition of Interest in Litigation**

Rule 1.8(j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, 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).

The Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

#### **CROSS REFERENCES:**

Rule 1.1 Competence

Rule 1.2 Scope of Representation

Rule 1.5 Fees

Rule 1.7 Conflict of Interest: General Rule

Rule 1.9 Conflict of Interest: Former Client

Rule 1.16 Declining or Terminating Representation

#### **RULE 1.9 Conflict of Interest: Former Client**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter;

(1) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or

(2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

(b) An Army lawyer shall not knowingly represent a second client in the same or a substantially related matter in which a firm with which the lawyer formerly associated had previously represented a client;

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

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) An Army 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 Rule 1.6 would permit with respect to a client or when the information has become generally known.

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

**COMMENT:**

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, 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.

The scope of a "matter" for purposes of Rule 1.9(a) may depend 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 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 wholly 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, review, claim and legal assistance functions within the same military jurisdiction is not precluded by this Rule.

The underlying question is whether the lawyer was so involved in a particular matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Information acquired by the lawyer in the course of representing a client may not subsequently be used 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.

Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's role in behalf of the new client.

Rule 1.9(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.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7.

**CROSS REFERENCES:**

- Rule 1.1 Competence
- Rule 1.2 Scope of Representation
- Rule 1.6 Confidentiality
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.16 Declining or Terminating Representation
- Rule 2.2 Intermediary

**RULE 1.10 Imputed Disqualification: General Rule**

(a) Army lawyers working in the same Army 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, 1.8(c), 1.9 or 2.2.

(b) 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 under this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

**COMMENT:**

The circumstances of military 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 lawyer are not to be imputed to another simply because they operate from the same office. For example, the fact that a number of defense attorneys operate from one office and share clerical assistance, would not prohibit them from representing co-accused at trial by court-martial.

Army policy 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.

Whether a 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 attorney-client confidentiality; maintaining independence of judgment; and avoiding positions adverse to a client.

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 lawyers work together. A lawyer may have general access to files of all clients of a military law office and may regularly participate in discussions of their affairs; it may be inferred that such a lawyer in fact is privy to all information about all the office's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion 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, a lawyer changing duty stations or changing assignments within an office has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

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.

Another aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers in the same office through imputed disqualification. Hence this aspect of the problem is governed by Rule 1.9(a).

Rules 1.10(b) and (c) address the imputed disqualification of the Army lawyer's former law firm. These rules indicate that the conflict-of-interest principles in Rule 1.9 do not apply to the law firm except as indicated in these rules.



## CROSS REFERENCES:

- Rule 1.6 Confidentiality
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.8 Conflict of Interest: Prohibited Transactions
- Rule 1.9 Conflict of Interest: Former Client
- Rule 2.2 Intermediary

### **RULE 1.11 Successive Government and Private Employment**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. 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 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.

(b) Except as law 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. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not;

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) 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 appropriate Government agency.

(e) As used in this Rule, the term "confidential Governmental information" means information which has been obtained under Governmental authority and which, at the time this Rule is applied, the Government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

### **COMMENT:**

This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a Government agency, whether employed or specially retained by the Government, is subject to these Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and Government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the Government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A

lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential Government information about the client or by reason of access to confidential Government information about the client's adversary obtainable only through the lawyer's Government service. However, 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. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the Government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the Government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) 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.

## CROSS REFERENCES:

- Rule 1.5 Fees
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.8 Conflict of Interest: Prohibited Transactions

### **RULE 1.12 Former Judge or Arbitrator**

(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, arbitrator, or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

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

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

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

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

### **COMMENT:**

This Rule generally parallels Rule 1.11. The term "personally and

substantially” signifies that a judge who was a member of a multi-member court, and thereafter left judicial office, 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 or judiciary office 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. The term “adjudicative officer” includes such officials as hearing officers, legal advisors to administrative boards, Article 32 investigating officers, summary court-martial officers, and also lawyers who serve as part time judges.

#### **CROSS REFERENCES:**

Rule 1.7 Conflict of Interest: General Rule

Rule 1.8 Conflict of Interest: Prohibited Transactions

Rule 1.11 Successive Government and Private Employment

#### **RULE 1.13 Army as Client**

(a) Except when representing an individual client pursuant to (g) below, an Army lawyer represents the Department of the Army acting through its authorized officials. These officials include the heads of organizational elements within the Army, such as the commanders of armies, corps and divisions, and the heads of other Army agencies or activities. When an Army lawyer is assigned to such an organizational element and designated to provide legal services to the head of the organization, the lawyer-client relationship exists between the lawyer and the Army as represented by the head of the organization as to matters within the scope of the official business of the organization. The head of the organization may not invoke the lawyer-client privilege or the rule of confidentiality for the head of the organization’s own benefit but may invoke either for the benefit of the Army. In so invoking either the lawyer-client privilege or lawyer-client confidentiality on behalf of the Army, the head of the organization is subject to being overruled by higher authority in the Army. 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.

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

(c) If a lawyer for the Army knows that an officer, employee, or other member associated with the Army is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest 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 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) advising 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;

(2) asking reconsideration of the matter;

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

(4) advising the person 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.

(5) 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 Army lawyer assigned to the staff of the acting official’s next superior in the chain of command.

(d) If, despite the lawyer’s efforts in accordance with paragraph (c), the highest authority that can act concerning the matter insists upon action, or refusal to act, that is clearly a violation of law, the lawyer may terminate representation with respect to the matter in question. In no event shall the lawyer participate or assist in the illegal activity.

(e) In dealing with the Army’s officers, employees, or members, a lawyer shall explain the identity of The Army as the client when it is apparent that the Army’s interests are adverse to those of the officers, employees, or members.

(f) 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 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.

(g) A lawyer who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide civil legal assistance to an individual, has, for those purposes, a lawyer-client relationship with that individual.

#### **COMMENT:**

##### **The Army as the Client**

The Army and its commands, units, and activities are legal entities, but cannot act except through their authorized officers, employees, and members. The Army’s interests may conflict with or become adverse to those of one or more of the officers, employees, or members. Under such circumstances the question arises as to who the client is. Identifying the client is of great significance to the lawyer because of the ramifications it has on the carrying out of legal and ethical obligations.

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 when acting as a representative of the organization that a lawyer’s immediate professional obligation and responsibility exists absent assignment or designation by the Army to represent a specific individual client.

When one of the officers, employees, or members of the Army communicates with the Army’s lawyer on a matter relating to the lawyer’s representation of the organization on the organization’s official business, the communication is generally protected from disclosure to anyone outside the Army by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the lawyer. It is the Army, and not the officer, employee, or member which benefits from Rule 1.6 confidentiality. The Army’s entitlement to confidentiality from third parties may not be asserted by an officer, employee, or member as a basis to conceal personal misconduct from the Army. The lawyer may not disclose information relating to the representation except for disclosures explicitly or impliedly authorized by the Army in order to carry out the representation or as otherwise permitted in Rule 1.6.

When the officers, employees, or members 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. However, different considerations arise when the lawyer may have reason to know that the Army may be substantially injured by the action of an officer, employee, or member that is in violation of law or directive. In such a circumstance, it may be necessary for the lawyer to ask the officer, employee, or member to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the Army, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by higher authority in the Army. Army

lawyers should refer such matters through supervisory channels.

Paragraph (b) specifies that a client-lawyer relationship is not formed between an Army Lawyer and an individual unless specifically authorized by competent authority such as statute, Executive Order, directive, regulation, or on a case by case basis by the 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 lawyer-client relationship exists. However, this obligation arises only when it appears that the individual acts or intends to act in violation of a legal obligation, contrary to the interests of the Army, or when it reasonably appears that the person is expecting representation in an individual capacity.

#### **Relation to Other Rules**

The authority and responsibility provided in paragraph (c) are concurrent with the authority and responsibility provided in other Rules. In particular, the Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

#### **Clarifying the Lawyer's Role**

At those times when the Army's interests are clearly adverse to those of one or more of its officers, employees, or members, the lawyer should advise the officer, employee, or member that the lawyer cannot continue to advise the officer, employee, or member and that such person may wish to obtain independent representation. Care must be taken to assure that the person understands that, when there is such adversity of interest, the lawyer for the Army may no longer provide legal advice to that person on those matters in which the person's interests are adverse, and that discussions between the lawyer for the Army and the person may not be confidential or privileged.

Subparagraph (c)(4) also requires the Army Lawyer to advise the individual of the Army Lawyer's duty to protect the interests of the Army, and the possibility of discussions of the matter within the Army Lawyer's immediate office or within the technical chain of supervision extending up to the Department of the Army.

#### **Dual Representation**

Paragraph (f) recognizes that a lawyer for the Army may also represent an officer, employee, or member of the Army.

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

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

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation  
Rule 1.6 Confidentiality of Information  
Rule 1.7 Conflict of Interest: General Rule  
Rule 1.8 Conflict of Interest: Prohibited Transactions  
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  
Rule 4.1 Truthfulness in Statements to Others  
Rule 5.1 Responsibilities of the 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 Under a Disability**

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

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

#### **COMMENT:**

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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about the matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, 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.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer should take action so that procedures are initiated for the appointment of a guardian by the person's relatives, civil authorities or the Veteran's Administration. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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. If a legal representative has not been appointed, the lawyer should consider recommending such an appointment where it would serve the client's best interests.

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

Rules of procedure in civil litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment or to disclosure of information which would be to a client's detriment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician but military law does not recognize a doctor-patient privilege.

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation  
Rule 1.3 Diligence  
Rule 1.6 Confidentiality of Information

the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

#### **CROSS REFERENCES:**

Rule 3.4 Fairness to Opposing Party and Counsel

#### **RULE 1.15 Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or the third person. Except as stated in this Rule or as otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other 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.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their respective interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

#### **COMMENT:**

Army lawyers normally will not hold property of clients or third persons. 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.

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in safe deposit boxes, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

When it is necessary to use a client's property as evidence, a lawyer should seek to obtain court permission to withdraw the property as an exhibit and to substitute a description or photograph after trial. If a lawyer is offered contraband property, the lawyer should refer to Rule 3.4 and Comment for guidance.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by

#### **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) the lawyer is dismissed by the client.

(b) Except as stated in paragraph (c), a lawyer may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if;

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

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

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) 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;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) 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) 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 employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

#### **COMMENT:**

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

#### **Mandatory Withdrawal**

A lawyer ordinarily must 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. The lawyer is not obliged to 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.

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

Notwithstanding the existence of good cause for terminating representation, a lawyer appointed to represent a client shall continue such representation until relieved by competent authority. Who is competent authority will differ with the circumstances. For example, in a trial by court-martial, the appointing authority would be competent authority prior to trial; but the military judge would be competent authority once trial begins. After trial, representation may be terminated pursuant to Army regulation. A lawyer representing the

Army may be authorized to withdraw from the representation by The Judge Advocate General or the lawyer's supervisory lawyer.

Difficulty may be encountered where competent authority requires an explanation for the termination and such explanation would necessitate the revelation of confidential facts. 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.

#### **Discharge by the Client**

A client has a right to discharge a lawyer with or without cause. Where future disputes about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can release appointed counsel may depend on applicable law. A client seeking to release appointed counsel should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself or herself.

If the client is mentally incompetent, 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. See Rule 1.14.

#### **Optional Withdrawal**

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 that would materially prejudice the client. The lawyer also may seek to withdraw where the client insists on a repugnant or imprudent objective.

As the scope of a lawyer's representation may be limited by the law under which the lawyer's services are made available to the client, see Comment to Rule 1.2, good cause to seek withdrawal exists when a lawyer changes duty stations or changes duties within an office. For example, a legal assistance lawyer has good cause to seek withdrawal when the lawyer is reassigned within the office to duties as trial counsel. In such a circumstance, the legal assistance lawyer has been granted permission to withdraw from representation of legal assistance clients by virtue of the reassignment to trial counsel 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.

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

A lawyer who has 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 is 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.

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 1.2 Scope of Representation
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.13 Army as Client
- Rule 1.14 Client Under A Disability
- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.3 Candor Toward the Tribunal
- Rule 3.8 Special Responsibilities of a Trial Counsel

#### **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, but not in conflict with the law.

##### **COMMENT:**

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

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.

Advice couched in narrowly 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.

A client may expressly or impliedly ask the lawyer for purely technical 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.

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 best advice often consists of recommending a course of action in the face of conflicting recommendations of experts.

###### **Offering Advice**

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, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. 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 Army as Client
- Rule 3.1 Meritorious Claims and Contentions
- Rule 5.4 Professional Independence of a Lawyer

### RULE 2.2 Mediation

- (a) A lawyer may act as a mediator between individuals if;
- (1) the lawyer consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the lawyer-client confidentiality, and obtains each individual's consent to the mediation;
  - (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the individuals' best interests, that each individual will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the individuals if the contemplated resolution is unsuccessful; and
  - (3) the lawyer reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the individuals.
- (b) While acting as a mediator, the lawyer shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that individual can make adequately informed decisions.
- (c) A lawyer shall withdraw as a mediator if any of the individuals so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

### COMMENT:

A lawyer acts as a mediator under this Rule when the lawyer mediates among two or more individuals with potentially conflicting interests. For example, both soldiers and dependents are entitled to legal assistance. Should a legal assistance officer see both the dependent-seller and a soldier-buyer of a used car, the individuals would have potentially conflicting interests and the legal assistance officer would be acting as a mediator in such a situation. Because confusion can arise as to the lawyer's role where each individual is not separately represented, it is important that the lawyer make clear the relationship.

A lawyer acts as a mediator in seeking to establish or adjust a relationship between individuals on an amicable and mutually advantageous basis; for example, arranging a property distribution in settlement of an estate or mediating a dispute between individuals. The lawyer seeks to resolve potentially conflicting interests by developing the individuals' mutual interests. The alternative can be that each individual may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the individuals may prefer that the lawyer act as mediator.

In considering whether to act as a mediator between individuals, a lawyer should be mindful that if the mediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that mediation is plainly impossible. For example, a lawyer cannot undertake mediation among individuals when contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the individuals has already assumed definite antagonism, the possibility that the individuals' interests can be adjusted by mediation ordinarily is not very good.

The appropriateness of mediation can depend on its form. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent either individual on a continuing basis and whether the situation involves creating a relationship between the individuals or terminating one.

### Confidentiality and Privilege

A particularly important factor in determining the appropriateness of mediation is the effect on client-lawyer confidentiality of information relating to the mediation. See Rules 1.4 and 1.6. As the lawyer represents neither individual in the mediation, there is neither lawyer-client privilege nor lawyer-client confidentiality.

Since the lawyer is required to be impartial between commonly represented clients, mediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the individuals for a long period and in a variety of matters might have difficulty being impartial between the individual and one to whom the lawyer has only recently been introduced.

### Consultation

In acting as a mediator between individuals, the lawyer is required to consult with the individuals on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Where the lawyer is a mediator, the individuals ordinarily must assume greater responsibility for decisions than when each individual is represented by a lawyer.

### Withdrawal

Each individual has the right to the loyalty and diligence of the mediating lawyer, and may discharge the lawyer as stated in the Rule.

## CROSS REFERENCES:

- Rule 1.4 Communication
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflicts of Interest: General Rule
- Rule 1.9 Conflicts of Interest: Former Client
- Rule 1.13 Army as Client
- Rule 1.16 Declining or Terminating Representation

### RULE 2.3 Evaluation for Use by Third Persons

- (a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:
- (1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client, and
  - (2) the client consents after consultation.
- (b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

### COMMENT:

#### Definition

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, a judge advocate is asked to prepare a brief setting forth his service's position on a situation for use by another Governmental agency or the Congress.

Lawyers may be called upon to give a formal opinion on the legality of action contemplated by the Army. In making such an evaluation, the lawyer acts at the behest 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.

If a lawyer believes that making an evaluation is incompatible with other aspects of the lawyer's relationship with the client, the lawyer should consult with the lawyer's supervisory lawyer for advice and guidance.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a lawyer-client relationship. For example, a 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 lawyer-client relationship with the soldier. So also, an investigation into a person's affairs by a lawyer 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 the 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**

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 lawyer-client 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 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.

#### **CROSS REFERENCES:**

- Rule 1.2 Scope of Representation
- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.9 Conflict of Interest: Former Client
- Rule 1.13 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 the Rights of Third Persons

#### **ADVOCATE**

##### **RULE 3.1 Meritorious Claims and Contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis 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:**

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.

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. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. Merely because an issue has never been raised before, or because it may have been raised under different circumstances and been resolved under those circumstances, the raising of the issue again is not necessarily frivolous. The action is frivolous,

however, if the client desires to have the action taken solely for the purpose of harassing or maliciously injuring a person or 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.

A lawyer does not violate this Rule by raising issues in good faith compliance with court precedent, see e.g., *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

##### **RULE 3.2 Expediting Litigation**

A lawyer shall make reasonable efforts to expedite litigation and other proceedings consistent with the interests of the client and the lawyer's responsibilities to the tribunal to avoid unwarranted delay.

#### **COMMENT:**

Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension. Expediting litigation, in contrast, often can directly benefit the client's interest in obtaining bargaining concessions and in obtaining an early resolution of the matter. Delay should not be indulged merely for the convenience of the advocates, or 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 material fact or law to a tribunal;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  - (3) 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;
  - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
  - (5) knowingly disobey an obligation or order imposed by a superior or tribunal, unless done openly before the tribunal in a good faith assertion that no valid obligation or order should exist.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal

of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

#### **COMMENT:**

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

#### **Representations by a Lawyer**

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**

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 which 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. A lawyer should not knowingly fail to disclose to the tribunal legal authority from a noncontrolling 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 it important to resolving the issue being litigated.

#### **False Evidence**

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the tribunal. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered. If it has been offered, the advocate's proper course ordinarily is to consult with the client confidentially. The lawyer should urge the client to immediately correct the matter on the record. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

The rule generally recognized is that, if the client refuses to correct the matter and if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the tribunal or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the tribunal, thereby subverting the truthfinding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject

the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the tribunal.

#### **Perjury by a Criminal Accused**

A criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious is the most difficult situation. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the tribunal.

If the accused has admitted to the lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the accused insists on exercising the right to testify, the lawyer must advise the client against taking the witness stand to testify falsely. If before trial the accused insists on testifying falsely, the lawyer shall seek to withdraw from representation. 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. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused does not have a right to assistance of counsel in committing perjury. Furthermore, an advocate 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(d).

#### **Remedial Measures**

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the tribunal. 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. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the tribunal. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

#### **Duration of Obligation**

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

#### **Refusing to Offer Proof Believed to be False**

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. 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.

#### **Ex Parte Proceedings**

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 an ex parte proceeding, such as an application for a temporary restraining order, 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.

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation  
Rule 1.6 Confidentiality of Information  
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  
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 to an opposing party and counsel 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:**

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.

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 UCMJ, makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

A lawyer who receives (i.e., 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 attorney. 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.

Neither a lawyer acting as a victim/witness liaison nor another person appointed by a lawyer to be a victim/witness liaison unlawfully obstructs another party's access to evidence or to material having potential evidentiary value by performing victim/witness liaison duties in accordance with Army regulation. For example, a victim/witness liaison, upon the request of a victim or witness, may require trial counsel and defense counsel to coordinate with the victim/witness liaison for interviews of a victim of or witness to the crime which forms the basis of a court-martial.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. 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.

With regard to paragraph (c), a "rule of a tribunal" includes Rule 6(e) of the Federal Rules of Criminal Procedure governing discussion of grand jury testimony.

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  
Rule 1.6 Confidentiality of Information  
Rule 1.7 Conflict of Interest: General Rule  
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 Respecting 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) seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

#### **COMMENT:**

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's

right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate 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

Rule 3.3 Candor Toward the Court

Rule 3.4 Fairness to Opposing Party and Counsel

#### **RULE 3.6 Tribunal Publicity**

(a) A lawyer shall not make an extra judicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter 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, or witness, or the identity of a witness, or the expected testimony of a party 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 in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial;

(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.

(c) Notwithstanding paragraphs (a) and (b)(1-5), a lawyer involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, 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 the 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) in a criminal case:

(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.

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

#### **COMMENT:**

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial 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 effects 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.

No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression. The formula in this Rule is based upon the ABA Model Code of Professional Responsibility and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

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

Rule 3.6(b)(7) makes clear that the prohibition on extra judicial statements does not preclude comment about the credibility, reputation, motives or character of DOD personnel by a lawyer properly acting in a representational capacity, e.g. before an administrative hearing where such matters are relevant. Rule 3.6d. acknowledges that an Army lawyer's release of information is governed not only by Rule 3.6 but also by law. 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

#### **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 except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and quality 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 office is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

**COMMENT:**

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

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.

Rule 3.7(a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Rule 3.7(a)(2) recognizes that where the testimony concerns the extent and quality 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.

Apart from these two exceptions, Rule 3.7(a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether 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.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 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 is improper. 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. See Comment to Rule 1.7.

**CROSS REFERENCES:**

- Rule 1.6 Confidentiality of Information
- Rule 1.7 Conflict of Interest: General Rule
- Rule 1.9 Conflict of Interest: Former Client
- Rule 3.4 Fairness to Opposing Party and Counsel

**RULE 3.8 Special Responsibilities of a Trial Counsel**

A trial counsel shall:

(a) recommend to the convening authority that any charge or specification not warranted by the evidence 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) not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(d) make timely disclosure to the defense of all evidence or information known to the lawyer 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 lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the lawyer in a criminal case from making an extra judicial statement that the trial counsel would be prohibited from making under Rule 3.6.

**COMMENT:**

A trial counsel is not simply an advocate but is responsible to see

that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. See also Rule 3.3(d), governing ex parte proceedings. Applicable law may require other measures by the trial counsel and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Rule 3.8(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.

The exception in Rule 3.8(d) recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosures 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 regulations may proscribe the disclosure of certain information without proper authorization.

A trial counsel may comply with Rule 3.8(e) 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.

**CROSS REFERENCES:**

- Rule 1.11 Successive Government and Private Employment
- 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 Trial Publicity
- Rule 3.9 Advocate in Nonadjudicative Proceedings
- Rule 4.4 Respect for the Rights of Third Persons
- Rule 5.4 Professional Independence of a Lawyer

**RULE 3.9 Advocate in Nonadjudicative Proceedings**

A lawyer representing a client before a legislative or administrative tribunal 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)-(c), 3.4(a)-(c), and 3.5.

**COMMENT:**

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking 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 should deal with the tribunal honestly and in conformity with applicable rules of procedure.

Lawyers have no exclusive right to appear before nonadjudicative bodies. 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.

**CROSS REFERENCES:**

- Rule 1.1 Competence
- Rule 1.6 Confidentiality of Information
- Rule 3.3 Candor Toward the Tribunal
- Rule 3.4 Fairness to the Opposing Party or Counsel
- Rule 3.5 Impartiality and Decorum of the Tribunal
- Rule 4.1 Truthfulness in Statements to Others
- Rule 5.4 Professional Independence of the 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 to a third person 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**

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.

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

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 are in this category.

##### **Fraud by Client**

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

#### **CROSS REFERENCES:**

Rule 1.6 Confidentiality of Information

Rule 3.3 Candor Toward the Tribunal

Rule 3.4 Fairness to Opposing Party and Counsel

### **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 party 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 by law to do so.

#### **COMMENT:**

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a Government agency and private party does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to controversy with a Government agency to speak with Government officials about the matter.

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

This rule does not prohibit a lawyer representing one party in a matter from communicating concerning the matter with the commander of another party to the matter. For example, a legal assistance lawyer representing a dependent spouse may write to the commander of the soldier-sponsor concerning a disputed matter of financial support to the dependent spouse.

#### **CROSS REFERENCES:**

Rule 3.8 Special Responsibilities of a Trial Counsel

Rule 4.1 Truthfulness in Statements to Others

Rule 4.4 Respect for Rights of Third Persons

### **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.

#### **COMMENT:**

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. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation

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**

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.

#### **COMMENT:**

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 his 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. Similarly, an Army lawyer may communicate a correct statement of fact that includes the possibility of criminal action if a civil obligation is not fulfilled. However, in such a communication, the lawyer may not use intemperate and inappropriate language to embarrass, delay, or burden the recipient of the communication.

#### **CROSS REFERENCES:**

Rule 3.2 Expediting Litigation

Rule 3.8 Special Responsibilities of a Trial 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 the Senior Counsel and Supervisory Lawyers**

(a) The General Counsel of the Army, The Judge Advocate General, the Chief Counsel, Corps of Engineers, the Command Counsel, Army Materiel Command, and other civilian and military supervisory lawyers shall make reasonable efforts to ensure that all lawyers conform to these Rules of Professional Conduct.

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

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

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

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

**COMMENT:**

Rule 5.1(a) recognizes the responsibilities of the Senior Counsel and supervisory lawyers to effect and ultimately enforce these Rules.

Rule 5.1(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 Rule 5.1(b) can depend on the office's structure and the nature of its practice. In a small office, informal supervision and occasional admonition ordinarily might be sufficient. In a large office, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. In some offices, for example, junior lawyers can make confidential referral of ethical problems directly to a senior lawyer. See Rules 1.13 and 5.2. Offices 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 these Rules.

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 administrative law lawyers and legal assistance lawyers. 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 such a situation, 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.

Rule 5.1(c)(1) expresses a general principle of supervisory responsibility for acts of another. See also Rule 8.4(a). Ratification as used in Rule 5.1(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.

Rule 5.1(c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Appropriate remedial action would depend on the immediacy of the supervisor'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 Rule 5.1(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.

Professional misconduct by a lawyer under supervision could reveal a violation of Rule 5.1(b) on the part of the supervisory lawyer even though it does not entail a violation of Rule 5.1(c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability 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.

**CROSS REFERENCES:**

Rule 1.13 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 these Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these 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:**

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 these 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.

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 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

Rule 5.4 Professional Independence of the Lawyer

Rule 8.4 Misconduct

**RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer under the authority, supervision, or direction of a lawyer:

(a) the senior supervisory lawyer in an 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;

(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; and

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

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

(2) 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:**

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 1.6 Confidentiality of Information

Rule 3.8 Special Responsibilities of a Trial Counsel

Rule 4.1 Truthfulness in Statements to Others

Rule 4.4 Respect for Rights of Third Persons

Rule 5.5 Unauthorized Practice of Law

**RULE 5.4 Professional Independence of a Lawyer**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a nonlawyer who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) Notwithstanding a lawyer's status as a commissioned officer or Department of the Army civilian, a lawyer detailed or assigned to represent an individual soldier or employee of the Army is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and to the same extent as required by a lawyer in private practice.

(f) The exercise of professional judgment in accordance with

(e) above will not, standing alone, be a basis for an adverse evaluation or other prejudicial action.

**COMMENT:**

**General**

Provisions (a) through (d) of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the 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 Rule 5.4(c), such arrangements should not interfere with the lawyer's professional judgment.

**Judge Advocates**

Provisions (e) and (f) of this Rule recognize that judge advocates and Department of the Army civilian attorneys are required by law to obey the lawful orders of superior officers. 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 other 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.

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 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.

Additionally, the military lawyer has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

**CROSS REFERENCES:**

**Preamble**

Rule 1.1 Competence

Rule 1.2 Scope of Representation

Rule 1.3 Diligence

Rule 1.7 Conflicts of Interest: General Rule

Rule 1.13 Army as Client

Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

Rule 5.2 Responsibilities of a Subordinate Lawyer

**RULE 5.5 Unauthorized Practice of Law**

A lawyer shall not:

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

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

**COMMENT:**

Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. 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. Paragraph (b) does not prohibit a lawyer from employing the services of nonlawyers and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit

lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of 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 prose or nonlawyers authorized by law to practice in military proceedings.

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation  
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants  
Rule 8.5 Jurisdiction

#### **PUBLIC SERVICE**

**RULE 6.1 [Not used]**  
**RULE 6.2 [Not used]**  
**RULE 6.3 [Not used]**  
**RULE 6.4 [Not used]**

#### **INFORMATION ABOUT LEGAL SERVICES.**

NOTE: The following Rules on lawyer advertising are included in these Rules of Professional Conduct not so much to regulate this aspect of private civilian lawyer practice as to provide professionally recognized standards which may be used by Army lawyers working with private civilian lawyers in considering alleged improper advertising on the part of private civilian lawyers. These rules do not authorize advertising activities on the part of Army lawyers which are otherwise prohibited by law. Publicizing the availability of government-provided legal services to authorized clients is not "advertising" for the purposes of these Rules.

#### **RULE 7.1 Communications Concerning a Lawyer's Services**

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:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate these Rules of Professional Conduct or other law; or (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

#### **COMMENT:**

This Rule governs all communications about a lawyer's services. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in Rule 7.1(b) of statements that may create "unjustified expectations" would ordinarily preclude statements about results obtained on behalf of a client, such as the lawyer's record in obtaining favorable decisions. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.

#### **CROSS REFERENCES:**

Rule 1.2 Scope of Representation  
Rule 4.1 Truthfulness in Statement to Others

#### **RULE 7.2 Advertising**

(a) Except as prohibited by law and subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor sign, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer responsible for its content.

#### **COMMENT:**

Note: This Rule and Comment do not authorize Army lawyers to advertise except as authorized and in the manner prescribed by Army regulation. The Rule and Comment are intended to govern the conduct of civilian lawyers practicing before tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice.

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

This Rule permits, except as prohibited by law, public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

#### **Record of Advertising**

Rule 7.2(b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

#### **Paying Others to Recommend a Lawyer**

A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer

referral programs and pay the usual fees charged by such programs. Rule 7.2(c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

#### **CROSS REFERENCES:**

Rule 7.1 Communications Concerning a Lawyer's Services  
Rule 7.3 Direct Contact with Prospective Clients  
Rule 7.4 Communication of Fields of Practice  
Rule 7.5 Firm Names and Letterheads

#### **RULE 7.3 Direct Contact with Prospective Clients**

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

#### **COMMENT:**

There is a potential for abuse inherent in direct solicitation by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Advertising makes it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct personal persuasion that may overwhelm the client's judgment.

The use of general advertising to transmit information from lawyer to prospective client, rather than direct private contact, will help to assure that the information flows cleanly as well as freely. Advertising is out in public view, thus subject to scrutiny by those who know the lawyer. This information review is itself likely to help guard against statements and claims that might constitute false or misleading communications, in violation of Rule 7.1. Direct, private communications from a lawyer to a prospective client are not subject to such third person scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

These dangers attend direct solicitation whether in person or by mail. Direct mail solicitation cannot be effectively regulated by means less drastic than outright prohibition.

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident,

therefore, more closely resemble permissible advertising rather than prohibited solicitation.

Similarly, this Rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries or other third parties for the purpose of the plan or arrangement which the lawyer or the lawyer's firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services or others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

#### **CROSS REFERENCES:**

Rule 7.1 Communication Concerning a Lawyer's Services  
Rule 7.2 Advertising  
Rule 7.4 Communication of Fields of Practice  
Rule 7.5 Firm Names and Letterheads

#### **RULE 7.4 Communication of Fields of Practice**

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) 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;

(b) a lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation; and

(c) a lawyer designated a specialist by an appropriate jurisdiction may use a designation authorized by that jurisdiction.

#### **COMMENT:**

This Rule permits a lawyer to indicate areas of practice in communication about the lawyer's services, for example, in a telephone directory or other advertising. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" or that the lawyer's practice "is limited to" or "concentrated in" particular fields is not permitted. These terms have acquired a secondary meaning employing formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the jurisdiction where the lawyer is licensed to practice.

Recognition of specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and federal courts.

#### **CROSS REFERENCES:**

Rule 7.1 Communications Concerning a Lawyer's Services  
Rule 7.2 Advertising  
Rule 7.3 Direct Contact with Prospective Clients  
Rule 7.5 Firm Names and Letterheads

#### **RULE 7.5 Firm Names and Letterheads**

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.



(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of the lawyer holding a public office shall not be used in the name of a law firm, or in communication on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

#### **COMMENT:**

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to Rule 7.5(d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

#### **CROSS REFERENCES:**

Rule 7.1 Communications Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Direct Contact with Prospective Clients

Rule 7.4 Communication of Fields of Practice

#### **MAINTAINING THE INTEGRITY OF THE PROFESSION**

##### **RULE 8.1 Bar Admission and Disciplinary Matters**

An applicant for admission to a bar, or a lawyer in connection with a bar admission application, application for employment with the Federal government, application for appointment or active duty in The Judge Advocate General's Corps, certification by The Judge Advocate General, or a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) 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:**

The duty imposed by this Rule extends to lawyers seeking admission to a bar, application for appointment or active duty in The Judge Advocate General's Corps or certification by The Judge Advocate General. Hence, if a person makes a material false statement in connection with an application for admission or certification, 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. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved

becomes aware.

This Rule is subject to the provisions of the fifth amendment of the United States Constitution and Article 31, UCMJ. 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.

A lawyer representing 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.

#### **CROSS REFERENCES:**

Rule 8.3 Reporting Professional Misconduct

Rule 8.4 Misconduct

Rule 8.5 Jurisdiction

#### **RULE 8.2 Judicial and Legal Officials**

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.

#### **COMMENT:**

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons 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.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

#### **RULE 8.3 Reporting Professional Misconduct**

(a) A lawyer having knowledge 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 pursuant to Rule 10.1 or implementing regulations promulgated by the Office of the General Counsel, The Judge Advocate General, the Corps of Engineers, or the Army Materiel Command.

(b) A lawyer having knowledge 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 inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) 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:**

Self regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of these Rules of Professional Conduct or other such rules. 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.

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 prosecution would not substantially prejudice the client's interests.

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. Any report should be made in accordance with regulations promulgated by the General Counsel, The Judge Advocate General, the Command Counsel, Army Materiel Command, or the Chief Counsel, Corps of Engineers, as appropriate.

#### **CROSS REFERENCES:**

Rule 5.1 Responsibilities of the Senior Counsel (Judge Advocate General) and Supervisory Lawyers  
Rule 8.4 Misconduct  
Rule 8.5 Jurisdiction

#### **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate these 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
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

#### **COMMENT:**

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. One example of such conduct is the unlawful, unauthorized or nonconsensual obtaining of confidential files, including confidential working paper files, of lawyers who are known or reasonably should be known to be representing a client. Such conduct includes the solicitation or prompting of another person, not bound by these Rules, to engage in such activities. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to ethical obligations.

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 apply to challenges of legal regulation of the practice of law.

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.

#### **CROSS REFERENCES:**

Rule 8.3 Reporting Misconduct  
Rule 8.5 Jurisdiction

#### **RULE 8.5 Jurisdiction**

(a) Lawyers (as defined in these Rules of Professional Conduct) shall be governed by these Rules of Professional Conduct.

(b) Pursuant to the authority of The Judge Advocate General under 10 U.S.C. S 3037, these Rules apply to Judge Advocates in the Active Army, the Army National Guard, and the U. S. Army Reserve.

(c) Pursuant to the authority of The Judge Advocate General under Rule for Courts-Martial 109, these Rules apply to lawyers who practice in proceedings governed by the UCMJ and the MCM.

(d) Pursuant to the authority of 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, in their capacities as qualifying authorities for the civilian Army lawyers in their respective organizations, these Rules apply to the civilian Army lawyers in their respective organizations when acting in an official capacity as employees of the Department of the Army. Official capacity includes providing legal assistance or other representation or counseling as part of a lawyer’s official duties even though the client may not be the Army.

(e) These Rules should be interpreted and applied in light of the similar rules and commentary thereon contained in the American Bar Association Model Rules of Professional Conduct, and the Federal Bar Association Rules of Professional Conduct for Federal Lawyers.

(f) Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. In 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 assistance of the lawyer exercising technical supervision over him or her. 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 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:**

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.

When Army lawyers are engaged in the conduct of Army legal functions, whether servicing the Army as a client or serving an individual 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. As for civilian lawyers practicing in tribunals conducted pursuant to the Manual for Courts-Martial or the Uniform Code of Military Justice, violation of these Rules may result in suspension from practice before such tribunals. 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.

Every lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities. This raises the possibility of a conflict in the governing rules, albeit a conflict likely more theoretical than practical. If a conflict does arise, the lawyer is advised to attempt to resolve the conflict with the assistance of the lawyer exercising technical supervision over him or her. 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 the subparagraphs (1) and (2) of Rule 8.5 (f) provide clear guidance.

## CROSS REFERENCES:

Rule 5.1 Responsibilities of the Senior Counsel and Supervisory Lawyers

Rule 8.3 Reporting Professional Misconduct

## INTERPRETATION

### RULE 9.1 Interpretation

(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 for the Army.

(b) The DA 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 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 Council shall meet as often as necessary. It 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 DA Council normally will adopt for the Army the opinion of that senior counsel, e.g., 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 a professional conduct committee within his or her jurisdiction to assist him or her with respect to questions before the DA Professional Conduct Council.

(e) Army lawyers are encouraged to seek interpretations of these rules from their legal supervisory chain. Any lawyer subject to these Rules 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(f), 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.

(f) All requests for opinions will be processed first through the committee of the senior counsel under whose qualifying authority or jurisdiction the issue arose, or when appropriate, the committee to which assigned by the DA Council.

(g) The actions of the DA 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.

(h) The written opinions of the DA Council shall be open to the public.

### RULE 9.2 [Not Used]

## ENFORCEMENT

### RULE 10.1 Enforcement

(a) The Judge Advocate General, the Command Counsel, Army Materiel Command, and the Chief Counsel, 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 in writing immediately upon learning of an allegation of a violation of these rules by any general officer or Senior Executive Service member under their qualifying authority.

(b) Any allegation of a violation of these rules by an attorney while assigned to the Office of the General Counsel, or by The Judge Advocate General, the Command Counsel of Army Materiel Command, or the Chief Counsel of the Corps of Engineers, will be reported to the General Counsel.

(1) The General Counsel 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 attorney who is the subject of the allegations.

(2) Upon completion of his/her inquiry, the General Counsel will take appropriate action with respect to attorneys from his/her office, or will advise the Secretary of the Army or the Chief of Staff, Army, of the action which should be taken, if any, with respect to the qualifying authority 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:

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.

Subparagraph (2) requires reporting to the General Counsel only those allegations involving a General Officer or member of the Senior Executive Service (SES). This Rule also provides that in the case of the Senior Counsel, other than the General Counsel, the General Counsel of the Army will conduct the investigation. This eliminates the potential problem of the Senior Counsel being subject to investigatory and disciplinary rules of their own creation and subject to their control.

The term "qualifying authority" has significance only with respect to civilian attorneys. Judge advocates are directed in their duties by The Judge Advocate General (see 10 USC 3037(c)(2)), and are not restricted to specific positions within an Army organization as are civilian attorneys. Therefore, "jurisdiction" in subparagraph (a)(1) refers only to judge advocates. They are under the jurisdiction of The Judge Advocate General even when assigned or detailed to MACOM legal offices, including those within the Army Materiel Command and the Corps of Engineers.

### RULE 10.2 [Not Used]

## **Glossary**

### **Section I Abbreviations**

#### **ABA**

American Bar Association

#### **AR**

Army regulation

### **Section II Terms**

#### **Army lawyer**

An Army lawyer is any attorney, whether civilian or military, while employed by the Department of the Army to provide legal services and acting in an official capacity. This includes attorneys providing legal assistance or defense counsel as part of their official duties. In addition, it includes any Army Reserve judge advocate or judge advocate in the Army National Guard when on active duty, active duty for training, inactive duty for training, or any other type of tour of Federal duty as a judge advocate. It also includes any attorney under contract to the Department of the Army to provide legal advice or services within the scope of that contract.

#### **Belief (or believes)**

The person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

#### **Consult (or consultation)**

A communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

#### **Fraud (or fraudulent)**

Conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

#### **Judge advocate**

An officer of The Judge Advocate General Corps of the Army.

#### **Judge Advocate General**

Refers to The Judge Advocate General of the Army.

#### **Knowingly (know or knows)**

The actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

#### **Law**

The term "law" as used in these Rules includes statutes, judicial precedents, regulations, directives, instructions, and orders.

#### **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 and who practices law under the disciplinary jurisdiction of the Army. This includes all

Army lawyers and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial.

#### **Other adjudicative officer**

Includes 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.

#### **Professional disciplinary proceeding**

Refers to 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.

#### **Reasonable (or reasonably)**

When used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

#### **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.

#### **Reasonably should know**

When used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

#### **Senior counsel**

This term applies to the General Counsel of the Army, 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.

#### **Substantial**

When used in reference to degree or extent means a material matter of clear and weighty importance.

#### **Supervisory lawyer**

Means 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 (paralegals).

#### **Tribunal**

Includes all fact-finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law.

### **Section III**

#### **Special Abbreviations and Terms**

There are no entries in this section.

## **Index**

This section contains no entries.

**Unclassified**

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