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COMMANDERS, STAFF JUDGE ADVOCATES, AND THE ARMY CLIENT

I. INTRODUCTION

On June 3, 1987, after two years of staffing by Army and joint service legal representatives, The Army Judge Advocate General (TJAG) approved "Rules of Professional Conduct for Lawyers".[1] The new ethical rules became effective on October 1, 1987, were published on December 31, 1987, as a Department of the Army Pamphlet, and subsequently incorporated in the Army Regulation on Military Justice.[2] These rules are the first set of consolidated ethical requirements, guidelines, and commentary drafted specifically for Army lawyers and for civilian lawyers who appear in Army legal proceedings.[3]

Since the origins of the Judge Advocate General's Corps in the Continental Army of 1775, military and civilian lawyers appearing in military proceedings followed the ethical rules of the civilian bar. Uniformed lawyers were bound by the ethical standards of their respective states, notwithstanding the military nature of the proceedings. The absence of formal ethical standards for practice before courts-martial or other military legal proceedings was probably attributable to the hybrid, lay-professional nature of lower levels of courts-martial prior to enactment of the Uniform Code of Military Justice in 1950.[4] Indeed, non-lawyer counsel continued to appear in lower levels of courts-martial until promulgation of the 1969 Manual for Courts-Martial.[5]

In the past twenty years, military legal proceedings have grown increasingly complex, both procedurally and substantively. The practice of military law expanded from the major areas of military justice, international law, administrative law, claims, contracts, and legal assistance, to a multitude of specialized requirements, including labor relations, environmental law, copyright and patent law, tort litigation, and information law. These new military needs for legal expertise and representation widened the scope of legal advice from staff judge advocates (SJA) to military commanders. As a result, commanders and their lawyers are seeing more of each other today than in the past. Command decisions are more likely than ever before to involve legal issues, either directly or indirectly. The broader range of the SJA-command relationship underscores the need for clear ground rules, in order to ensure that no misunderstandings exist as to the limits of the relationship.

This article focuses on one of the new ethical rules, Rule 1.13, "Army as Client." The provisions of this rule identify the Army as the primarily client of command lawyers and staff judge advocates. Client loyalties and duties to protect confidential communications of the client are extended first and foremost to the Army, and only derivatively to commanders and other authorized representatives of the Army. The thesis of this article is that Rule 1.13 clarifies a basic, but sometimes not fully understood principle that must govern professional relationships among commanders, command lawyers, and their mutual

employer, the U.S. Army: duties of public office - to the Constitution, to the rule of law, and to the Government - must prevail if conflicting personal interests arise.

Before considering the terms and implications of Rule 1.13 in more detail, it will be useful to review the general intent in promulgating the Rules and the basic ethical considerations of public service, for both military officers and lawyers, which led the drafters to emphasize the paramount duty to the institutional client and to the law.

II. DRAFTER'S INTENT

Prior to issuance of the rules, published ethical guidance for military and civilian lawyers in Army legal proceedings was limited to the ethical rules of general application to all lawyers upon bar admission by their state or federal licensing authorities,[6] and to various laws, regulations, Executive orders, and opinions addressing ethically related behavior in particular types of legal or illegal activity.[7] State ethical codes compare closely with the American Bar Associations (ABA) ethical guidelines. After the ABA drafted a revised model for ethical rules in 1983, some states adopted the new ABA Model Rules, some elected to retain the older ABA Model Code, and others preferred to continue studying the newer Rules for possible adoption.[8] Military lawyers from State X, practicing in an Army proceeding in State Y, looked to the older ABA Code by Army Regulation,[9], but were left somewhat uncertain about the effects of any variances in the state ethical codes. The ABA guidelines and the state ethical rules do not address specific

conditions of military practice. The 1983 ABA ethical revisions provided the impetus for a joint service effort to revise the new ABA Model Rules and to adapt them to legal practice in the armed services.[10]

Service unique laws, Executive orders, regulations, and procedures can create correspondingly unique ethical situations.[11] Because the ethical rules that the ABA, the states, and even the Federal Bar Association (FBA) developed generally do not distinguish between civilian and military practice, a need existed for a consolidated set of rules, guidelines, and examples of ethical conduct tailored to the specialized military setting. The Army Rules of Professional Conduct for Lawyers are intended to meet this need.

Although designed to be autonomous, the Rules rest heavily upon the framework of the ABA Model Rules. The more relevant and more specific ethical guidance in the Army Rules provides a better basis for self-assessment and clearer notice of the standards that The Judge Advocate General will apply in exercise of his express and implied administratively and disciplinary powers under the Uniform Code of Military Justice.[12] Rule for Court-Martial 109,[13] Army Regulation 27-1,[14] in addition to the Rules of Professional Conduct themselves.[15]

A failure to comply with the Rules is a basis for invoking the disciplinary process, but does not, in itself, create a legal right or cause of action for any third party, including clients. Accordingly, no collateral claim or basis for relief necessarily arises from a disciplinary violation of the Rules.[16]

The overriding intent in developing the Rules was to enhance the high, but sometimes inadequate ethical standards applicable to Army practice. The abilities of state bar or judicial authorities to investigate allegations of ethical impropriety reported from extra-jurisdictional, military forums vary considerably. Where allegations do not involve criminal matters or more serious questions of moral turpitude, some state authorities may not feel as compelled to conduct the often expensive investigations and hearings that would normally occur. There are too few Army cases to form definite conclusions, but the reaction of some local authorities to referrals from the Army suggests use of a cost-benefit, interest analysis to decline or limit investigations of allegations of impropriety arising in military proceedings. State authorities are often unfamiliar with military requirements or procedures. If no in-state complainant or particular state interest is involved, there may be an understandable tendency to limit inquiries, hold ex parte proceedings, and impose minimal sanctions. When the referred allegation has a foreign country situs, local reticence to sanction may increase still further. As noted in the Army's Trial Procedural Pamphlet, state ethical standards are the minimum acceptable requirements and "reflect jurisdictional compromises.... Each licensing jurisdiction is ultimately free to strike its own balance between competing norms and ...[the compromise] within each jurisdiction reflects the relative power of specific interest groups in that jurisdiction."[17]

The Preamble to the Army Rules describes the roles of a lawyer as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility" for the improvement of justice by virtue of his or her license to practice law.[18] Such responsibilities - to clients, to the courts, to the law, and to the improvement of justice - are "usually harmonious."[19] As commissioned military officers, uniformed lawyers have additional obligations, to their oaths of office and to their military supervisors. This role is compatible with a lawyer's role, except in the rare circumstance where a conflict occurs between what the military obligations require and what a lawyer may do. A key aspect of the Rules is the guidance provided on the dovetailing professional obligations of uniformed legal officers, both as lawyers obligated to the ethical standards of their licensing jurisdictions and as military officers obligated to obey the law.

The Preamble and Scope of the Rules recognize that lawyers who practice in military proceedings, especially military lawyers who represent the U.S. Government, can encounter ethical situations unknown to private practitioners. Probably the most common examples arise from the multifaceted responsibilities of commanders of both major units and activities, such as commanders of both divisions and installations. Commanders at these and higher senior levels act as quasi-judicial officials for military justice purposes and as decision making Army representatives for a variety of administrative actions with legal consequences, in

addition to being concerned with their traditional priority: preparation for combat success through necessarily authoritarian means. Identifying the commander's role becomes critical to both the command legal advisor and to the commander to avoid such problems as inadvertent unlawful command influence in military justice matters.

Should commanders be considered as legal clients of SJA's in the traditional sense, the same as any lawyer's client and to the same extent as the Army client? More specifically, should the duties and loyalties that lawyers owe clients, and should traditional concepts of privileges and confidences be the same for the commander as for the Army and the U.S. Government, when the client is the commander as for the Army and the U.S. Government, when the client is the commander and the lawyer is the command legal advisor, both of whom are subject to their oaths to support the Constitution? Relatedly, what are the duties of SJA's and other command lawyers if conflicts occur between the personal interests of commanders and the interests of the Army and the U.S. Government? Before examining, approach Rule 1.13's to these questions for command lawyers, it would be useful to review the broader ethical environment, that of professional military officership. The position taken by Rule 1.13 is that the ethical obligations of military lawyers in advising their commanders are logical and necessary extensions of the same ethical obligations that apply to all military officers.

III. REFLECTING "THE MILITARY ETHIC"

Ethical issues are at the core of the human condition, ever confronting us in our lessor or greater roles, whether we be princes or paupers, preachers or politicians, citizens or soldiers.[20] Having noted some unique legal concerns as motive for the new Rules, it should not be forgotten that military service involves unique ethical, as well as legal concerns. As an institution, the military places great emphasis on the need for sound ethical behavior. Shortfalls in character traits are generally career terminators. A comprehensive review of what has been written about the ethics of officership would take years of study. In 1987 alone, the Army published three new publications on leadership and related ethical issues.[21] Military and federal courts have acknow-ledged a special trust, confidence, and responsibility required of military officers.[22] Professional ethics are the most critical aspect of Army leadership, and it has been observed that competence in military leadership has a unique ethical dimension.[23] Ethical rules for lawyers who are part of such an environment must take into account such uncommon ethical demands.

Military life is still carried on in a closely structured, cloistered environment, and the concern of military leaders for morality, self-sacrifice and the justness of their cause has an almost ecclesiastical quality. The institutional concern for ethical behavior and a plethora of standards of conduct, service policies, procedures, orders, regulations, laws, and an officer's

oath to the Constitution -all designed to protect against abuse of powers - stake out a well-marked trail around many behavioral pitfalls. The law channels professional choices for the military to a greater degree than for many in the private sector. Even in combat, laws of armed conflict and rules of engagement shape military decisions.

The high degree of structure in the military is not surprising. The basic military mission carries with it a higher demand for ethical accountability. In the midst of democracy, military leaders are entrusted with an autocratic power to direct, to judge, to punish, to restrict liberty, and to send others to their deaths, if necessary. Military leaders at the higher levels have the potential to influence decisions that affect our very survival as a nation. Most soldiers are comfortable with both their commitment to soldiering and their oath to support the Constitution, notwithstanding the perceptions of some military commentators who are troubled by "careerism," loss of "warrior spirit," or inadequate appreciation of constitutional principles.[24]

IV. ETHICAL RULES FOR SJA-COMMAND RELATIONSHIPS

One might ask why, with an abundance of rules, standards, customs, and laws already guiding military officers in their conduct, and with civilian professional rules of ethics already applicable to lawyers, it is necessary to promulgate yet another such rule. The short answer, already suggested, is that the SJA-commander relationship has unique aspects because both parties owe allegiance to the Constitution and the governmental hierachy

as long as they hold their offices. The relationship between SJAs and commanders involves a duality of purpose, at times intimate and personal, at other times structured and formal. With the mingling of professional and personal factors, a potential exists for misunderstandings. It is, therefore, useful to have norms for dealing with unethical as well as unlawful acts. Role clarification provides additional safeguards for the government, additional deterrence for the potential lawbreaker, additional assistance for staff judge advocates representing the Army acting through its agents, and proper representation for the aberrational commander who could persist in an illegal action.

Inherent in the SJA-commander relationship is a more fundamental ethical issue: the extent to which laws and codes can change ethical attitudes. What is beyond serious dispute is that ethical thought and careful formulation of ethical standards have a salutary effect on action.[25] Setting down what is and what is not acceptable increases ethical awareness and sensitivity. Objective standards cut against our human tendencies to rationalize actions to support purely personal benefits. Knowing that there are rules, sanctions for violations, and effective enforcement procedures, most of us reduce our incidents of misconduct, whether due to heightened ethical consciousness and self internal motivation to act ethically, or to a more pragmatic concern for self-preservation.

Most military officers reach an easy consensus on basic ethical standards of behavior. One does not survive without a well developed ethical consciousness. The trick is applying the

theoretical standards to subtle, real world scenarios, where rights and wrongs are not always neatly discernible, choices are limited to degrees of imperfection, and reasonable compromises are sometimes the only way to participate meaningfully. Hence, notwithstanding the general agreement of all military officers on common ethical and legal norms, opinions often vary on how to apply those norms in practical decision making. To the extent that there is controversy over the application of ethical norms among senior leaders, the case is strengthened for more ethical study and the formulation of well considered guidelines that reflect realistic standards of ethical behavior. With these thoughts in mind, the need for ethical standards designed specifically for legal practice in the military is more apparent.

V. RULE 1.13: THE SJA-COMMAND-ARMY RELATIONSHIP

Rule 1.13 provides that Army lawyers, other than those who are specifically assigned to individual defense or legal assistance duties, represent the Department of the Army "acting through its authorized officials." "Authorized officials" include "commanders of armies, corps and divisions," and the heads of other Army activities, such as installation commanders.[26] Rule 1.13 further provides that the confidential, lawyer-client relationship that exists between a command lawyer and the Army client may extend to commanders, so long as the commander acts lawfully on behalf of the Army and the matters discussed with the command lawyer relate to official Army business.[27]

The attorney-client privilege encourages full and free communication between an attorney and a client by requiring the attorney to keep in confidence information relating to the representation. An attorney may not disclose such information except as authorized by applicable rules of professional conduct. Typically, disclosures are authorized to avert certain crimes or frauds on the court and as appropriate for proper representation. Hence, identifying the client, whether it is an organization or an individual agent of the organization, is crucial to attachment of the privilege.

If it becomes apparent to a staff judge advocate that a commander is engaged or has engaged in illegal command action, or intends to take illegal action knowingly in a situation reasonably imputable to the Army, the staff judge advocate must proceed "in the best interests of the Army." Measures that SJA's should consider when facing these unusual situations include: (1) advising the commander of the potential illegality and the conflict with Army interests; (2) asking the commander to reconsider; (3) requesting permission to seek a separate legal opinion or decision on the matter; and (4) referral to the legal authority in the next higher command.[28]

No identical provision to Rule 1.13 exists in private sector ethical codes, although the duties of a corporate counsel to the stockholders rather than the corporate officers is somewhat analogous.[29] Rule 1.13 is based on the well-established, fundamental notion that the true client of command lawyers is the

Army, in the first instance, and ultimately the laws and Government of the United States. Three related tenets are involved in Rule 1.13: (1) the sworn duty of all Army officers to support the Constitution and the system of laws and government expressed therein; (2) the extension of our constitutional allegiance to the U.S. Army, through the Department of Defense and the Executive Branch; and (3) the recognition that our ultimate loyalties to the Constitution, public service, and our at-large government employer must prevail over any conflicting personal interests that may arise.

The significance of Rule 1.13 lies more in what the Rule says about the tripartite, SJA-commander-Army relationship than in the guidance the Rule provides on how to cope with aberrational[30] cases of intentionally illegal conduct by senior commanders. Regarding the lawyer-client relationship the Rule states:

> When a judge advocate or other Army lawyer is... designated to provide legal services to the head [commander] of the organization, the lawyer and the Army as represented by the head [commander] of the organization as to matters within the scope of the official business of the organization. The head [commander] of the organization <u>may not invoke the lawyer-client privilege or the rule of confidentiality</u> for the [commander's] own benefit but may invoke either

for the benefit of the Army. In so invoking... on behalf of the Army, the [commander] is subject to being overruled by higher authority in the Army.[31]

The Comment to Rule 1.13 elaborates on the relationship:

> The Army and its commands, units, and activities are legal entities, but cannot act except through their authorized officers....
>
> [A] judge advocate...normally represents the Army acting through its officers....It is to that client when acting as a representative of the organization that a lawyer's immediate professional obligation and responsibility exists....[32]

The comment goes on to say that official lawyer-commander communications are protected by confidentiality (Rule 1.6), but the comment contains the following words of caution: "This does not mean, however, that the officer...is a client of the lawyer. It is the Army, and not the officer...which benefits from Rule 1.6 confidentiality."[33]

Prior to promulgation of Rule 1.13 and the Army Rules of Professional Conduct for Lawyer, there was no clear statutory, regulatory, or ethical guidance defining the nature of SJA-commander-Army relationships in terms of client loyalty and privilege from disclosure.[34] Few problems arose, because a high degree of professionalism characterized relationships between SJAs and senior commanders. Occasionally, however,

confusion arose from loose distinctions between personal and institutional loyalties, and between a right to privacy for personal disclosures or secrets, and protected lawyer-client privileges. A distinction should be and is drawn by Rule 1.13 between opinion or thoughts that should not be disclosed, as a matter of personal privacy that are no one else's business, and what must be disclosed as required by law and by our paramount duty to the Government Ambiguous language in a now rescinded Department of Army Pamphlet[35] contributed to the mistaken notion among some that a staff judge advocate's loyalty to a commander ought to be an all-or-nothing, undivided, right-or-wrong commitment, to the exclusion of other loyalties, just as attorney-client loyalties are often described. Of course, limits exist on the duties and loyalties of lawyers to their clients, whether personal or institutional. Representation of any client must be zealous, but within ethical and legal bounds.[36]

As critical as personal loyalty and freedom of expression are to a successful SJA-Commander relationship, there should be no confusion that such expression extends to counsel for clearly illegal actions taken or to nondisclosure for illegal action to be taken. Defense counsel should handle the former case, higher authority the latter. The proposition that loyalty to a personal interest (in the form of a privilege from disclosure) is an absolute requirement that should properly prevail over loyalty to the law has been so thoroughly rejected that it bears little

discussion.[37] In his book, Limits of Loyalty, A.C. Wedemeyer describes the predicament facing many senior German officers in World War II:

> Colonel General Beck...General Rommel and thousands of other patriotic Germans in the military service were...torn between loyalties to those in power and their innate loyalties to principles of decency and justice....[T]here was a duty, in Rommel's view...of loyalty to the nation which now came into conflict with the duty to the commander.[38]

General George Marshall went a step further: "[A]n officer's ultimate, commanding loyalty at all times is to his country and not to his service or superiors."[39] Similarly, the Code of Ethics for Government Service in the current Army Regulation 600-50 states: "Any person in Government service should - a. Put loyalty... country above loyalty to persons...[and] b. Uphold the Constitution, laws and regulations of the United States...ever conscious that public office is a public trust."[40] The courts, as do the great majority of commanders, have recognized these same principles as applicable to military officers.[41]

Occasional confusion over the attorney-client privilege and the appropriate object of a command lawyer's loyalty made it apparent that ethical "rules of engagement" for lawyers needed to be precisely defined. Informality and trust had to be preserved,

without protecting known, deliberate illegal acts. Implicit in Rule 1.13 is the requirement that both commanders and their staff judge advocates, as representatives of the Army, obey their fiduciary duties to the law and to honor their oaths to the Constitution. So long as this duty is met and there is the recognition that public office equates to a public trust that the offices will be exercised lawfully, commanders are entitled to expect both confidentiality and loyalty from their lawyers. Whether the Army extends that confidence to commanders as "quasi-clients"[42] of the command lawyer or simply as protection for matters conveyed in the expectation of privacy, SJA's have an ethical duty not to disclose such communications to those who have no legitimate right to know. The fact that the Army and the government and, when relevant to trial issues, opposing counsel and the courts have a right to know of evidence of illegalities or conflicts of interest does not detract from, but bolsters the professionalism of the relationship.

V. "HE TELLS ME EVERYTHING, AND THAT'S THE WAY I WANT IT"

Of course, commanders have a right to expect that their SJAs will "keep them out of trouble" and respect a limited rather than an absolute confidentiality of communications. The rule does not affect this situation. "inadvertent" illegality is distinguished from deliberate illegality. But if some boundaries or "good faith" of the SJA-commander representation are not well established, a commander may expect his own personal legal representation and strict confidentiality from the SJA, vis a vis

the government. When the SJA does not provide this representation, the command may sense that the lawyer is merely attempting to avoid association with the commander in the commander's hour of need. Clear rules and bilateral understanding of those rules at the outset leave should minimize any such misunderstandings.

The drafters of Rule 1.13 understood that commanders must have the support of their lawyers and must be free to discuss with their staff judge advocates any aspect of official business fully, frankly, and with the assurance of confidentiality, expect as to those higher authorities who have legitimate right to disclosure. The Comment to the Rule states: "When the officers...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."[43] Thus, Rule 1.13 changes nothing of substance. The Rule merely clarifies an area of potential misunderstanding and provides a structure for addressing representational conflicts. No well-intentioned commander need hesitate to discuss any command option, power or duty with the SJA. Providing advice on such matters is the bread and butter of the SJA's job. Subject to the narrow exceptions required by law and the ethical rules, for governmental access to the information, as described above, no third party disclosures of a commander's private communications are appropriate. Only a

clearly intended or actual illegality that might be imputed to the Army, or a violation of a legal obligation to the Army, is to be disclosed under Rule 1.13. Only those who insist upon proceeding against these Army interests lose their derivative protections from disclosure.

Rule 1.13 also notes that SJAs, when facing a situation where a command is engaged in illegal action, may refer the matter to or ask for guidance from higher authority in the technical chain. This provision reflects a right that already exists in Article 6(b), UCMJ.

The same basic principle that governs SJA-commander relationships also applies to subordinate command representatives and other command lawyers. If these officials insisted upon illegal action and cannot otherwise be deterred, the situation should be brought to the attention of the higher commander or supervising command lawyer.

The Army Rules integrate, cross reference and extend the provisions of Rule 1.13 in several of the other rules, wherever appropriate to clarify the nature of the ethical duty described. The Comment in Rule 1.4, "Communication," requires that appropriate Army officials be kept informed of legal developments on behalf of the Army client. The Comment to Rule 1.6, "Confidentiality of Information," notes that lawyers who represent the Army may inquire within the Army to clarify the possible need for withdrawal from representation of local

officials where doubt exists about contemplated criminal conduct. Rule 1.7, "Conflict of Interest," includes the following in it's Comment:

> Loyalty is an essential element in the lawyer's relationship to a client....
>
> [L]oyalty to a client is...impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests....
>
> A client including an organization (see Rule 1.13b), may consent to representation notwithstanding a conflict.[44]

Similarly, Rule 5.4, "Professional Independence of a Lawyer," requires a lawyer to exercise individual professional judgment in representing a client, free of competing influences and loyalties. Lastly, the Comment to Rule 8.5, "Jurisdiction," applies the Rules to the separate roles of lawyers, whether serving the Army as an institutional client, or serving individual clients as authorized by the Army.

Rule 1.13 recognizes that judge advocates and other Army lawyers are both commissioned officers and "officers of the court," with complementing, but not identical, ethical obligations in each capacity. Rule 1.13's approach is partially analogous to American Bar Association and Federal Bar Association guidance on duties of civilian attorneys to their corporate or institutional employers.[45] Rule 1.13 also follows the

evidentiary privilege rationale of Military Rule of Evidence 502,[46] "lawyer-client privilege," by recognizing that the client can be a public entity and entitled, as such, to claim the privilege of nondisclosure of confidential communications of its representatives.

The greatest value of Rule 1.13 is its clarification of respective, official roles and of legal relationships that are occasionally misunderstood. Public servants, and military authorities in particular, conduct their official business through the power entrusted to them by the Government. Commanders and Army lawyers must expect that they may be held accountable for their actions, and should conduct their activities accordingly, mindful of potential scrutiny by judges, by higher authorities in all branches of government, and even by the public at large when the information is not protected from disclosure.[47]

VI. CONCLUSION

The Book of Timothy reminds us that laws are not made for the righteous. Yet even for the righteous, the full ethical dimension of decision making is not always obvious. The best of us sometimes fail to realize all the consequences of decisions. All of us can benefit from wise counsel. Well-considered laws and codes of behavior alert us to ethical issues which we may not otherwise perceive, and inform us of societal preferences for resolving conflicting and sometimes ambiguous choices in an increasingly complex world. Wise rules of ethical behavior are

beneficial norms, serving as a departure point for subjective and objective analysis, stimulating ethical discussion and thought, and conforming behavior to desirable ends.[48] We learn from the great German philosopher, Immanuel Kant, echoing similar thoughts of Socrates two millenium earlier, that we should strive to develop good laws and obey them, not because the laws are perfect, but because it is our duty and otherwise there is but chaos.[49] Army Rules represent an effort to develop the laws of our profession.

Official duties should be performed lawfully, in a manner that will withstand public scrutiny, even if that scrutiny never occurs. The dictates of law, our oath, and applicable ethical rules must be observed as necessary conditions of public service. Keeping the Army's interests in mind strengthens, rather than detracts from the commander's entitlement to special care, loyalty, and protection from illegality or unwarranted disclosure. By setting the ground rules out clearly, Rule 1.13 fortifies an already sound relationship among SJA's, commanders, and the Army client.

ENDNOTES

1. 52 Fed. Reg. 122 (1987).

2. Dept of Army, Pam 27-26, Legal Services: Rules of Professional Conduct for Lawyers (31 Dec 1987) [hereinafter Rules]. AR 27-10, Military Justice (18 Mar1988).

3. The Rules define "lawyer" as "a member of the bar...who practices law under the disciplinary jurisdiction of The Judge Advocate General. This includes judge advocates...and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial...." The Rules define "tribunal" as including "all fact-finding, review or adjudicatory bodies or proceedings convened or initiated pursuant to applicable law." The "Army" is the immediate subagency of the Department of Defense, an Executive agency. This in no respect limits the ultimate duty to the Constitution, the law, and the three branches of the Federal Government.

4. 64 Stat. 120 (May 5, 1950).

5. Manual for Courts-Martial, United States, 1969 (Rev. ed.).

6. The Army, Navy, and Marine Corps agreed on the desirability of promulgating ethical rules with specific guidance for military lawyers. However, the Navy/Marine Corps guidance is less comprehensive, includes no commentary, and is inapplicable to civilian lawyers. The Air Force is studying the need for ethical rules tailored to their service practice. The Court of Military Appeals continues to apply the ABA Model Code of Professional Responsibility, per Rule of Court 12(a), 4 M.J.XCV,CI (1977). It is hoped that the Army Rules will provide the basis for a more uniform approach among the services and the court.

7. See, e.g., the "conflict of interest" provisions of 18 U.S.C. s201-209 and the "Ethics in Government" requirements of 5 U.S.C.A. App-I, s201 et seq (26 Oct. 1978; 13 and 22 Jun. 1979). The primary Army authority for investigation of ethical allegations against lawyers is Army Reg. 27-1, Legal Services: Judge Advocate Legal Service, para. 5-3)1 Aug. 1984) (under revision). See also Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (10 Jul. 1987) (under revision); Army Reg. 600-50, Standards of Conduct, App. D (25 Sep. 1986). The Federal Ethical Considerations (F.E.C.) of the Federal Bar Association (FBA) are an excellent source of guidance for the federal sector attorney, but are not adapted to military practice. The Army Office of The Judge Advocate General also issues an annual "Reference Guide to Prohibited Activities of Military and Former Military Personnel, as a research tool for judge advocates facing stautory requirements related to common ethical problems.

8. See Model Rules of Professional Conduct (1983). As of November 1987, twenty-three states had adopted modified versions of the 1983 Model Rules of Professional Conduct. Most other states were still following the older ABA Code, but considering adoption of some version of the 1983 ABA Rules.

9. Army Reg. 27-10, Legal Services: Military Justice, para 5-8 (10 Jul. 1987).

10. Colonel (U.S. Army, retired) William Fulton, the current Clerk of Court for the U.S. Army Court of Military Review, first proposed the possibility of joint service modification of the 1983 ABA Rules to military practice in Army channels in 1984. The Army working group representative and primary drafter was Major Thomas Leclair. The author of this article supervised the Army drafting and joint service coordination.

11. Although the Supreme Court recognized, in Parker v. Levy, 417 U.S. 733, 744 (1973), that "[m]ilitary law is a jurisprudence...separate and apart from the law which governs our federal government," such differences exist more outside the courtroom than within. See Solorio v. United States, 107 S. Ct. 2924 (1987).

12. 10 U.S.C. 801-940 (1982) [hereinafter UCMJ]. Article 6 (806) provides the fundamental authority of the Judge Advocate General (TJAG) to supervise the administration of military justice, including assignment and direct communication powers. The other articles add to TJAG's powers and responsibilities, either directly or by implication. For example, article 38 describes Court-Martial representation by "civilian defense counsel," article 42 refers collectively to "defense counsel," and article 27 describes detail and certification of counsel. The Military Justice Act of 1984 did not affect substantially these articles.

13. Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 109 [hereinafter R.C.M. 1. R.C.M. 109(a), building on the UCMJ powers of the Judge Advocates General, provides authority to "govern the professional supervision and discipline" of military lawyers and "other lawyers who practice in proceedings governed by the Code and this Manual." The Army Rules of Professional Conduct refer to lawyers before "tribunals conducted pursuant to the "UCMJ and the Manual." See Army Rules, Definition. This distinction between "proceedings" and "tribunals" is probably without great significance, as both would encompass, for example, article 32, UCMJ, and similar hearings. But see O'Hare, Dealing With Client Perjury Under the Army Rules of Professional Conduct, Army Lawyer, Nov. 87 34-35. F.E.C. 4-4 of the FBA notes: "In respects not applicable to the private practitioner, the federal lawyer is under an obligation to the public."

14. Army Reg. 27-1, supra note 7, now under revision, describes the procedures for investigation of allegations of professional impropriety, and for imposing discipline, when appropriate.

15. See Rule 5.1, "Responsibilities of The Judge Advocate General and Supervisory Lawyers;" Rule 8.5, "Jurisdiction."

16. Rules, Preamble, at 2.

17. Dept. of Army Pam. 27-173, Trial Procedure, para 30-1 (15 Feb. 1987). This text contains an excellent discussion of the professional responsibilities of military counsel and notes the pre-Rules need for guidance on whether the client of the staff judge advocate should be the Army or the commander at paragraphs 30-1 to 30-4. An excellent discussion of the ABA approach to extraterritoriality is at paragraph 30-1.

18. Rules, Preamble, 2.

19. Id.

20. See generally Frankena, Ethics (2nd ed. 1973), at IX-XI.

21. Dept. of Army, Field Manual 22-103, Leadership and Command at Senior Levels; Dept. of Army, Pam. 600-80, Executive Leadership (1982); and the Army Rules of Professional Conduct for Lawyers.

22. See, e.g., United States v. Means, 20 M.J. 162 (C.M.A. 1981). Chief Judge Everett notes: "In light of the unique special position of honor and trust enjoyed by an officer...it is quite understandable why the President determined that an officer should only be sentenced to confinement by the highest military tribunal." Id. at 167.

23. See Sorley, Competence As an Ethical Imperative, Army, August 1982, at 42. Sorley argues persuasively that competence is a virtue that subsumes many others.

24. See R. Gabriel, supra note 21, at 119-129.

25. See, e.g., Ehrlich, Common Issues of Professional Responsibility, The Geo. J. Legal Ethics 41 (1987). Ehrlich points out that forty-one professional societies have developed ethical rules, and notes benefits from comparative analysis. John A. Rohr observes: "Although one might quarrel with certain self-serving aspects of the codes of ethics developed by the medical and legal professions, there is little doubt that it is the high sense of professional definition among physicians and

lawyers that accounts for the relatively clear ethical standards of their profession." J. Kohr, Ethics for Bureaucrats 10 (1978) (emphasis added). Dean Derek C. Bok is quoted in R. Gabriel, To Serve With Honor 9 (1982): "Most men...will profit from instruction that helps them become more alert to ethical issues, and to apply their moral values more carefully and vigorously to the ethical dilemmas they encounter in their professional lives."

26. Rule 1.13(a).

27. Disclosures or nondisclosures of confidences may be analyzed from at least four perspectives: (1) what evidence rules or court orders require as a matter of discovery for a fair trial of an accused; (2) what ethical rules require to preserve the confidences of clients; (3) what is required by the Freedom of Information and Privacy Acts, and (4) what is morally required by personal expectation or commitment. Distinguishing disclosure issues according to each of these categories is helpful to analysis of particular questions. Discovery and ethical disclosure obligations are summarized in Dept. of Army, Pam. 27-173, Trial Procedure, paras. 30-5 and 30-6, (15 Feb. 1987), [hereinafter DA Pam. 27-173]. Multiple clients with conflicting interests are prohibited by the ABA Code of Professional Responsibility, Canon 5 (1980).

28. Rule 1.13(b)(1)-(4).

29. ABA Model Rule 1.13(b) "Organization as Client" and Federal Ethical Consideration 4-1 of Canon 4, FBA Rules, were models for Army Rule 1.13, but do not reflect unique aspects of the SJA-commander relationship.

30. In an unpublished report, "Legal operations in the European Theater during World War II, by LTC Joseph W. Riley, U.S. Army, JAGC, it is interesting to note that problems between SJA's and commanders are considered virtually nonexistent. See "Legal Questions Arising in the Theater of Operations," Study No. 87 (unpub. 1947) (on file in the Army Library, Headquarters, Department of Army).

31. Rule 1.13(a). DA Pam 17-173, discusses the SJA-commanding general relationship prior to the Rules at para 30-3. In United States v. Albright, 9 C.M.A. 628, 26 C.M.R. 408 (1958), the roles of the SJA were alternatively described as "advisor" on legal matters, "chief spokesman" for the commander, "legal conduit," and wearer of "judicial robes" when reviewing criminal charges and records of trial.

32. Rule 1.13 comment.

33. Ibid.

34. See Gaydos, The SJA as the Commander's Lawyer: A Realistic Proposal, The Army Lawyer, Aug. 1983, at 14.

35. Dept of Army, Pam 27-5, Staff Judge Advocate Handbook, para. 19b (July 1963). "He [the commander] does want a legal advisor whose loyalty is unquestioned." Id.

36. Model Code of Professional Responsibility, Canon 7 (1980); ABA Model Rules of Professional Conduct 1.6 and 3.3 See also, Nix v. Whiteside, 106 S. Ct. 988 (1986); Hazard, Nature of Legal Ethics, 1 Geo J. Legal Ethics 43, 1987 67-84. Prof. Hazard makes a persuasive case that the ABA Model Rules on confidentiality (1.6) represents an unsuccessful attempt "to create an island of refuse in the legal sea of integrity and to establish a pirate's cove of confidentiality." Id. at 67. For this and other reasons, the Army Rules impose a clearer duty upon attorneys to disclose future crime under Rules 1.6, 1.13 and 3.3, than exists under the ABA Model Rules. Hazard also makes a compelling argument that the conduct of a client is "the ultimate source of ethical issues for a lawyer." Id. at 84. According to Hazard, unless there is ethical association with the legal actions of a client, "the administration of law becomes a sporting contest...with lawyers manufacturing rights for clients that do not exist and erasing duties that do." Id. at 83. But see Wasserstrom, Lawyers as Professionals, 5 Hum. Rights L. Rev. 1 (1975) for a contrary view. The question of how to deal with client perjury under the Rules is addressed in O'Hare, supra note 13.

37. See e.g., J. Sorley, Duty, Honor, Country: Practice and Precept, in M. Wakin, War, Morality and the Military Profession (2d ed., 1986). ("The essence is loyalty...to ideals that transcend self.") Accord, Philip Flammer, Conflicting Loyalties and the American Military Ethic, in M. Wakin, supra, at 165. ("[T]he military ethic calls for ultimate loyalty to cause and principles higher than self...loyalty demands a firm will to justice and truth.") Wakin himself observes, "It is no longer the case that extreme value is placed on personal loyalty to a commander; that aspect of military honor is transferred to the oath of office which requires allegiance to the Constitution." M. Wakin, supra, at 185. See also Reese, An Officer's Oath, 25 Mil. L. Rev. 1 (1964).

38. A.C. Wedmeyer, Limits of Loyalty 125 (1980).

39. R. Gabriel, To Serve With Honor, supra note 21.

40. Army Reg. 600-50, Standards of Conduct, App. D (26 Sep 1986).

41. See, e.g., United States v. Scott, 21 M.J. 345 (C.M.A. 1986). Commenting on article 133, UCMJ, ("conduct unbecoming"), Judge Cox states in his concurring opinion: "It [article 133] focuses on the fact that an accused is 'an officer' and that his conduct has brought discredit upon all officers and, thus, upon the honor, integrity, and good character inherent in that important, unique status." Id. at 351 (Cox, J., concurring).

42. The term "quasi-client" is attributed to G.C. Hazard, Jr., in Ethics in the Practice of Law, J. Hum. Rights (Fall 1978), p. 44. Prof. Hazard also provides a useful model for analysis of the SJA-Commander-Army relationship in Triangular Lawyer Relationships: An Exploratory Analysis, Geo. J. Legal Ethics (1987). The term "derivative client" also has been used.

43. Rule 1.13 comment.

44. Rule 1.7 comment.

45. See notes 7, 13 and 30, supra.

46. M.R.E. 502, Manual for Courts-Martial, United States, 1984, Mil R. Evid. 502.

47. "Interagency" communications and attorney-client predecisional memoranda are generally exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(5) (1982).

48. "Our central problem is...an obtuseness in refusing to see basic choices among incompatible ends [when we are] unable to agree on normal or prudential norms." Leebman, Legislating Morality in the Proposed CIA Charter, in Public Duties: The Moral Obligations of Government Officials, 248 (1982). The editors of the Georgetown Journal of Legal Ethics, note: "The need for considered reflection about the ethical issues lawyers confront in daily practice is great." 1 Geo. L. J. Legal Ethics ii (1987). R.B. Stewart, in Reformation of American Administrative Law, 88 Harv. L. Rev. 8, 28 (1985), notes that the "astonishing capacity for rationalization" that exists when professional environments are left "morally ambiguous."

49. I. Kant, In Critique of Practical Reason (1788) summarized in 4 The Encyclopedia of Philosophy, 317-22 (967). See W.B. Gallie, Philosopher of Peace and War 36-58 (1978).