

Professional Responsibility

Continuing Legal Education

General Counsel

Texas National Guard

Texas Joint JAG Workshop

San Antonio, TX

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Agenda

- Contact Info
- Observations
- The Process
- Policy
- Trends
- Select ARPCL Rules
- Questions



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Observations

- **Everyone is busy**
- **No one is perfect**
- **Young JAs have to learn our values**
- **The generational gap**
- **Why PR issues arise**
- **Training**
- **Communication**



The Process

Important Points Up Front

1. The Process applies to:

- All JALS (lawyers, paralegals, enlisted, WOs, civ staff)
- Any civilian involved in any matter that falls under TJAG's responsibility and authority

2. The ARPCL apply to:

- All lawyers who practice in an Army system
- All (mil or civ) who work in an Army legal office

3. There are different clients:

- The Army
- NGB, Joint Command or another Executive agency
- Individuals



The Process

- **Allegations originate from:**
 - **IG Referrals**
 - **ACCA / CAAF**
 - **Judge Advocates and Civilians**
 - **Clients / Third Parties**



The Process

- **Authorities:**
 - AR 27-1
 - CH 7 (Professional Responsibility)
 - CH 8 (Mismanagement)
 - AR 27-26 Rules of Professional Conduct
 - ABA Model Rules of Professional Conduct
 - ABA Model Code of Judicial Conduct
 - Code of Judicial Conduct for Army Trial and Appellate Judges



The Process

- **What is the nature of the allegation?**
 - **Is it Professional Responsibility?**
 - Applies to all JALS members.
 - **Is it Mismanagement?**
 - Applies to all JALS members who are supervisors in Army legal offices under TJAG jurisdiction
 - **Is it both Professional Responsibility and Mismanagement?**
 - **Is it something else?**



The Process

Professional Responsibility

If allegation is Professional Responsibility:

- **Conduct Credibility Determination (CD) (AR 27-1, Ch 7).**
 - **SJA or Senior Supervisory JA (SSJA) can direct.**

An SSJA is generally an ACOM SJA or equivalent. Mobilized/ Title 10 Reserve Component JAs fall under the appropriate SSJA. USARC SJA (not Legal Command) is the SSJA for non-active USAR. The NGB Chief Counsel is the SSJA for ARNG JAs. The TDS Chief and Chief Trial Judge are also SSJA's. TJAG/DJAG and PRB can also direct CDs.
 - **Informal. No due process attaches.**
 - **Purpose of CD is to determine: Is allegation credible?**
 - **No. Done.**
 - **Yes. Does it raise substantial question as to honesty, trustworthiness or fitness?**
 - **No. Done.**
 - **Yes, then . . .**



The Process

Professional Responsibility

- . . . Then, coordinate with PRB to get permission to conduct a Preliminary Screening Inquiry (PSI).
 - Only PRB, DJAG, or TJAG can direct (authorize) a PSI. Why? State Bar implications.
 - SSJA (or PRB) appoints PSI Inquiry Officer.
 - Due process attaches.
- If PSI finds:
 - No violation, or minor or technical violation, then SSJA and Ch, PRB close case, with counseling as appropriate.
 - Substantial violation, then action by DJAG or TJAG



The Process

Mismanagement

If allegation is Mismanagement:

- **Determine if Respondent was a supervisor.**
 - If no, stop. Can't be Mismanagement.
 - If yes, then proceed.
- **CD procedure is the same (AR 27-1, Ch 8).**
 - Informal. No due process attaches.
 - Purpose of CD is to determine: Is allegation credible?
 - No. Done.
 - Yes. Adversely affect legal services? Or, misuse gov't resources? Or, violate ARs or TJAG policy memoranda?
 - No. Done.
 - Yes, then . . .



The Process

Mismanagement

- . . . Then, coordinate with PRB to get permission to conduct a Preliminary Screening Inquiry (PSI).
 - Only PRB, DJAG, or TJAG can direct (authorize) a PSI. Why? State Bar implications.
 - SSJA (or PRB) appoints PSI Inquiry Officer.
 - Due process attaches.
- **If PSI finds:**
 - No violation, or minor or technical violation, then SSJA and PRB close case, with counseling as appropriate.
 - Exception: If respondent is SJA / DSJA / CJA, case cannot be resolved below DJAG.
 - Substantial violation, then action by DJAG or TJAG



The Process

Professional Responsibility & Mismanagement

- **PSI finds no violation (or minor, technical):**
 - Closed.* Counseling as appropriate.
- **PSI finds violation:**
 - **TJAG / DJAG**
 - GOMOR
 - Withdraw Art 27(b)(2) certification – JA
 - Suspend from RCM 109(a) practice – JA or civ atty
 - Suspend from JA duties
 - Report to licensing authority

*In Mismanagement cases, file must go to DJAG for action / closure if Respondent is SJA, DSJA, CJA or equivalent.



The Process

- **Inquiries are informal (*i.e.*, no board).**
- **Need thorough analysis supported by evidence. Conclusions alone are insufficient.**
 - Evidence must support findings.
 - Findings must support recommendations.
- **Standard: Preponderance of Evidence.**
 - (In 99% of substantiated cases, the evidence ends up being clear and convincing.)



Policy

TJAG Policy Memo 14-02

“Every lawyer will receive annual training on the Army Rules of Professional Conduct for Lawyers (AR 27-26), State Bar rules, and other applicable ethical standards...”

At a minimum, each lawyer should receive three hours of professional responsibility training each year.

All nonlawyer personnel, who perform duty in an Army or joint legal office, should receive one hour of professional responsibility training each year.



Policy

TJAG Policy Memo 14-02 cont...

Self-Reporting

Any lawyer in JALS notified by a state or federal licensing authority, administrative agency, or tribunal that an allegation of misconduct, impropriety, or unfitness has been made against him or her in connection with their practice of law or in connection with any proceeding shall immediately report, through appropriate technical channels to the Chief, Professional Responsibility, the nature and status of the allegation(s). Any lawyer in JALS charged with a criminal offense in any state, territory, commonwealth, or possession of the United States or in any federal court of the United States or the District of Columbia shall immediately inform, through appropriate technical channels, the Chief, Professional Responsibility, in writing of the charge. The lawyer shall thereafter promptly inform the Chief, Professional Responsibility, of the disposition of the matter.



Trends

- **Professional Responsibility Allegations:**
 - For all ranks, Rule 8.4 (Misconduct) is by far the Rule most violated.
 - Rule 8.4 Misconduct: Violate the ARPCL; commit criminal act; engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
 - Many don't understand (& complain about):
 - Use and purpose of legal technical (tech) chain
 - SJA's role as senior legal advisor responsible for all legal advice, including subordinates' legal advice
 - Not all direction given to subordinate lawyer is an attempt to improperly influence the lawyer's professional judgment



Trends

- **Mismanagement Complaints**
 - **Leadership Style**
 - **Discontent over Evaluations**
 - **Management Decisions**
 - **Perception of Unfairness**
 - **Perception of Reprisal**



Select ARPCL Rules for Today's Training

- Rule 5.1, Responsibilities of Supervisors
- Rule 5.2, Responsibilities of Subordinates
- Rule 5.3, Nonlawyer Assistants



Rule 5.1, Responsibilities of Supervisors

- A supervisory Army lawyer is responsible:
 - To ensure that subordinate lawyer conforms to the ARPCL, and is **properly trained** and **competent**.
 - For subordinate lawyer's violation of Rules if he orders or ratifies the conduct involved or knew about it but fails to prevent it or mitigate its consequence.

Comment to Rule 5.1

- Supervisory lawyer (e.g., Chief of Admin Law) must be careful to avoid conflicts of interest in providing advice to subordinate lawyers.



Rule 5.2, Responsibilities of Subordinates

- (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 if that lawyer acts IAW a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment to Rule 5.2

- When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment.



Rule 5.3, Nonlawyer Assistants

- It is senior supervisory lawyer's responsibility to take reasonable efforts to ensure office has in effect measures (e.g., training) giving reasonable assurance that assistants' conduct is compatible with lawyer's professional obligations.
- Paralegals and legal administrators are common example, but don't forget MPI/CID agent acting under direction of TC.
- A lawyer shall be responsible for conduct of such a person if:
 - (1) Lawyer orders or, w/knowledge of conduct, ratifies it; or
 - (2) Lawyer has direct supervisory authority over the person, and knows of conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action.
 - Ex: TC cannot question witness represented by counsel, but asks CID agent to do it for him.

Comment to Rule 5.3

Assistants act for the lawyer in rendition (performance) of the lawyer's professional services!



Professional Responsibility Update

QUESTIONS?

