DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO

JAGINST 5803.1C
JAG 132

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JAG INSTRUCTION 5803.1C

From: Judge Advocate General

Subj: PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL

Ref: (a) Uniform Code of Military Justice (UCMJ)
(b) Manual for Courts-Martial, United States (MCM)
(c) 10 U.S.C. § 1044
(d) SECNAVINST 5430.27 (series)
(e) U.S. Navy Regulations
(f) American Bar Association Code of Judicial Conduct
(g) SECNAVINST 5211.5 (series)
(h) SECNAVINST 5212.5 (series)

Encl: (1) Rules of Professional Conduct
(2) Complaint Processing Procedures
(3) Outside Practice of Law by Covered USG Attorneys
(4) Relations With Non-USG Counsel

1. **Purpose**. In furtherance of references (a) through (f), which require the Judge Advocate General of the Navy (JAG) to supervise the performance of legal services under JAG cognizance throughout the Department of the Navy (DON), this instruction is promulgated:

a. to establish Rules of Professional Conduct (the Rules) for attorneys subject to this instruction;

b. to establish procedures for receiving, processing, and taking action on complaints of professional misconduct made against attorneys practicing under the supervision of JAG, whether arising from professional legal activities in DON proceedings and matters, or arising from other, non-U.S. Government related professional legal activities or personal misconduct which suggests the attorney is ethically, professionally, or morally unqualified to perform legal services within the DON;

c. to prescribe limitations on, and procedures for processing requests to engage in, the outside practice of law by those DON attorneys practicing under the supervision of JAG; and

d. to ensure quality legal services at all proceedings under the cognizance and supervision of the JAG.

2. **Cancellation**. JAGINST 5803.1B.

3. **Effective Date**

a. This instruction is effective immediately. All conduct that commenced after the effective date is governed by this instruction.

b. Any complaint received after the effective date of this instruction shall be processed in accordance with the procedures set forth in enclosure (2).

4. **Applicability**

a. This instruction applies to all "covered attorneys" as defined herein.

b. "Covered attorneys" include:

(1) The following U.S. Government (USG) attorneys, referred to, collectively, as "covered USG attorneys" throughout this instruction:

(a) All active-duty Navy judge advocates (designator 2500 or 2505) or Marine Corps judge advocates (MOS 4402 or 9914).

(b) All active-duty judge advocates of other U.S. armed forces who practice law or provide legal services under the cognizance and supervision of the JAG.

(c) All civil service and contracted civilian attorneys who practice law or perform legal services under the cognizance and supervision of the JAG.

(d) All Reserve or Retired judge advocates of the Navy or Marine Corps (and any other U.S. armed force), who, while performing official DON duties, practice law, provide legal services under the cognizance and supervision of the JAG, or are serving in non-legal Military Occupational Specialty (MOS) billets.

(e) All other attorneys appointed by JAG (or the Director, Judge Advocate (JA) Division, Headquarters Marine Corps (HQMC), in Marine Corps matters) to serve in billets or to provide legal services normally provided by Navy or Marine Corps

judge advocates. This policy applies to officer and enlisted reservists, to active-duty personnel, and to any other personnel who are licensed to practice law by any Federal or state authorities, but who are not members of the Judge Advocate General's Corps or who do not hold the 4402 or 9914 designation in the Marine Corps.

(2) The following non-U.S. Government attorneys, referred to, collectively, as "covered non-USG attorneys" throughout this instruction: all civilian attorneys representing individuals in any matter for which JAG is charged with supervising the provision of legal services. These matters include, but are not limited to, courts-martial, administrative separation boards or hearings, and disability evaluation proceedings.

(3) The term "covered attorney" does not include those civil service or civilian attorneys who practice law or perform legal services under the cognizance and supervision of the General Counsel of the Navy.

c. Professional or personal misconduct unrelated to a covered attorney's DON activities, while normally outside the ambit of these rules, may be reviewed under procedures established herein and may provide the basis for decisions by the JAG regarding the covered attorney's continued qualification to provide legal services in DON matters.

d. Although the Rules do not apply to non-attorneys, they do define the type of ethical conduct that the public and the military community have a right to expect from DON legal personnel. Accordingly, these Rules shall serve as models of ethical conduct for the following personnel when involved with the delivery of legal services under the supervision of the JAG:

(1) Navy legalmen and Marine Corps legal administrative officers, legal service specialists, and legal services reporters (stenotype);

(2) limited duty officers (LAW);

(3) legal interns; and

(4) civilian support personnel including paralegals, legal secretaries, legal technicians, secretaries, court reporters, and others holding similar positions.

Covered USG attorneys who supervise non-attorney DON employees are responsible for their ethical conduct to the extent provided for in Rule 5.3 of enclosure (1).

5. **Policy**

a. Covered attorneys shall maintain the highest standards of professional ethical conduct. Loyalty and fidelity to the United States, to the law, to clients both institutional and individual, and to the rules and principles of professional ethical conduct set forth in enclosure (1) must come before private gain or personal interest.

b. The Rules and related procedures set forth herein concern matters solely under the purview of JAG. Whether conduct or failure to act constitutes a violation of the professional duties imposed by this instruction is a matter within the sole discretion of JAG or officials authorized to act for JAG. The Rules are not substitutes for, and do not take the place of, other rules and standards governing DON personnel such as the Department of Defense Joint Ethics Regulation, the Code of Conduct for members of the Armed Forces, the Uniform Code of Military Justice, and the general precepts of ethical conduct to which all DON service members and employees are expected to adhere. Similarly, action taken per this instruction is not supplanted or barred by, and does not, even if the underlying misconduct is the same, supplant or bar the following action from being taken by authorized officials:

(1) punitive or disciplinary action under reference (a); or

(2) administrative action under references (b), (e) or other applicable authority.

c. Inquiries into allegations of professional misconduct will normally be held in abeyance until any related criminal investigation or proceeding is complete. However, a pending criminal investigation or proceeding does not bar the initiation or completion of a professional misconduct investigation stemming from the same or related conduct or prevent the JAG from imposing professional disciplinary sanctions as provided for in this instruction.

6. **Attorney-Client Relationships**

a. The executive agency to which assigned (DON in most cases) is the client served by each covered USG attorney unless

detailed to represent another client by competent authority. Specific guidelines are contained in enclosure (1) at Rule 1.13.

b. Covered USG attorneys will not establish attorney-client relationships with any individual unless detailed, assigned, or otherwise authorized to do so by competent authority. Wrongfully establishing an attorney-client relationship may subject the attorney to discipline administered per this instruction. See Rule 1.2 of enclosure (1).

c. Employment of a non-USG attorney by an individual client does not alter the professional responsibilities of a covered USG attorney detailed or otherwise assigned by competent authority to represent that client. Specific guidance is set forth in enclosure (4).

7. **Judicial Conduct**. To the extent that it does not conflict with statutes, regulations, or these Rules, the American Bar Association's Code of Judicial Conduct applies to all military and appellate judges and to all other covered USG attorneys performing judicial functions under JAG supervision within the DON.

8. **Conflict**

a. To the extent that a conflict exists between these Rules and the rules of other jurisdictions that regulate the professional conduct of attorneys, these Rules will govern the conduct of covered attorneys engaged in legal functions under JAG cognizance and supervision. Specific and significant instances of conflict between these Rules and the rules of other jurisdictions shall be reported promptly to the Rules Counsel, via the attorney's supervisory attorney.

b. In the case of Navy and Marine Corps personnel engaged in legal functions under Department of Defense (DOD) vice JAG cognizance and supervision (e.g., DOD Office of Military Commissions), these Rules and the applicable DOD professional responsibility rules apply. In such a case, to the extent that a conflict exists between these Rules and applicable DOD professional responsibility rules, the DOD rules shall take precedence.

9. **Reporting Requirements**. Covered USG attorneys shall report promptly to the Rules Counsel (identified below) any disciplinary or administrative action, including initiation of investigation, by any licensing authority or Federal, State, or local bar,

possessing the power to revoke, suspend, or in any way limit the authority to practice law in that jurisdiction, upon himself, herself, or another covered attorney. Failure to report such discipline or administrative action may subject the covered USG attorney to discipline administered per this instruction. See Rule 8.6 of enclosure (1).

10. **Professional Responsibility Committee**

a. Composition. This standing committee will consist of the Assistant Judge Advocate General (AJAG) for Military Justice; the Vice Commander, Naval Legal Service Command (NLSC); the Chief Judge, Navy-Marine Corps Trial Judiciary; and in cases involving Marine Corps judge advocates, the Deputy Director, JA Division, HQMC; and such other personnel as JAG from time-to-time may appoint. A majority of the members constitutes a quorum. The Chairman of the Committee shall be the AJAG for Military Justice. The Chairman may excuse members disqualified for cause, illness, or exigencies of military service, and may appoint additional or alternate members on a permanent basis.

b. Purpose

(1) When requested by JAG or by the Rules Counsel, the Committee will provide formal advisory opinions to JAG regarding application of the Rules to individual or hypothetical cases.

(2) On its own motion, the Committee may also issue formal advisory opinions on ethical issues of importance to the DON legal community.

(3) Upon written request, the Committee may also provide formal advisory opinions to covered attorneys about the propriety of proposed courses of action under the Rules. If such requests are predicated upon full disclosure of all relevant facts, and if the Committee advises that the proposed course of conduct is not violative of the Rules, then no adverse action under this instruction may be taken against a covered attorney who acts consistent with the Committee's advice. Such requests must be made via Rules Counsel.

(4) The Chairman will forward copies of all opinions issued by the Committee to the Rules Counsel.

c. Limitation. The Committee will not normally provide ethics advice or opinions concerning professional responsibility matters that are then the subject of litigation.

11. **Rules Counsel**. Appointed by JAG to act as special assistants for the administration of the Rules, the Rules Counsel derive authority from JAG and, as detailed in this instruction, have "by direction" authority. The Rules Counsel shall cause opinions issued by the Professional Responsibility Committee of general interest to the DON legal community to be published in summarized, non-personal form in suitable publications. Unless another officer is appointed by JAG to act in individual cases, the following officers shall act as Rules Counsel:

a. Director, JA Division, HQMC, for cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under his cognizance;

b. AJAG for Civil Law, in all other cases.

12. **Informal Ethics Advice**

a. Advisors. Covered attorneys may seek informal ethics advice either from the officers named below or from supervisory attorneys in the field. Within the Office of the JAG and HQMC, the following officials are designated to respond, either orally or in writing, to informal inquiries concerning this instruction in the areas of practice indicated:

(1) Head, Military Affairs/Personnel Law Branch, Administrative Law Division: administrative boards and related matters;

(2) Deputy Director, Criminal Law Division: military justice matters;

(3) Director, Legal Assistance Division: legal assistance matters;

(4) Deputy Director, JA Division, HQMC and Head, Judge Advocate Research and Civil Law Branch, JA Division, HQMC (JAR): cases involving Marine Corps judge advocates, or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of Director, JA Division, HQMC; and

(5) Head, Standards of Conduct/Government Ethics Branch, Administrative Law Division: all other matters.

b. Limitation. Informal ethics advice will not normally be provided by JAG/HQMC advisors concerning professional responsibility matters that are then the subject of litigation.

c. Written Advice. A request for informal advice does not relieve the requester of the obligation to comply with the Rules. Although covered attorneys are encouraged to seek advice when in doubt as to their responsibilities, they remain personally accountable for their professional conduct. If, however, an attorney receives written advice on an ethical matter after full disclosure of all relevant facts and reasonably relies on such advice, no adverse action under this Instruction will be taken against the attorney. Written advice may be sought from either a supervisory attorney or the appropriate advisor listed in paragraph 12a. JAG is not bound by unwritten advice or by advice provided by personnel who are not supervisory attorneys or advisors. See Rule 5.2c of enclosure (1) and paragraph 10b(3) above.

13. **Outside Practice of Law**. A covered USG attorney's primary professional responsibility is to the client, as defined by paragraph 6 above, and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of these rules and other regulations concerning the provision of legal services within the Department of the Navy. The outside practice of law, therefore, must be carefully monitored. Covered USG attorneys who wish to engage in the outside practice of law, including while on terminal leave, must first obtain permission from JAG. Failure to obtain permission before engaging in the outside practice of law may subject the covered USG attorney to administrative or disciplinary action, including professional sanctions administered per this instruction. Further details are contained in Rule 5.5 and enclosure (3).

14. **Maintenance of Files**. Ethics complaint records and outside practice of law request files shall be maintained by the Administrative Law Division, Office of the Judge Advocate General (JAG (13)), and, in the case of Marine records, by the Judge Advocate Research and Civil Law Branch, JA Division, HQMC (JAR), per references (g) and (h).

a. Requests for access to such records should be referred to Deputy Assistant Judge Advocate General (Administrative Law), Office of the Judge Advocate General (Code 13), 1322 Patterson Avenue SE Suite 3000, Washington Navy Yard, DC, 20374-5066, or to Head, Judge Advocate Research and Civil Law Branch, JA Division,

Headquarters Marine Corps, Washington DC, 20380-0001, as appropriate.

b. Local command files regarding professional responsibility complaints will not be maintained. Commanding officers and other supervisory attorneys may, however, maintain personal files but must not share their contents with others.

c. All records maintained under this instruction shall be maintained in accordance with the following procedures established by reference (h) and DON Privacy Act Notice N05813-1:

(1) Records shall be maintained for a minimum of two years;

(2) Records shall be maintained for as long as an attorney remains subject to JAG-imposed limitations on practice;

(3) Records pertaining to unsubstantiated complaints, or to attorneys who are no longer subject to limitation on practice, shall be destroyed after ten years.

15. Questions concerning this instruction and the Rules of Professional Conduct should be directed to the Standards of Conduct and Government Ethics Branch of the Administrative Law Division, Office of the Judge Advocate General.

MICHAEL F. LOHR
Rear Admiral, JAGC, U.S. Navy

Distribution:

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RULES OF PROFESSIONAL CONDUCT

PREAMBLE

A covered attorney is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen who has a special responsibility for the quality of justice and legal services provided to the Department of the Navy and to individual clients. These Rules of Professional Conduct (Rules) govern the ethical conduct of covered attorneys practicing under the Uniform Code of Military Justice, the Manual for Courts-Martial, 10 U.S.C. § 1044 (Legal Assistance), other laws of the United States, and regulations of the Department of the Navy.

The Rules not only address the professional conduct of judge advocates, but also apply to all other covered attorneys who practice under the cognizance and supervision of the Judge Advocate General of the Navy.

The comments accompanying each rule explain and illustrate the meaning and purpose of the rule. The comments are intended as guides to interpretation, but the text of each rule, printed in boldface, is authoritative. All covered attorneys are subject to professional disciplinary action, as outlined in this instruction, for violation of the Rules. Action on allegations of professional or personal misconduct undertaken per these Rules does not prevent other Federal, state, or local bar associations, or other licensing authorities, from taking professional disciplinary or other administrative action for the same or similar conduct.

PRINCIPLES

The Rules are based on the following principles. Interpretation of the Rules should flow from their common meaning. To the extent that any ambiguity or conflict exists, the Rules should be interpreted consistent with these general principles.

I. COVERED ATTORNEYS SHALL:

A. OBEY THE LAW AND APPLICABLE MILITARY REGULATIONS, AND COUNSEL CLIENTS TO DO SO.

B. FOLLOW ALL APPLICABLE ETHICS RULES.

C. PROTECT THE LEGAL RIGHTS AND INTERESTS OF CLIENTS, ORGANIZATIONAL AND INDIVIDUAL.

D. BE HONEST AND TRUTHFUL IN ALL DEALINGS.

E. NOT DERIVE PERSONAL GAIN, EXCEPT AS AUTHORIZED, FOR THE PERFORMANCE OF LEGAL SERVICES.

F. MAINTAIN THE INTEGRITY OF THE LEGAL PROFESSION.

II. ETHICAL RULES SHOULD BE CONSISTENT WITH LAW. IF LAW AND ETHICS CONFLICT, THE LAW PREVAILS UNLESS AN ETHICAL RULE IS CONSTITUTIONALLY BASED.

III. THE MILITARY CRIMINAL JUSTICE SYSTEM IS A TRUTH-FINDING PROCESS CONSISTENT WITH CONSTITUTIONAL LAW.

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ATTORNEY-CLIENT RELATIONSHIP

1. <u>RULE 1.1 COMPETENCE</u>. A covered attorney shall provide competent, diligent, and prompt representation to a client. Competent representation requires the legal knowledge, skill, access to evidence, thoroughness and expeditious preparation reasonably necessary for representation. Initial determinations as to competence of a covered USG attorney for a particular assignment shall be made by a supervising attorney before case or issue assignments; however, assigned attorneys may consult with supervisors concerning competence in a particular case.

a. <u>COMMENT</u>

(1) <u>Legal Knowledge and Skill</u>

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

(b) A covered attorney need not necessarily have special training or prior experience to handle legal problems of a type with which the covered attorney is unfamiliar. A newly admitted attorney 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 covered attorney can provide adequate representation in a wholly novel field through necessary study or consultation with an attorney of established competence in the field in question.

(c) A covered attorney may become involved in representing a client whose needs exceed either the attorney's competence or authority to act in the client's behalf. In such a situation, a covered USG attorney should consult with his or her supervisory attorney. For covered non-USG attorneys, competent representation may be provided through referral of the matter to

another attorney who has the requisite competence or through the association of an attorney of established competence in the field in question.

(d) A covered attorney may give advice or assistance in a matter which the attorney does not have the skill ordinarily required when referral to or consultation with another attorney would be impractical. Assistance, however, should be limited to that reasonably necessary under the circumstances, since ill-considered action can jeopardize the client's interest.

(2) 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 require more elaborate treatment than matters of lesser consequence.

(3) Maintaining Competence. To maintain the requisite knowledge and skill, a covered attorney should engage in continuing study and education.

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

b. CROSS REFERENCES

(1)	Rule 1.2	Establishment and Scope of Representation
(2)	Rule 1.3	Diligence
(3)	Rule 1.13	Department of the Navy as Client
(4)	Rule 1.16	Declining or Terminating Representation
(5)	Rule 2.1	Advisor
(6)	Rule 3.1	Meritorious Claims and Contentions
(7)	Rule 3.4	Fairness to Opposing Party and Counsel
(8)	Rule 5.1	Responsibilities of the Judge Advocate General and Supervisory Attorneys
(9)	Rule 5.2	Responsibilities of a Subordinate Attorney

2. RULE 1.2 ESTABLISHMENT AND SCOPE OF REPRESENTATION

a. Formation of attorney-client relationships by covered USG attorneys with, and representation of, clients is permissible only when the attorney is authorized to do so by competent authority. For purposes of this instruction, MRE 502, the Manual of the Judge Advocate General (JAGINST 5800.7 series), and the Naval Legal Service Office and Trial Service Office Manual (COMNAVLEGSVCCOMINST 5800.1 series), generally define when an attorney-client relationship is formed between a covered USG attorney and a client servicemember, dependent, or employee.

b. Generally, the subject matter scope of a covered attorney's representation will be consistent with the terms of the assignment to perform specific representational or advisory duties. A covered attorney shall inform clients at the earliest opportunity of any limitations on representation and professional responsibilities of the attorney towards the client.

c. A covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives, choice of counsel, forum, pleas, whether to testify, and settlements.

d. A covered attorney's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

e. A covered attorney shall not counsel or assist a client to engage in conduct that the attorney knows is criminal or fraudulent, but a covered attorney may discuss the legal and moral consequences of any proposed course of conduct with a client, and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

f. COMMENT

(1) Establishment of Representation. Formation of attorney-client relationships and representation of clients by covered USG attorneys is permissible only when authorized by competent authority. For example, the Secretary of the Navy or JAG may prescribe who is eligible for 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. Covered USG attorneys operating under JAG supervision must be careful not to enter, errantly or purposefully, into an unauthorized attorney-client relationship. This is required so that attorney resources can be adequately managed as dictated by

the needs of the DON, and to serve individual DON clients better. Any communications which would require a person to reveal confidential information in order for a covered USG attorney properly to represent or advise that person, consistent with these rules, would involve the formation of an attorney-client relationship and, absent proper authorization, must be avoided. The formation of attorney-client relationships is discussed in further detail in COMNAVLEGSVCOMINST 5800.1 series.

(2) Scope of Representation

(a) Both the covered attorney and the 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 attorney's professional obligations. Within those limits, a client also has a right to consult with the attorney about the means to be used in pursuing those objectives. At the same time, a covered attorney is not required to pursue objectives or employ means simply because a client may wish that the attorney do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the attorney-client relationship partakes of a joint undertaking. In questions of means, the covered attorney should assume responsibility for technical and legal tactical issues, such as which witnesses to call, whether and how to conduct cross-examination, which court members to challenge, and what motions to make. Except when precluded by Rule 4.4, the covered attorney should defer to the client regarding such questions as any expense to be incurred in the representation, and concern for third persons who might be adversely affected by decisions resulting from the representation.

(b) When the client appears to be suffering a mental disability, the covered attorney's duty to abide by the client's decisions is to be guided by Rule 1.14.

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

(3) Service Limited in Objectives or Means

(a) The objectives or scope of services provided by a covered attorney may be limited by agreement with the client or

by the law and regulations governing the conditions under which the attorney's services are made available to the client. When the objectives or scope of services provided by a covered attorney are limited, the attorney should ensure at the earliest opportunity that the client is aware of such limitations.

(b) If a covered USG attorney is uncertain of the permitted scope of services or the conditions under which the attorney's services are made available to a client, the attorney should consult with the supervisory attorney concerning the matter. See Rule 5.2.

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

(4) Criminal, Fraudulent, and Prohibited Transactions

(a) A covered attorney 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 an attorney a party to the course of action. However, a covered attorney may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between advising a client on the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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

(c) Paragraph e of the Rule applies whether or not the defrauded party is a party to the transaction. Hence, a covered attorney 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 e

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.

g. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.6 Confidentiality of Information
(3) Rule 1.13 Department of the Navy as Client
(4) Rule 1.14 Client Under a Disability
(5) Rule 2.1 Advisor
(6) Rule 2.3 Evaluation for Use by Third Persons
(7) Rule 3.3 Candor and Obligations Toward the Tribunal
(8) Rule 4.4 Respect for Rights of Third Persons
(9) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys
(10) Rule 5.2 Responsibilities of a Subordinate Attorney

3. RULE 1.3 DILIGENCE. A covered attorney shall act with reasonable diligence and promptness in representing a client, and shall consult with a client as soon as practicable and as often as necessary upon being assigned to the case or issue.

a. COMMENT

(1) A covered attorney should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the covered attorney, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A covered attorney should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a covered attorney is not bound to press for every advantage that might be realized for a client. Although a covered attorney 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 covered attorney has professional discretion in determining the means by which a matter should be pursued. See Rules 1.2 and 1.4b. A covered attorney's workload should be managed by the attorney (and supervisor, if applicable) so that each matter can be handled effectively. See Rule 5.1.

(2) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions. In extreme instances, as when a covered attorney 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 attorney's trustworthiness.

(3) Unless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law and regulations, a covered attorney should carry through to conclusion all matters undertaken for a client. If a covered attorney's representation is limited to a specific matter, the relationship terminates when the matter has been either concluded or resolved. Doubt about whether an attorney-client relationship continues to exist should be clarified by the covered attorney, preferably in writing, so that the client will not mistakenly suppose the attorney is looking after the client's affairs when the attorney has ceased to do so.

(4) A covered attorney who has handled a judicial or administrative proceeding that produced a result adverse to the client shall advise the client of any avenues and procedures of appeal before relinquishing responsibility for the matter.

b. CROSS REFERENCES

(1)	Rule 1.1	Competence
(2)	Rule 1.2	Establishment and Scope of Representation
(3)	Rule 1.4	Communication
(4)	Rule 1.16	Declining or Terminating Representation
(5)	Rule 3.1	Meritorious Claims and Contentions
(6)	Rule 3.2	Expediting Litigation
(7)	Rule 3.3	Candor and Obligations Toward the Tribunal
(8)	Rule 4.1	Truthfulness in Statements to Others
(9)	Rule 5.1	Responsibilities of the Judge Advocate General and Supervisory Attorneys

4. RULE 1.4 COMMUNICATION

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

b. A covered attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

c. COMMENT

(1) 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 covered attorney 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 covered USG attorney 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.

(2) Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations when there is time to explain a proposal, the covered attorney should review all important provisions with the client before proceeding to an agreement. In litigation, a covered attorney 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 covered attorney ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the covered attorney 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.

(3) When the client is the DON, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the covered attorney should address communications to appropriate officials of the DON. See Rule 1.13.

(4) When 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 covered attorney to act for a client without prior consultation.

(5) In some circumstances, a covered attorney may be required to withhold information from a client. For example, classified information may not be disclosed without proper authority. In other circumstances, a covered attorney may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate

communication. Thus, a covered attorney might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A covered attorney may not withhold information to serve the covered attorney's own interest or convenience, or when disclosure is required by Rule 3.8. Rules or court orders governing litigation may provide that information supplied to a covered attorney may not be disclosed to the client. Rule 3.3a(5) directs compliance with such rules or orders.

d. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.3 Diligence
(4) Rule 1.6 Confidentiality of Information
(5) Rule 1.7 Conflict of Interest: General Rule
(6) Rule 1.13 Department of the Navy as Client
(7) Rule 2.1 Advisor
(8) Rule 2.2 Mediation
(9) Rule 3.2 Expediting Litigation
(10) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(11) Rule 4.1 Truthfulness in Statements to Others

5. RULE 1.5 FEES.

a. A covered USG attorney shall not accept any salary, fee, compensation, or other payments or benefits, directly or indirectly, other than Government compensation, for services provided in the course of the covered USG attorney's official duties or employment.

b. A covered USG attorney shall not accept any salary or other payments as compensation for legal services rendered, by that covered USG attorney in a private capacity, to a client who is eligible for assistance under the Department of the Navy Legal Assistance Program, unless so authorized by the Judge Advocate General. This rule does not apply to Reserve or Retired judge advocates not serving on extended active-duty.

c. A Reserve or Retired judge advocate, whether or not serving on extended active-duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the attorney's official Navy or Marine Corps 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, unless so authorized by the Judge Advocate General.

d. Covered non-USG attorneys may charge fees. Fees shall be reasonable. Factors 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 attorney;

(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 attorney or attorneys performing the services; and

(8) whether the fee is fixed or contingent.

e. When the covered non-USG attorney 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 the representation.

f. 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 (g) 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 covered non-USG attorney 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 covered non-USG attorney 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.

g. A covered non-USG attorney shall not enter into an arrangement for, charge, or collect a contingent fee for representing an accused in a criminal case.

h. A division of fees between covered non-USG attorneys who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each attorney or, by written agreement with the client,

each attorney assumes joint responsibility for the representation;

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

(3) the total fee is reasonable.

i. COMMENT. This rule is unusual in that it applies substantially to attorneys other than those employed by the Government.

(1) Covered USG Attorneys

(a) All covered USG attorneys are prohibited by statute (18 U.S.C. § 209) and regulation from accepting any salary or contribution to or supplementation of salary, as compensation for services as an officer or employee of the DON from any source other than the Government of the United States. They may neither request nor accept any gratuity, salary, or other compensation from any source as payment for performance of official DON duties or incident thereto. For example, a legal assistance attorney is prohibited from accepting a gift or loan from a client tendered as a result of assistance rendered. This prohibition extends to the covered USG attorney using his or her position to seek or attain a benefit, even if initiated by the client. For example, a legal assistance attorney may not draft himself or herself into a will as a beneficiary or as a person, such as an executor, to be later compensated. Additionally, all covered USG attorneys are prohibited from accepting any compensation or fee for making a referral of a client in the course of their official duties. Nothing in this Rule prohibits covered USG attorneys from providing pro bono assistance so long as the means and manner of the service do not otherwise violate the letter or spirit of these Rules, and is properly approved per the procedures set forth in enclosure (3).

(b) This Rule precludes a legal assistance attorney (including a Reserve officer) from referring a client originally seen in a legal assistance capacity to himself or herself or to the firm in which the covered USG attorney works in a private capacity or has any interest, unless no fee or other compensation is charged. A covered USG attorney (including a Reserve officer) is prohibited from using an official position to solicit or obtain clients for a private practice. See Rule 1.8.

(c) Covered USG attorneys are prohibited from deriving financial benefit based upon the provision of legal services, in a private capacity, to members of the naval service and their dependents unless so authorized by the JAG.

(2) Reserve or Retired Judge Advocates. Reserve or Retired judge advocates serving on extended active duty are bound by the same rules as their Regular component counterparts in this regard. Reserve or Retired judge advocates not serving on extended active duty are necessarily treated differently but are prohibited from accepting fees from members and dependents for matters in which the member or dependent was seen in the Reserve or Retired judge advocate's official capacity. The Rule does not preclude the Reserve or Retired judge advocate 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. For example, a Reserve judge advocate who sees a legal assistance client during a drill period regarding a divorce matter is prohibited from then representing that client in the divorce for a fee. If there is any question of whether the case concerns the same matter, the presumption should be that it is the same matter. A will and a divorce may be two separate matters; however, they also may be part of the same general subject if the will is being drafted in conjunction with the divorce. As with the previous section, the JAG may grant exceptions.

(3) Covered Non-USG Attorneys. Paragraphs d through h apply only to private civilian attorneys practicing in proceedings conducted under the cognizance and supervision of the JAG. The primary purposes of paragraphs d through h are not to permit the JAG to regulate fee arrangements between civilian attorneys and their clients but to provide guidance to covered USG attorneys practicing with non-USG attorneys and to supervisory attorneys who may be asked to inquire into alleged fee irregularities. Absent paragraphs d through h, such supervisory attorneys have no readily available standard against which to compare allegedly questionable conduct of a civilian attorney.

(4) Basis or Rate of Fee. When a covered non-USG attorney has regularly represented a client, there ordinarily will be an understanding concerning the basis or rate of the fee. In a new attorney-client 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 as soon as possible. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the attorney's customary fee schedule is sufficient if the basis or rate of fee is set forth.

(5) Terms of Payment

(a) A covered non-USG attorney may require advance payment of a fee, but is obliged to return any unearned portion. The attorney 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 of the litigation. A fee paid in property instead of money, however, may be subject to special scrutiny because it involves questions concerning both the value of the services and the attorney's special knowledge of the value of the property.

(b) An agreement may not be made whose terms might induce the covered non-USG attorney to improperly curtail services for the client or perform them in a way contrary to the client's interest. For example, an attorney 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 covered non-USG attorney should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the attorney should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees.

(6) Division of Fee. A division of fee is a single billing to a client covering the fee of two or more non-USG attorneys who are not in the same firm. A division of fee facilitates association of more than one attorney 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 attorney and a trial specialist. Paragraph h permits the attorney to divide a fee on either the basis of the proportion of services they render or by agreement between the participating attorneys 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 attorney is to receive. Joint responsibility for the representation entails mutual obligations as stated in Rule 5.1a and c for purposes of the matter involved.

k. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.8 Conflict of Interest: Prohibited Transactions
(4) Rule 1.16 Declining or Terminating Representation

6. RULE 1.6 CONFIDENTIALITY OF INFORMATION

a. A covered attorney 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 and c.

b. A covered attorney shall reveal such information to the extent the covered attorney reasonably believes necessary to prevent the client from committing a criminal act that the covered attorney 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 covered attorney may reveal such information to the extent the covered attorney reasonably believes necessary to establish a claim or defense on behalf of the covered attorney in a controversy between the covered attorney and the client, to establish a defense to a criminal charge or civil claim against the attorney based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the

attorney's representation of the client.

d. COMMENT

(1) The covered attorney is part of a judicial system charged with upholding the law. One of the covered attorney's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

(2) The observance of the ethical obligation of a covered attorney 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.

(3) Almost without exception, clients come to covered attorneys 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, covered attorneys know that almost all clients follow the advice given, and the law is upheld.

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

(5) 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 covered attorney may be called as a witness or otherwise required to produce evidence concerning a client. The rule of attorney-client confidentiality applies in situations other than those in which evidence is sought from the covered attorney 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 covered attorney may not disclose such information except as authorized or required by these Rules or other lawful order, regulation, or statute.

(6) The requirement of maintaining confidentiality of information relating to representation applies to covered USG attorneys representing the DON who may disagree with the policy

goals that their representation is designed to advance. See Rule 1.13.

(7) Authorized Disclosure

(a) A covered attorney 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 covered attorney may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

(b) A covered attorney may disclose to supervisory attorneys within the office and to paralegals subject to the direction and control of the covered attorney, information relating to a client, unless the client has instructed that particular information be confined to specified covered attorneys, or unless otherwise prohibited by these Rules or other lawful order, regulation, or statute.

(8) Disclosure Adverse to Client. The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a covered attorney may foresee that the client intends serious harm to another person or to national security interests. However, to the extent a covered attorney is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the covered attorney 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. Yet, several situations must be distinguished:

(a) First, the covered attorney may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2e. Similarly, a covered attorney owes a duty of candor to the court and has a duty under Rule 3.3a(4) not to use false evidence.

(b) Second, the covered attorney may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the covered attorney has not violated Rule 1.2e, because to "counsel or assist" criminal or fraudulent conduct requires knowledge that the conduct is of that character.

(c) Third, the covered attorney 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 covered attorney has a professional obligation to reveal information to the extent the covered attorney reasonably believes necessary to prevent such consequences.

(d) Examples of conduct likely to result in the significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system include: divulging the classified location of a special operations unit such that the lives of members of the unit are placed in immediate danger; sabotaging a vessel or aircraft to the extent that the vessel or aircraft could not conduct an assigned mission, or that the vessel or aircraft and crew could be lost; and compromising the security of a weapons site such that the weapons are likely to be stolen or detonated. Paragraph b 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.

(e) Where practical, the covered attorney should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the covered attorney reasonably believes necessary to the purpose.

(f) Once an attorney-client relationship has been established, information concerning the client's whereabouts usually constitutes information protected from disclosure. Rule 1.6 applies equally to defense counsel and attorneys performing legal assistance duties. By virtue of Rule 5.3, the rule also applies to Legalmen, Legal Service Specialists, and other personnel assisting the judge advocate. If, however, a prospective client does not have an attorney-client relationship with a defense attorney or attorney performing legal assistance duties, judge advocates and their assistants would not violate their ethical obligations by revealing whether the prospective client had been to their office spaces and, if so, the time the client was there.

(9) Withdrawal

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

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

(c) When the client is the DON, the covered USG attorney may be in doubt whether contemplated conduct will actually be carried out. When necessary to guide conduct in connection with this Rule, the covered USG attorney may make inquiry within the DON as indicated in Rule 1.13.

(10) Dispute Concerning a Covered Attorney's Conduct

(a) If the covered attorney is charged with wrongdoing, the rule of confidentiality should not prevent the covered attorney from defending against the charge. Such a charge can arise in a civil, criminal, administrative, or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the covered attorney against the client, or a wrong alleged by a third person. The covered attorney 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.

(b) A covered non-USG attorney entitled to a fee is permitted by paragraph c 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.

(c) When a legal claim or disciplinary charge alleges complicity of the covered attorney in a client's conduct or other misconduct of the covered attorney involving representation of the client, the covered attorney may respond to the extent the covered attorney 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 covered

attorney's right to respond arises when an assertion of such complicity has been made. Paragraph c does not require the covered attorney 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. When practicable and not prejudicial to the covered attorney's ability to establish the defense, the covered attorney should advise the client of the third party's assertion and request that the client respond appropriately. As stated above, disclosure should be no greater than the covered attorney 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 covered attorney to the fullest extent practicable.

(11) Disclosure Otherwise Required or Authorized

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

(b) These Rules in various circumstances permit or require a covered attorney to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3, and 4.1. In addition to these provisions, a covered attorney 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.

(12) Former Client. The duty of confidentiality continues after the attorney-client relationship has terminated.

(13) Means of Communication. Covered attorneys shall take reasonable steps to prevent unauthorized use or disclosure of confidential client information. These steps include choosing a means of communication in which the lawyer has a reasonable expectation of privacy. The reasonableness of this choice will depend on factors such as the level of security in the mode chosen as well as the existence of laws protecting the privacy of information conveyed in such a manner. Some risk of interception

does not invalidate a particular means of communication. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 99-413 (1999) (holding an attorney may transmit confidential client information through unencrypted E-Mail sent through the internet).

e. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.13 Department of the Navy as Client
(4) Rule 1.16 Declining or Terminating Representation
(5) Rule 2.1 Advisor
(6) Rule 2.2 Mediation
(7) Rule 2.3 Evaluation for Use by Third Persons
(8) Rule 3.3 Candor and Obligations toward the Tribunal
(9) Rule 4.1 Truthfulness in Statements to Others
(10) Rule 5.4 Professional Independence of a Covered USG Attorney

7. RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

a. A covered attorney shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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

(2) each client consents after consultation.

b. A covered attorney shall not represent a client if the representation of that client may be materially limited by the covered attorney's responsibilities to another client or to a third person, or by the covered attorney's own interests, unless:

(1) the covered attorney 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.

c. COMMENT

(1) Loyalty is an essential element in the covered attorney's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event a covered USG attorney shall inform the supervisory attorney of the conflict. If such a conflict arises after representation has been undertaken, the covered attorney should seek to withdraw from the representation. See Rule 1.16. When more than one client is involved and the covered attorney is permitted to withdraw because a conflict arises after representation, whether the covered attorney may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2c. As to whether an attorney-client relationship exists or, having once been established, is continuing, see the Comments to Rules 1.2 and 1.3.

(2) 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 covered attorney ordinarily may not act as an advocate against a person the covered attorney 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.

(3) Loyalty to a client is also impaired when a covered attorney cannot consider, recommend, or carry out an appropriate course of action for the client because of the covered attorney's other responsibilities or interests. These conflicting responsibilities or interests can be professional, commercial, or personal. The conflict in effect forecloses alternatives that would otherwise be available to the client. 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 covered attorney's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. A pre-existing personal or commercial relationship with any other party, witness, judge, or attorney involved in a proceeding creates a strong appearance of a potential conflict of interest that must be disclosed to the client. During the pendency of any proceeding governed by these Rules, a covered attorney shall not enter into a personal or commercial relationship with any other party, witness, judge, or

attorney involved in the case, unless full compliance with Paragraph b occurs. Consideration should be given to whether the client wishes to accommodate the other interest involved.

(4) Consultation and Consent. A client, including an organization, may consent to representation notwithstanding a conflict. See Rule 1.13. However, as indicated in paragraph a(1) with respect to representation directly adverse to a client, and paragraph b(1) with respect to material limitations on representation of a client, when a disinterested covered attorney would conclude that the client should not agree to the representation under the circumstances, the covered attorney involved cannot properly ask for such agreement or 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 when it is impossible to make the disclosure necessary to obtain consent. For example, when the covered attorney 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 covered attorney cannot properly ask the latter to consent.

(5) The Attorney's Interests. A covered attorney's own interests should not be permitted to have an adverse effect on representation of a client. For example, a covered attorney's desire to take leave or transfer duty stations should not motivate the covered attorney to recommend a pretrial agreement in a case. If the propriety of the covered attorney's own conduct in a transaction is in serious question, it may be difficult or impossible for the covered attorney to give a client detached advice. A covered attorney may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the covered attorney has an undisclosed interest. See also 18 U.S.C. § 208 (which makes it a criminal offense for any Federal officer to participate personally and substantially in an official capacity in any particular matter in which the officer, or others whose interests are imputed to the officer, including potential employers, has a financial interest). Also, a covered attorney's personal or commercial interests, responsibilities, or relationships with any other party, witness, judge, or attorney - whether pre-existing the client's proceeding or contemplated during the course of a proceeding - must be disclosed to the client to permit the client to make an informed decision regarding the potential conflict of interest.

(6) Conflict of Litigation

(a) Paragraph a prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-accused, is governed by paragraph b. An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility of 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. The potential for conflict of interests in representing multiple accused in a criminal case is so grave that ordinarily a covered attorney 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. Cf. Rule 2.2 (involving mediation between clients).

(b) Ordinarily, a covered attorney may not act as an advocate against a client the covered attorney represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a covered attorney may act as an advocate against a client. For example, covered USG attorneys 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.

(c) A covered attorney 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 not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

(7) Interest of a Person Paying for an Attorney's Service. A covered non-USG attorney, who practices under the supervision of the JAG, 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 attorney's duty of loyalty to the client. For example, an accused servicemember's family may pay a civilian attorney to represent the servicemember at a court-martial.

(8) Other Conflict Situations

(a) 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 covered attorney's relationship with the client or clients involved, the functions being performed by the covered attorney, 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 proximity and degree of conflict.

(b) 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 when 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 automobile and preparing a bill of sale.

(c) Conflict questions may also arise in estate planning. A covered USG attorney may be called upon to prepare wills for several family members, such as husband and wife and, depending upon the circumstances, a conflict of interests may arise.

(9) Conflict Charged by an Opposing Party. While the covered attorney must be careful to avoid conflict of interest situations, resolving questions of conflict of interest involving covered USG attorneys is primarily the responsibility of the supervisory attorney 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 covered attorney has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a covered attorney represents multiple co-accused. When the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Rule 1.2.

(10) Reserve or Retired Judge Advocates. These conflict of interest rules only apply to Reservists while they are actually drilling or on active-duty for training, or, as is the case with Retirees, on extended active-duty or when performing other duties subject to JAG supervision. Therefore, unless otherwise prohibited by criminal conflict of interest statutes, Reserve or Retired attorneys providing legal services in their civilian capacity may represent clients, or work in firms whose

attorneys represent clients, with interests adverse to the United States. Reserve judge advocates who, in their civilian capacities, represent persons whose interests are adverse to the Department of the Navy will provide written notification to their supervisory attorney and commanding officer, detailing their involvement in the matter. Reserve judge advocates shall refrain from undertaking any official action or representation of the Department of the Navy with respect to any particular matter in which they are providing representation or services to other clients.

d. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.4 Communication
(4) Rule 1.8 Conflict of Interest: Prohibited Transactions
(5) Rule 1.9 Conflict of Interest: Former Client
(6) Rule 1.12 Former Judge or Arbitrator
(7) Rule 1.13 Department of the Navy as Client
(8) Rule 1.16 Declining or Terminating Representation
(9) Rule 2.2 Mediation
(10) Rule 2.3 Evaluation for Use by Third Persons
(11) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys
(12) Rule 5.4 Professional Independence of a Covered USG Attorney

8. Rule 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

a. Covered USG attorneys shall strictly adhere to current Department of Defense Ethics Regulations and shall not:

(1) knowingly enter into any business transactions on behalf of, or adverse to, a client's interest which directly or indirectly relate to or result from the attorney-client relationship; or

(2) provide any financial assistance to a client or otherwise serve in a financial or proprietorial fiduciary or bailment relationship, unless otherwise specifically authorized by competent authority.

b. No covered attorney shall:

(1) use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3;

(2) prepare an instrument giving the covered attorney or a person related to the covered attorney as parent, child, sibling, or spouse any gift from a client, including a testamentary gift, except where the client is related to the donee;

(3) in the case of covered non-USG attorneys, accept compensation for representing a client from one other than the client unless the client consents after consultation, there is no interference with the covered attorney's independence of professional judgment or with the attorney-client relationship, and information relating to representation of a client is protected as required by Rule 1.6;

(4) negotiate any settlement on behalf of multiple clients in a single matter unless each client provides fully informed consent;

(5) prior to the conclusion of representation of the client, make or negotiate an agreement giving a covered attorney literary or media rights for a portrayal or account based in substantial part on information relating to representation of a client;

(6) represent a client in a matter directly adverse to a person whom the covered attorney knows is represented by another attorney who is related as parent, child, sibling, or spouse to the covered attorney, except upon consent by the client after consultation regarding the relationship; or

(7) acquire a proprietary interest in the cause of action or subject matter of litigation the covered attorney is conducting for a client.

c. COMMENT

(1) Covered USG Attorneys. Covered USG attorneys will strictly adhere to the Department of Defense Joint Ethics Regulation in all dealings with clients. Such regulations generally prohibit entering into business transactions with clients, deriving financial benefit from representations of clients, and accepting compensation or gifts in any form from a client or other person or entity, other than the U.S. Government, for the performance of official duties. Such regulations also

prohibit profiting, directly or indirectly, from knowledge acquired in the course of the covered USG attorney's official duties. This rule does not authorize conduct otherwise prohibited by such regulations. A covered USG attorney will not make any referrals of legal or other business to any private civilian attorney or enterprise with whom the covered USG attorney 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 covered USG attorneys acting in their private capacities.

(2) Transactions Between Clients and Covered USG Attorneys

(a) As a general principle, any and all business transactions between clients and covered USG attorneys should be carefully reviewed by supervisory attorneys. All transactions must comply with promulgated standards of conduct and other statutes, lawful orders, and regulations. See also Rule 1.5.

(b) Covered attorneys may not exploit information relating to the representation to the client's disadvantage. For example, a covered attorney who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property when doing so would adversely affect the client's plan for investment. The Rule does not, however, apply to standard commercial transactions between the covered attorney and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, and products manufactured or distributed by the client. In such transactions, the covered USG attorney has no advantage in dealing with the client, and the restrictions in paragraph a are unnecessary and impracticable.

(c) Paragraph a(2) 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.

(3) Literary Rights. An agreement by which a covered attorney 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 covered attorney. For example, trial actions enhancing the publication value may not be in the best interests of the client. Even after the representation has concluded, covered USG attorneys may be restricted in teaching, speaking, and writing activities, and receiving compensation therefor, by applicable statutes and regulations.

(4) Person Paying for a Covered Non-USG Attorney's Services. There must be disclosure to the client of the fact that the covered non-USG attorney's services are being paid for by a third party. Such an agreement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest.

(5) Family Relationships. Paragraph b(6) applies to related covered attorneys who are in different offices, e.g., one covered attorney is staff judge advocate to a convening authority and another covered attorney is a civilian defense counsel with potential involvement in a case referred by the convening authority served by that same staff judge advocate. Related covered attorneys in the same office are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph b(6) is personal and is not imputed to other covered attorneys in the offices with whom the covered attorney performs duty or practices.

(6) Acquisition of Interest in Litigation. All covered attorneys 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.

d. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.5 Fees
(4) Rule 1.7 Conflict of Interest: General Rule
(5) Rule 1.9 Conflict of Interest: Former Client
(6) Rule 1.16 Declining or Terminating Representation

9. RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

a. A covered attorney who has 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 former client, unless the former client consents after consultation;

(2) use information relating to the representation to the disadvantage of the former client or to the covered

attorney's own advantage, except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known; or

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

b. COMMENT

(1) After termination of an attorney-client relationship, a covered attorney 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 covered attorney could not properly seek to rescind, on behalf of a new client, a contract drafted on behalf of the former client. Additionally, a covered attorney who has defended an accused at trial could not properly act as appellate Government counsel in the appellate review of the accused's case.

(2) The scope of a "matter" for purposes of paragraph a may depend on the facts of a particular situation or transaction. The covered attorney's involvement in a matter can also be a question of degree. When a covered attorney 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 covered attorney 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 attorneys between defense, prosecution, court-martial review, claims, and legal assistance functions within the same military jurisdiction is not precluded by this Rule. See, e.g., U.S. v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

(3) The underlying issue of this Rule is whether a covered attorney 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. See also 18 U.S.C. § 207 (for related post-Government service employment restrictions).

(4) Information acquired by a covered attorney in the course of representing a client may not subsequently be used or revealed by the covered attorney to the disadvantage of a client. However, the fact that a covered attorney has once served a client does not preclude the covered attorney from using

generally known information about that client when later representing another client.

(5) Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the covered attorney's role on behalf of the new client.

(6) With regard to an opposing party's raising a question of conflict of interest, see comment to Rule 1.7.

(7) When a covered attorney is representing the Department of the Navy (e.g., as a staff judge advocate), the covered attorney must take reasonable steps to avoid participating in decision-making or information-sharing that would have an adverse effect on a former client (e.g., a former defense client).

c. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.6 Confidentiality of Information
(4) Rule 1.7 Conflict of Interest: General Rule
(5) Rule 1.16 Declining or Terminating Representation
(6) Rule 2.2 Mediation

10. RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE. Covered USG attorneys working in the same military law office are not automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, 1.9, or 2.2. Covered non-USG attorneys must consult their federal, state, and local bar rules governing the representation of multiple or adverse clients within the same office before such representation is initiated, as such representation may expose them to disciplinary action under the rules established by their licensing authority.

a. COMMENT

(1) The circumstances of military (or Government) service may require representation of opposing sides by covered USG attorneys 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 covered USG

attorneys. The knowledge, actions, and conflicts of interests of one covered USG attorney are not 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 normally share clerical assistance would not prohibit them from representing co-accused at trial by court-martial. Imputed disqualification rules for non-USG attorneys are established by their individual licensing authorities and may well proscribe all attorneys from one law office from representing a co-accused, or a party with an adverse interest to an existing client, if any attorney in the same office were so prohibited.

(2) Whether a covered USG attorney 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. See, e.g., U.S. v. Stubbs, 23 M.J. 188 (C.M.A. 1987).

(3) 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 covered USG attorneys work together. A covered USG attorney may have general access to files of all clients of a military law office (e.g., legal assistance attorney) and may regularly participate in discussions of their affairs; it may be inferred that such a covered USG attorney in fact is privy to all information about all the office's clients. In contrast, another covered USG attorney (e.g., military defense counsel) 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 covered USG attorney in fact is privy to information about the clients actually served but not to information of other clients. Additionally, a covered USG attorney changing duty stations or changing assignments within a military office has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

(4) In military practice, where covered USG attorneys representing adverse interests are sometimes required to share common spaces, equipment, and clerical assistance, inadvertent disclosure of confidential or privileged material may occur. A covered attorney who mistakenly receives any such confidential or privileged materials should refrain from reviewing them (except for the limited purpose of ascertaining ownership or proper

routing), notify the attorney to whom the material belongs that he or she has such material, and either follow instructions of the attorney with respect to the disposition of the materials or refrain from further reviewing or using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court. A covered attorney's duty to provide his or her client zealous representation does not justify a rule allowing the receiving attorney to take advantage of inadvertent disclosures of privileged and/or confidential materials. This policy recognizes and reinforces the principles of: confidentiality and the attorney-client privilege; analogous principles governing the inadvertent waiver of the attorney-client privilege; the law governing bailments and missent property; and considerations of common sense, reciprocity, and professional courtesy.

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

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

b. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.8 Conflict of Interest: Prohibited Transactions
(4) Rule 1.9 Conflict of Interest: Former Client
(5) Rule 2.2 Mediation

11. Rule 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

a. Except as the law or regulations may otherwise expressly permit, a former covered USG attorney shall not represent a private client in connection with a matter in which the covered USG attorney participated personally and substantially as a public officer or employee, unless the appropriate Government

agency consents after consultation. If a former covered USG attorney in a firm, partnership, or association knows that another attorney within the firm, partnership, or association is undertaking or continuing representation in such a matter:

(1) the disqualified former covered USG attorney must ensure that he or she is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom; and,

(2) must provide written notice promptly to the appropriate Government agency to enable it to ascertain compliance with the provisions of applicable law and regulations.

b. Except as the law or regulations may otherwise expressly permit, a former covered USG attorney, who has information known to be confidential Government information about a person which was acquired while a covered USG attorney, 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. The former covered USG attorney may continue association with a firm, partnership, or association representing any such client only if the disqualified covered USG attorney is screened from any participation in the matter and is apportioned no part of the fee or any other benefit therefrom.

c. Except as the law or regulations may otherwise expressly permit, a covered USG attorney shall not:

(1) participate in a matter in which the covered USG attorney 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 covered USG attorney'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 covered USG attorney 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 Department of Defense, DON, or other appropriate Government agency.

e. As used in the 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 or regulations from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

f. COMMENT

(1) This Rule prevents a former covered USG attorney from exploiting public office for the advantage of a private client.

(2) A covered attorney representing the DON, whether employed or specially retained by the Government, is subject to these Rules, including the prohibition against representing adverse interests stated in Rule 1.7 and the protection afforded former clients in Rule 1.9. In addition, such a covered attorney 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 a Government agency may give consent under this Rule.

(3) 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. See 18 U.S.C. § 207 (related statutory restraints on post-Government service employment restrictions). A covered USG attorney should not be in a position where benefit to a prospective private client might affect performance of the attorney'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 private client or by reason of access to confidential Government information about the client's adversary obtainable only through the attorney's Government service. The rules, however, governing attorneys 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 attorneys 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.

(4) 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 attorney thereafter represents an agency of another government, as when an attorney represents a city and subsequently is employed by a Federal agency.

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

(6) Paragraph a(2) does not require that a former covered USG attorney 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 attorney. 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 attorney is complying with this Rule and to take appropriate action if it believes the attorney is not complying.

(7) Paragraph b operates only when the former covered USG attorney 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 attorney.

(8) Paragraph c does not disqualify other covered USG attorneys in the agency with which the covered USG attorney in question has become associated.

g. CROSS REFERENCES

(1) Rule 1.5 Fees
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.8 Conflict of Interest: Prohibited Transactions
(4) Rule 1.13 Department of the Navy as Client

12. RULE 1.12 FORMER JUDGE OR ARBITRATOR

a. Except as stated in subparagraph c below, a covered USG attorney shall not represent anyone in connection with a matter in which the covered USG attorney 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 covered USG attorney 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 covered USG attorney is participating personally and substantially as a judge or other adjudicative officer. A covered USG attorney 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 covered USG attorney has notified the judge, other adjudicative officer, or arbitrator, and been disqualified from further involvement in the matter.

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

d. 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 who 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 covered USG attorney in a matter when 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 covered USG attorneys who serve as part-time judges.

e. CROSS REFERENCES

(1) Rule 1.7 Conflict of Interest: General Rule
(2) Rule 1.8 Conflict of Interest: Prohibited Transactions
(3) Rule 1.11 Successive Government and Private Employment

13. RULE 1.13 DEPARTMENT OF THE NAVY AS CLIENT

a. Except when representing an individual client pursuant to subparagraph f below, a covered USG attorney represents the Department of the Navy (or the Executive agency to which assigned) acting through its authorized officials. These officials include the heads of organizational elements within the naval service, such as the commanders of fleets, divisions, ships and other heads of activities. When a covered USG attorney is

assigned to such an organizational element and designated to provide legal services to the head of the organization, an attorney-client relationship exists between the covered attorney and the Department of the Navy 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 attorney-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 Department of the Navy. In invoking either the attorney-client privilege or attorney-client confidentiality on behalf of the Department of the Navy, the head of the organization is subject to being overruled by higher authority.

b. If a covered USG attorney knows that an officer, employee, or other member associated with the organizational client is engaged in action, intends to act or refuses to act in a matter related to the representation that is either adverse to the legal interests or obligations of the Department of the Navy or a violation of law which reasonably might be imputed to the Department, the covered USG attorney shall proceed as is reasonably necessary in the best interest of the naval service. In determining how to proceed, the covered USG attorney shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the covered USG attorney's representation, the responsibility in the naval service and the apparent motivation of the person involved, the policies of the naval service concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize prejudice to the interests of the naval service and the risk of revealing information relating to the representation to persons outside the service. Such measures shall include among others:

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

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

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

(4) advising the acting official 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 interests for the covered USG attorney, and the covered USG attorney's responsibility is to the organization.

c. If, despite the covered USG attorney's efforts per paragraph b, the highest authority that can act concerning the matter insists upon action or refuses to act, in clear violation of law, the covered USG attorney shall terminate representation with respect to the matter in question. In no event shall the attorney participate or assist in the illegal activity. In this case, a covered USG attorney shall report such termination of representation to the attorney's supervisory attorney or attorney representing the next superior in the chain of command.

d. In dealing with the officers, employees, or members of the naval service a covered USG attorney shall explain the identity of the client when it is apparent that the naval service's interests are adverse to those of the officer, employee, or member.

e. A covered USG attorney representing the naval service may also represent any of its officers, employees, or members, subject to the provisions of Rule 1.7 and other applicable authority. If the Department of the Navy's consent to dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the Department of the Navy other than the individual who is to be represented.

f. A covered USG attorney who has been duly assigned to represent an individual who is subject to criminal or disciplinary action or administrative proceedings, or to provide legal assistance to an individual, has, for those purposes, an attorney-client relationship with that individual.

g. COMMENT

(1) The Department of the Navy as the Client

(a) The Department of the Navy (although DON is used throughout this comment, the term includes any Executive agency to which a covered USG attorney is assigned) and its commands, units, and activities are legal entities, but cannot act except through their authorized officers, employees, and members. The Department's interests may conflict with or become adverse to the personal interests of one or more of the officers, employees, or members. Under such circumstances the question arises as to who is the client. Identifying the client is of great significance to the covered USG attorney because of the ramifications it has on the carrying out of legal and ethical obligations.

(b) For purposes of these Rules, a covered USG attorney normally represents the DON, acting through its officers, employees, or members in their official capacities. When acting as a representative of the organization, the covered USG attorney's immediate professional obligation and responsibility is to the DON, in the absence of assignment or designation by the DON to represent any individual.

(c) When one of the officers, employees, or members of the DON communicates with the covered USG attorney on a matter relating to the covered USG attorney's representation of the organization on the organization's official business, the communication is protected from disclosure to anyone outside the DON by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the covered USG attorney. It is the DON, not the officer, employee, or member, that benefits from Rule 1.6 confidentiality. The Department's entitlement to confidentiality may not be asserted by an officer, employee, or member to conceal personal misconduct from Navy or Marine Corps authorities. The covered USG attorney may not disclose information relating to the representation except for disclosures explicitly or impliedly authorized by the DON in order to carry out the representation or as otherwise permitted in Rule 1.6.

(d) When the officers, employees, or members of the DON make decisions for the Department, the decisions ordinarily must be accepted by the covered USG attorney even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not, as such, in the covered USG attorney's province. Different considerations, however, arise when the covered USG attorney may have reason to know that the DON may be substantially injured by the action of an officer, employee, or member that is in violation of law or regulation. In such a circumstance, it may be necessary for the covered USG attorney 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 DON, it may be reasonably necessary for the covered USG attorney to take steps to have the matter reviewed by higher authority in the Department. Covered USG attorneys should refer such matters through supervisory attorney channels. See Article 6(b), UCMJ.

(e) As noted above, a covered USG attorney assigned outside the DON, such as to a joint or unified command, owes loyalty to that organization or agency. It is to that client that a covered USG attorney's immediate professional obligation and responsibility exists, absent assignment or designation by the organization to represent a specific individual client.

(2) Relation to Other Rules. The authority and responsibility provided in subparagraph b are concurrent with the authority and responsibility provided in other Rules. In particular, the Rule does not limit or expand the covered USG attorney's responsibility under Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the covered USG attorney's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2e applies.

(3) Clarifying the Covered USG Attorney's Role. At those times when the DON's interests are clearly adverse to those of one or more of its officers, employees, or members, the covered USG attorney should advise the officer, employee, or member that the attorney cannot continue to advise the officer, employee, or member and that such person may wish to obtain personal legal counsel or advice. Care must be taken to assure that the person understands that, when there is such adversity of interest, the covered USG attorney may no longer provide legal advice to that person on those matters in which the person's interest are adverse, and that discussions between the covered USG attorney and the person may not be confidential or privileged from disclosure to DON or other appropriate authorities.

(4) Dual Representation

(a) Paragraph e recognizes that a covered USG attorney may also represent an officer, employee, or member of the Navy or Marine Corps whose official interests are consistent with those of the DON. Attorney-client confidentiality with the officer, employee, or member of the DON only extends to matters within the scope of the authorized representation.

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

h. CROSS REFERENCES

(1)	Rule 1.2	Establishment and Scope of Representation
(2)	Rule 1.6	Confidentiality of Information
(3)	Rule 1.7	Conflict of Interest: General Rule
(4)	Rule 1.8	Conflict of Interest: Prohibited Transactions
(5)	Rule 1.16	Declining or Terminating Representation
(6)	Rule 2.1	Advisor
(7)	Rule 3.3	Candor and Obligations Toward the Tribunal
(8)	Rule 3.8	Special Responsibilities of a Trial Counsel and Other Government Counsel
(9)	Rule 4.1	Truthfulness in Statements to Others
(10)	Rule 5.1	Responsibilities of the Judge Advocate General and Supervisory Attorneys
(11)	Rule 5.2	Responsibilities of a Subordinate Attorney
(12)	Rule 5.4	Professional Independence of a Covered USG Attorney

14. 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 covered attorney shall, as far as reasonably possible, maintain a normal attorney-client relationship with the client.

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

c. COMMENT

(1) The normal attorney-client 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 attorney-client 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. It is also recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

(2) The fact that a client suffers a disability does not diminish the covered attorney's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the covered attorney should consider initiating procedures for the appointment of a guardian by the person's relatives, civil authorities, or the Department of Veteran's Affairs, where such appointment would serve the client's best interests. Even if the person does have a legal representative, the covered attorney should as far as possible accord the represented person the status of client, particularly in maintaining communication.

(3) If a legal representative has already been appointed for the client, the covered attorney should ordinarily look to the representative for decisions on behalf of the client.

(4) Disclosure of the Client's Condition. Rules of procedure in civil litigation generally provide that minors or persons suffering a 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 covered attorney's position in such cases is an unavoidably difficult one. The covered attorney may seek guidance from an appropriate diagnostician, recognizing that military law does not recognize a doctor-patient privilege.

d. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 1.3 Diligence
(3) Rule 1.6 Confidentiality of Information

15. **RULE 1.15 SAFEKEEPING PROPERTY. Covered USG attorneys shall not normally hold or safeguard property of a client or third persons in connection with representational duties. See Rule 1.8.**

a. COMMENT

(1) Covered USG attorneys normally will not hold or safeguard property of clients or third persons. Should a covered USG attorney find it necessary to hold such property, care will be taken to ensure that the Navy or Marine Corps does not become responsible for any claims for the property. This rule does not authorize a covered USG attorney to hold property of clients or third persons when otherwise prohibited from doing so.

(2) A covered USG attorney holding property of others should exercise the care required of a professional fiduciary.

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

(4) Covered non-USG attorneys should consult their bar rules for guidance regarding this issue.

b. CROSS REFERENCES

(1) Rule 1.8 Conflict of Interest: Prohibited Transactions
(2) Rule 3.4 Fairness to Opposing Party and Counsel

16. RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

a. Except as stated in paragraph c, a covered attorney shall not represent a client or, when representation has commenced, shall seek to withdraw from the representation of a client if:

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

(2) the covered attorney's physical or mental condition materially impairs his or her ability to represent the client; or

(3) the covered attorney is dismissed by the client.

b. Except as stated in paragraph c, a covered attorney 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 covered attorney's services that the covered attorney reasonably believes is criminal or fraudulent;

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

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

(4) in the case of covered non-USG attorneys, the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

c. When ordered to do so by a tribunal or other competent authority, a covered attorney shall continue representation notwithstanding good cause for terminating the representation.

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

e. COMMENT. A covered attorney should not represent a client in a matter unless the covered attorney can perform competently, promptly, without improper conflict of interests, and to completion.

(1) Mandatory Withdrawal. A covered attorney ordinarily must seek to withdraw from representation if the client demands that the covered attorney engage in conduct that is illegal or violates these Rules. The covered attorney is not obliged to seek to withdraw simply because the client suggests such a course of conduct; the client may make such a suggestion in the hope that a covered attorney will not be constrained by a professional obligation.

(2) Continued Representation Notwithstanding Good Cause. Notwithstanding the existence of good cause for terminating representation, a covered USG attorney appointed or detailed to represent a client shall continue such representation until

properly relieved by competent authority. Who is "competent authority" will differ with the circumstances. For example, in a trial by court-martial, the authority originally appointing or detailing the covered USG attorney would be competent authority prior to trial; the military judge would be competent authority once trial begins. After trial, representation may be terminated pursuant to regulation. A covered USG attorney representing the DON may be authorized to withdraw from the representation by the JAG or the covered attorney's supervisory attorney. Difficulty may be encountered when competent authority requires an explanation for the termination and such explanation would necessitate the revelation of confidential facts. When necessary and practicable, a covered USG attorney should seek the advice of a supervisory attorney. The decision by one authority to continue representation does not prevent the covered USG attorney from seeking withdrawal from another competent authority, such as a military judge.

(3) Discharge by the Client

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

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

(c) If the client is mentally incompetent, the client may lack the legal capacity to discharge the covered attorney, and in any event, the discharge may be seriously adverse to the client's interests. The covered attorney should make special effort to help the client consider the consequences. See Rule 1.14.

(4) Optional Withdrawal

(a) A covered attorney may seek to withdraw from representation in some circumstances. The covered attorney may seek to withdraw if it can be accomplished without material adverse effect on the client's interests. Seeking to withdraw is justified if the client persists in a course of action that the covered attorney reasonably believes is criminal or fraudulent, for a covered attorney is not required to be associated with such

conduct even if the covered attorney does not further it. Seeking to withdraw is also permitted if the covered attorney's services were misused in the past, even if withdrawal would materially prejudice the client. The covered attorney also may seek to withdraw when the client insists on a repugnant or imprudent objective. A covered non-USG attorney may seek to withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees.

(b) The scope of a covered attorney's representation may be limited by the law and regulations under which legal services are made available to the client. See Rule 1.2 Comment. Good cause to seek withdrawal exists when a covered attorney changes duty stations or changes duties within an office. For example, a legal assistance attorney has good cause to seek withdrawal from further representation of legal assistance clients when reassigned to duties as trial counsel. If a question arises as to whether a covered USG attorney has permission to withdraw from a particular representation, the covered USG attorney should consult with the supervisory attorney who has the authority to grant permission to withdraw from the representation.

(5) Assisting the Client Upon Withdrawal

(a) A covered attorney 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 covered attorney who is able to represent the client further. A covered attorney making such a referral should ensure that these Rules and any Navy or Marine Corps policy governing referral of clients are followed. If a covered attorney must refer a client to another covered attorney due to a conflict of interests, the referring covered attorney should be careful not to disclose confidential information relating to representation of another client.

(b) Whether or not a covered USG attorney may under certain unusual circumstances have a legal obligation to the Navy or Marine Corps after withdrawing or being released by the Navy's or Marine Corps's highest authority is beyond the scope of these Rules.

f. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 1.6 Confidentiality of Information
(3) Rule 1.7 Conflict of Interest: General Rule

(4) Rule 1.13 Department of the Navy as Client
(5) Rule 1.14 Client Under A Disability
(6) Rule 3.1 Meritorious Claims and Contentions
(7) Rule 3.3 Candor and Obligations Toward the Tribunal
(8) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel

17. **Rule 1.17 Prohibited Sexual Relations**

a. A covered attorney shall not have sexual relations with a current client. A covered attorney shall not require, demand, or solicit sexual relations with a client incident to any professional representation.

b. A covered attorney shall not engage in sexual relations with another attorney currently representing a party whose interests are adverse to those of a client currently represented by the covered attorney.

c. A covered attorney shall not engage in sexual relations with a judge who is presiding or who is likely to preside over any proceeding in which the covered attorney will appear in a representative capacity.

d. A covered attorney shall not engage in sexual relations with other persons involved in the particular case, judicial or administrative proceeding, or other matter for which representation has been established, including but not limited to witnesses, victims, co-accuseds, and court-martial or board members.

e. For purposes of this Rule, "sexual relations" means:

(1) Sexual intercourse; or

(2) Any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the covered attorney for the purpose of arousing or gratifying the sexual desire of either party.

f. COMMENT. Rule 1.7, the general rule on conflict of interest, has always prohibited a covered attorney from representing a client when the covered attorney's ability to represent the client competently may be impaired by the covered attorney's other personal or professional commitments. Under the general rule on conflicts and the rule on prohibited transactions (Rule 1.8), relationships with clients, whether personal or financial, that affect a covered attorney's ability to exercise

his or her independent professional judgment on behalf of a client are closely scrutinized. The present rule clarifies that a sexual relationship with a client and other parties related to the representation is damaging not only to the attorney-client relationship, but also to the administration of military law, and creates an impermissible conflict of interest which cannot be ameliorated by the consent of the client.

(1) Exploitation of the Covered Attorney's Fiduciary Position

(a) The relationship between a covered attorney and client is a fiduciary relationship in which the covered attorney occupies the highest position of trust and confidence. The relationship is also inherently unequal. The client comes to a covered attorney with a problem and puts faith in the covered attorney's special knowledge, skills, and ability to solve the client's problem. The same factors that lead the client to place trust and reliance in the covered attorney also have the potential to place the covered attorney in a position of dominance and the client in a position of vulnerability. This is particularly true in the military context, given differences in rank and status.

(b) A sexual relationship between a covered attorney and a client may involve unfair exploitation of the covered attorney's fiduciary position. Because of the dependence that so often characterizes the attorney-client relationship, there is a significant possibility that a sexual relationship with a client resulted from the exploitation of the covered attorney's dominant position and influence. Moreover, if a covered attorney permits the otherwise benign and even recommended client reliance and trust to become the catalyst for a sexual relationship with a client, the covered attorney violates one of the most basic of ethical obligations, not to use the trust of the client to the client's disadvantage. This same principle underlies the rules prohibiting the use of client confidences to the disadvantage of the client and the rules that seek to ensure that covered attorneys do not take financial advantage of their clients. See Rule 1.6, Rule 1.8.

(2) Impairment of the Ability to Represent the Client Competently. A covered attorney must maintain the ability to represent a client dispassionately and without impairment to the exercise of independent professional judgment on behalf of the client. The existence of a sexual relationship between a covered attorney and client presents a significant danger that the covered attorney's ability to represent the client under the circumstances may be adversely affected because of the covered

attorney's emotional involvement. This emotional involvement has the potential to undercut the objective detachment necessary for adequate representation. A sexual relationship also creates the risk that the covered attorney will be subject to a conflict of interest. For example, a covered attorney who is sexually involved with a client risks becoming an adverse witness in a divorce action where there are issues of adultery and child custody to resolve. Finally, a blurred line between the professional and personal relationship may make it difficult to predict to what extent client confidences will be protected by the attorney-client privilege in the law of evidence since client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship.

(3) No Prejudice to Client. The prohibition upon representing a client with whom a sexual relationship develops applies regardless of the absence of a showing of prejudice to the client and regardless of whether the relationship is consensual.

(4) Prior Sexual Relationship. A covered attorney shall not form an attorney-client relationship with any person with whom the covered attorney currently maintains, or had in the past, a sexual relationship, absent the specific approval of the supervisory attorney. Even where supervisory attorney approval is obtained, the covered attorney may undertake the formation of the attorney-client relationship only if he or she reasonably believes that representation will not be adversely affected by the prior relationship and the client consents after consultation. See Rule 1.7.

(5) Sexual Relations with Other Principals. As sexual relations with a client raise inherent conflicts of interest, so do sexual relations between a covered attorney and other principals to the case, court-martial, judicial or administrative proceeding, or other matter. Intimate relationships between attorneys representing adverse interests raise questions regarding attorney loyalty. Similarly, where intimate relations exist between a covered attorney and a principal assigned a fact-finding or advisory role in a judicial or administrative proceeding, such a personal relationship creates a per se conflict of interest that requires disclosure to the client and withdrawal from representation. Establishing or maintaining a sexual relationship with a victim or witness involved in the case or proceeding is prohibited for the same reason. To protect the legal interests of the client and the integrity and fairness of the military legal process, covered attorneys must not represent a client where professional judgment and integrity may be called

into question due to intimate relations with other principals to the process.

(6) Additional statutes and regulations may further prohibit sexual relations between clients and/or other principals, including rules on fraternization, adultery, conduct unbecoming an officer, and misuse of official position, and may constitute separate grounds for disciplinary or administrative action.

g. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.8 Conflict of Interest: Prohibited Transactions
(4) Rule 1.9 Conflict of Interest: Former Client
(5) Rule 1.14 Client Under A Disability
(6) Rule 1.16 Declining or Terminating Representation
(7) Rule 3.5 Impartiality and Decorum of the Tribunal
(8) Rule 5.4 Professional Independence of a Covered USG Attorney
(9) Rule 8.4 Misconduct

COUNSELOR

1. RULE 2.1 ADVISOR. In representing a client, a covered attorney shall exercise independent professional judgment and render candid advice. In rendering advice, a covered attorney should refer not only to law but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

a. COMMENT

(1) Scope of Advice

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

(b) Advice couched in narrowly legal terms may be of little value to a client, especially when 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 covered attorney to refer to relevant moral and ethical considerations in giving advice. Although a covered attorney 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.

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

(d) 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. When consultation with a professional in another field is itself something a competent covered attorney would recommend, the covered attorney should make such a recommendation. At the same time, a covered attorney's best advice often consists of recommending a course of action in the face of conflicting recommendations of experts.

(2) Offering Advice. In general, a covered attorney is not expected to give advice until asked by the client. However, when a covered attorney 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 covered attorney act if the client's course of action is related to the representation. A covered attorney 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 covered attorney may initiate advice to a client when doing so appears to be in the client's interest.

b. CROSS REFERENCES

(1) Rule 1.4 Communication
(2) Rule 1.6 Confidentiality of Information

(3) Rule 1.13 Department of the Navy as Client
(4) Rule 3.1 Meritorious Claims and Contentions
(5) Rule 5.4 Professional Independence of a Covered USG Attorney

2. RULE 2.2 MEDIATION

a. A covered attorney may act as a mediator between individuals if:

(1) the covered attorney consults with each individual concerning the implications of the mediation, including the advantages and risks involved, and the effect on the attorney-client confidentiality, and obtains each individual's consent to the mediation;

(2) the covered attorney reasonably believes that the matter can be resolved on terms compatible with each individual's 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 covered attorney reasonably believes that the mediation can be undertaken impartially and without improper effect on other responsibilities the covered attorney has to any of the individuals.

b. While acting as a mediator, the covered attorney shall consult with each individual concerning the decisions to be made and the considerations relevant in making them, so that each individual can make adequately informed decisions.

c. A covered attorney 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 covered attorney shall not represent any of the individuals in the matter that was the subject of the mediation unless each individual consents.

d. COMMENT

(1) A covered attorney acts as a mediator under this Rule when the covered attorney mediates among two or more individuals with potentially conflicting interests. For example, both service members and dependents are entitled to legal assistance. Should a legal assistance attorney see both the dependent-seller and a servicemember-buyer of a used car, individuals would have

potentially conflicting interests and the legal assistance attorney would be acting as a mediator in such a situation. Because confusion can arise as to the covered attorney's role when each individual is not separately represented, it is important that the covered attorney make clear the relationship.

(2) A covered attorney 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 covered attorney 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 covered attorney act as mediator.

(3) In considering whether to act as a mediator between individuals, a covered attorney 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 covered attorney cannot undertake mediation among individuals when contentious litigation is imminent or they 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.

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

(5) Confidentiality and Privilege

(a) A particularly important factor in determining the appropriateness of mediation is the absence of a traditional attorney-client relationship. See Rules 1.4 and 1.6. As the covered attorney represents neither individual in the mediation, there is neither attorney-client privilege nor attorney-client confidentiality.

(b) Since the covered attorney is required to be impartial between the individuals, mediation is improper when

that impartiality cannot be maintained. For example, a covered attorney who has represented one of the individuals for a long period and in a variety of matters might have difficulty being impartial between that individual and one to whom the covered attorney has only recently been introduced.

(6) Consultation

(a) In acting as a mediator between individuals, the covered attorney 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 covered attorney's role is not one of partisanship.

(b) When the covered attorney is a mediator, the individuals ordinarily must assume greater responsibility for decisions than when each individual is independently represented.

(7) Withdrawal. Each individual has the right to the impartial and diligent efforts of the mediating covered attorney, and may request the covered attorney withdraw from the mediation as stated in the Rule.

e. CROSS REFERENCES

(1) Rule 1.4 Communication
(2) Rule 1.6 Confidentiality of Information
(3) Rule 1.7 Conflict of Interest: General Rule
(4) Rule 1.9 Conflict of Interest: Former Client
(5) Rule 1.13 Department of the Navy as Client
(6) Rule 1.16 Declining or Terminating Representation

3. RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

a. A covered attorney may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the covered attorney reasonably believes that making the evaluation is compatible with other aspects of the covered attorney'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.

c. COMMENT

(1) Definitions

(a) 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 covered attorney is asked to prepare a brief setting forth the service's position on a situation for use by another Governmental agency or the Congress.

(b) Covered attorneys may be called upon to give a formal opinion on the legality of action contemplated by the Navy or Marine Corps. In making such an evaluation, the covered attorney acts at the behest of the Navy or Marine Corps as the client but for the purpose of establishing the limits of the Navy's or Marine Corps's authorized activity. Such an opinion may be confidential legal advice depending on whether the Navy or Marine Corps intended it to be confidential.

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

(d) A legal evaluation should be distinguished from an investigation of a person with whom the covered attorney does not have an attorney-client relationship. For example, a covered attorney detailed to conduct a foreign claims investigation of a traffic accident between a foreign national and a servicemember in accordance with applicable regulations does not have an attorney-client relationship with the servicemember. Additionally, an investigation into a person's affairs by a covered attorney is not an "evaluation" as that term is used in this Rule. The question is whether the covered attorney represents the person whose affairs are being examined. When the covered attorney 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.

(2) 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 attorney-client relationship, careful analysis of the situation is required. The covered attorney 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 covered attorney is acting as an advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the covered attorney to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the covered attorney should advise the client of the implications of the evaluation, particularly the covered attorney's responsibilities to third persons and the duty to disseminate the findings.

d. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 1.6 Confidentiality of Information
(3) Rule 1.7 Conflict of Interest: General Rule
(4) Rule 1.9 Conflict of Interest: Former Client
(5) Rule 1.13 Department of the Navy as Client
(6) Rule 1.16 Declining or Terminating Representation
(7) Rule 4.1 Truthfulness in Statements to Others
(8) Rule 4.2 Communication with Person Represented by Counsel
(9) Rule 4.3 Dealing with an Unrepresented Person
(10) Rule 4.4 Respect for Rights of Third Persons

ADVOCACY

1. **RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS. A covered attorney 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 covered attorney representing an accused in a criminal proceeding or the respondent in an administrative proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, may nevertheless defend the client at the proceeding as to require that every element of the case is established.**

a. COMMENT

(1) The covered attorney has a duty to use legal procedure for the fullest benefit of the client's cause, but also

has a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. The law, however, is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

(2) The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the covered attorney expects to develop vital evidence only by discovery. Such action is not frivolous even though the attorney 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 covered attorney is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

(3) A covered attorney 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).

b. CROSS REFERENCES

(1)	Rule 1.3	Diligence
(2)	Rule 1.4	Communication
(3)	Rule 1.6	Confidentiality of Information
(4)	Rule 3.2	Expediting Litigation
(5)	Rule 3.3	Candor and Obligations Toward the Tribunal
(6)	Rule 3.4	Fairness to Opposing Party and Counsel
(7)	Rule 3.8	Special Responsibilities of a Trial Counsel and Other Government Counsel

2. RULE 3.2 EXPEDITING LITIGATION. A covered attorney shall make reasonable efforts to expedite litigation or other proceedings consistent with the interests of the client and the attorney's responsibilities to tribunals.

a. COMMENT. Dilatory practices bring the administration of justice into disrepute. The interests of the client are rarely 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 covered attorneys, 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 covered attorney 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.

b. CROSS REFERENCES

(1) Rule 1.4 Communication
(2) Rule 3.1 Meritorious Claims and Contentions
(3) Rule 3.3 Candor and Obligations Toward the Tribunal

3. **RULE 3.3 CANDOR AND OBLIGATIONS TOWARD THE TRIBUNAL**

a. A covered attorney 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 covered attorney to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) offer evidence that the covered attorney knows to be false. If a covered attorney has offered material evidence and comes to know of its falsity, the covered attorney shall take reasonable remedial measures; or

(5) disobey an order imposed by a tribunal unless done openly before the tribunal in a good faith assertion that no valid order should exist.

b. The duties stated in paragraph a continue to the conclusion of the proceedings, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

c. A covered attorney may refuse to offer evidence that the covered attorney reasonably believes is false.

d. In an ex parte proceeding, a covered attorney shall inform the tribunal of all material facts known to the covered attorney which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

e. COMMENT. The covered attorney'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 covered attorney's duty of candor to the tribunal. However, a covered attorney does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

(1) Representations by a Covered Attorney. A covered attorney 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 covered attorney. Cf. Rule 3.1. However, an assertion purporting to be of the covered attorney's own knowledge, as in an affidavit by the covered attorney or in a statement in open court, may properly be made only when the covered attorney knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances when failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2e not to counsel a client to commit or assist the client in committing a fraud applies in litigation. See Rule 1.2e Comment; see also Rule 8.4a(2) Comment.

(2) Misleading Legal Argument. Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A covered attorney 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(3), 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 covered attorney should not knowingly fail to disclose to the tribunal legal authority from a non-controlling jurisdiction, known to the covered attorney to be directly adverse to the position of the client and not disclosed by opposing counsel, if the legal issues

being litigated have not been decided by a controlling jurisdiction and the judge would reasonably consider it important to resolving the issue being litigated.

(3) False Evidence

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

(b) When false evidence is offered by the client, however, a conflict may arise between the covered attorney'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 covered attorney should seek to persuade the client that the evidence should not be offered. If it has already been offered, the attorney's proper course ordinarily is to consult with the client confidentially. The covered attorney should urge the client to immediately correct the matter on the record. If the persuasion is ineffective, the covered attorney must take reasonable remedial measures.

(c) Should the client refuse to correct the matter and if necessary to rectify the situation, a covered attorney must disclose the existence of the client's deception to the tribunal or to the other party (in the case of perjury by a criminal accused, see subparagraph e(4) below). 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 covered attorney cooperates in deceiving the tribunal, thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2e. Furthermore, unless it is clearly understood that the covered attorney will act upon the duty to disclose the existence of false evidence, the client can simply reject the covered attorney's advice to reveal the false evidence and insist that the covered attorney keep silent. Thus the client could in effect coerce the covered attorney into being a party to fraud on the tribunal.

(4) Perjury by a Criminal Accused

(a) A criminal case in which the accused insists on testifying when the covered attorney knows that the testimony is perjurious is the most difficult situation. The covered attorney'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 covered attorney does not exercise control over the proof, the covered attorney participates, although in a merely passive way, in deception of the tribunal.

(b) If the accused has admitted to the covered attorney facts which establish guilt and the covered attorney's independent investigation establishes that the admissions are true but the accused insists on exercising the right to testify, the covered attorney must advise the client against taking the witness stand to testify falsely. If before trial the accused insists on testifying falsely, the covered attorney 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 a violation of this Rule for the covered attorney to lend aid to the perjury or use the perjured testimony. A criminal accused has a right to the assistance of an attorney, 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, a covered attorney 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 1.2e.

(5) Remedial Measures. If perjured testimony or false evidence has been offered, the covered attorney's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the covered attorney should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the covered attorney 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 covered attorney's version of their communication when the covered attorney discloses the situation to the tribunal. If there is an issue whether the client has committed perjury, the covered attorney 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.

(6) 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.

(7) Refusing to Offer Proof Believed to be False. Generally speaking, a covered attorney has authority to refuse to offer testimony or other proof that the covered attorney reasonably believes is untrustworthy. Offering such proof may reflect adversely on the covered attorney's ability to discriminate in the quality of evidence and thus impair the covered attorney's effectiveness as an advocate.

(8) Ex Parte Proceedings. Ordinarily, a covered attorney 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 a hearing before an initial review officer, there is no balance of presentation by opposing attorneys. 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 covered attorney for the represented party has the correlative duty to make disclosures of material facts known to the covered attorney and that the covered attorney reasonably believes are necessary to an informed decision.

f. CROSS REFERENCES

(1)	Rule 1.2	Establishment and Scope of Representation
(2)	Rule 1.6	Confidentiality of Information
(3)	Rule 3.1	Meritorious Claims and Contentions
(4)	Rule 3.4	Fairness to Opposing Party and Counsel
(5)	Rule 3.8	Special Responsibilities of a Trial Counsel and Other Government Counsel
(6)	Rule 4.1	Truthfulness in Statements to Others
(7)	Rule 8.4	Misconduct
(8)	Rule 8.5	Jurisdiction

4. **RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL**

a. A covered attorney shall not:

(1) unlawfully obstruct a party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A covered attorney shall not counsel or assist another person to do any such act;

(2) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(3) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by a party;

(4) in trial, allude to any matter that the covered attorney 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

(5) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(a) the person is a relative, an employee, or other agent of a client; and

(b) the covered attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

b. COMMENT

(1) The procedure of the adversary system contemplates that the evidence in a case is to be marshaled 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. The actions of covered attorneys who are not considered a party to litigation have the potential to affect the litigation process. These situations arise most frequently in cases where the DON is not a party to the litigation, but covered attorneys are assigned to facilitate access for the parties to DON information, evidence, and witnesses. The prohibitions of Rule 3.4 apply equally to covered attorneys whether the DON is a party to litigation or not.

(2) Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of a party, including the Government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions, including the Uniform Code of Military Justice, makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.

Falsifying evidence is also a criminal offense. Paragraph a(1) applies to evidentiary material generally, including computerized information.

(3) A covered attorney who receives (e.g., in the covered attorney'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 covered attorney receives contraband, the covered attorney has no legal right to possess it and must always surrender it to lawful authorities. If a covered attorney receives stolen property, the covered attorney 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 covered attorney 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 covered attorney, the covered attorney should inform the client of the covered attorney's legal and ethical obligations regarding evidence. Frequently, the best course for the covered attorney 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 Rule 1.6, 1.7. If a covered attorney 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 covered attorney 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.

(4) With regard to paragraph a(2), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law and regulation. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

(5) Paragraph a(5) permits a covered attorney 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.

c. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation

(2)	Rule 1.6	Confidentiality of Information
(3)	Rule 1.7	Conflict of Interest: General Rule
(4)	Rule 3.3	Candor and Obligations Toward the Tribunal
(5)	Rule 4.1	Truthfulness in Statements to Others
(6)	Rule 4.2	Communication with Person Represented by Counsel
(7)	Rule 4.4	Respect for Rights of Third Persons
(8)	Rule 5.2	Responsibilities of a Subordinate Attorney
(9)	Rule 5.4	Professional Independence of a Covered USG Attorney

5. **RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL**

a. A covered attorney shall not:

(1) 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 or regulation;

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

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

b. COMMENT

(1) Many forms of improper influence upon a tribunal are proscribed by law or regulation. Others are specified in the Code of Judicial Conduct, with which an attorney should be familiar. A covered attorney is required to avoid contributing to a violation of such provisions.

(2) The covered attorney's function is to present evidence and argument so that the cause may be decided according to law or regulation. Refraining from abusive or obstreperous conduct is a corollary of the covered attorney's right to speak on behalf of litigants. A covered attorney is required to be respectful to military judges, court-martial members, administrative board members, opposing counsel, victims, witnesses, spectators, and other tribunal personnel. A covered attorney may stand firm against abuse by a judge but should avoid reciprocation; the judge's departure from the expected demeanor is no justification for similar dereliction by a covered attorney. A covered attorney can forcefully present a cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or disruptive theatrics.

c. CROSS REFERENCES:

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 3.3 Candor and Obligations Toward the Tribunal
(3) Rule 3.4 Fairness to Opposing Party and Counsel

6. **RULE 3.6 EXTRA-TRIBUNAL STATEMENTS**

a. A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney 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 (including before a military tribunal or commission), or any other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action, and the statement relates to:

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

(2) the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any forensic 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 other proceeding that could result in incarceration, discharge from the naval service, or other adverse personnel action;

(5) information the covered attorney knows or reasonably should know is likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of

materially prejudicing an impartial proceeding;

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

(7) the credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.

c. Notwithstanding paragraphs a and b(1) through (7), a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(1) the general nature of the claim, offense, 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 or regulation, 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, in addition to subparagraphs (1) through (6):

(a) the identity, duty station, occupation, and family status of the accused;

(b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(c) the fact, time, and place of apprehension; and

(d) the identity of investigating and apprehending officers or agencies and the length of the investigation.

d. Notwithstanding paragraphs a and b(1) through (7), a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the

substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

e. The protection and release of information in matters pertaining to the Department of the Navy is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

f. COMMENT

(1) It is difficult to strike a balance between protecting the right to a fair trial or proceeding and safeguarding the right of free expression. Preserving the right to a fair proceeding necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly when 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.

(2) No body of rules can simultaneously satisfy all interests of fair proceedings and all those of free expression. The formula in this rule is based upon the ABA Model Rules of Professional Conduct and the ABA Standards Relating to Fair Trial and Free Press, as amended in 1978.

(3) Paragraph a provides the general prohibition against release of extrajudicial statements that are reasonably known to carry the substantial likelihood of material prejudice. Paragraph b contains a non-exclusive list of subjects that presumptively result in material prejudice and must be considered specifically prohibited absent unique or compelling circumstances. Paragraph c identifies a non-exclusive list of

specific matters about which a covered attorney's statement would not ordinarily be considered to present a substantial likelihood of material prejudice and should not, in most instances, be considered prohibited by paragraph a.

(4) Extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable covered attorney would believe a public response is required in order to avoid prejudice to the covered attorney's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

(5) Paragraph e acknowledges that a covered attorney's release of information is governed not only by this Rule but also by Federal statutes and regulations. Prior to releasing any information, a covered attorney should consult the appropriate statute, directive, regulation, or policy guideline.

g. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.4 Fairness to Opposing Party and Counsel
(3) Rule 3.5 Impartiality and Decorum of the Tribunal
(4) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel

7. **RULE 3.7 ATTORNEY AS WITNESS**

a. A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(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 covered attorney would work substantial hardship on the client.

b. A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely

to be called as a witness, unless precluded from doing so by Rule 1.7 or Rule 1.9.

c. COMMENT

(1) Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interests between the covered attorney and client.

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

(3) Paragraph a(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph a(2) recognizes that when the testimony concerns the extent and quality of legal services rendered in the action in which the testimony is offered, permitting the covered attorney to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

(4) Apart from these two exceptions, paragraph a(3) recognizes that a balancing is required between the interests of the client and those of the 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 covered attorney's testimony, and the probability that the covered attorney's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the covered attorney should be disqualified, due regard must be given to the effect of disqualification on the covered attorney's client. It is relevant that one or both parties could reasonably foresee that the covered attorney would probably be a witness.

(5) Whether the combination of roles involves an improper conflict of interests 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 covered attorney, the representation is improper. The problem can arise whether the covered attorney 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 covered attorney involved. See Rule 1.7 Comment.

d. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 1.7 Conflict of Interest: General Rule
(3) Rule 1.9 Conflict of Interest: Former Client
(4) Rule 3.4 Fairness to Opposing Party and Counsel

8. **RULE 3.8 SPECIAL RESPONSIBILITIES OF A TRIAL COUNSEL AND OTHER GOVERNMENT COUNSEL**

a. A trial counsel shall:

(1) recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;

(2) 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;

(3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under Rule 3.6; and

(6) except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

b. Trial counsel and other government counsel shall exercise reasonable care to avoid intercepting, seizing, copying, viewing, or listening to communications protected by the attorney-client privilege during investigation of a suspected offense (particularly when conducting government-sanctioned searches where attorney-client privileged communications may be present), as well as in the preparation or prosecution of a case. Such communications expressly include, but are not limited to, land-line telephone conversations, facsimile transmissions, U.S. mail, and E-Mail. Trial counsel and other government counsel must not infringe upon the confidential nature of attorney-client privileged communications and are responsible for the actions of their agents or representatives when they induce or assist them in intercepting, seizing, copying, viewing, or listening to such privileged communications.

c. COMMENT

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

(2) Paragraph a(3) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and to remain silent.

(3) The exception in paragraph a(4) recognizes that a trial counsel may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result

in substantial harm to an individual or organization or to the public interest. This exception also recognizes that applicable statutes and regulations may proscribe the disclosure of certain information without proper authorization.

(4) A trial counsel may comply with paragraph a(5) in a number of ways. These include personally informing others of the trial counsel's obligations under Rule 3.7, conducting training of law enforcement personnel, and appropriately supervising the activities of personnel assisting the trial counsel.

(5) Paragraph a(6) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. A trial counsel can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a trial counsel may make which comply with Rule 3.6.

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

(7) The reference to "other government counsel" in the title to this rule pertains only to paragraph b. That paragraph should apply not only to trial counsel, but also to other government counsel (*i.e.*, staff judge advocates, their assistants or deputies, and command services attorneys).

(8) The responsibilities of trial counsel and other government counsel, set out in paragraph b., are consistent with Rule 4.4 (Respect for Rights of Third Persons). The last sentence of paragraph b, addressing trial counsel or other government counsel responsibility for actions of his or her agents or representatives, is consistent with the standard set out in paragraph a(1) of Rule 8.4 (Misconduct).

d. CROSS REFERENCES

(1) Rule 3.1 Meritorious Claims and Contentions
(2) Rule 3.3 Candor and Obligations Toward the Tribunal
(3) Rule 3.4 Fairness to Opposing Party and Counsel

(4) Rule 3.5 Impartiality and Decorum of the Tribunal
(5) Rule 3.6 Extra-Tribunal Statements
(6) Rule 3.9 Advocate in Nonadjudicative Proceedings
(7) Rule 4.4 Respect for Rights of Third Persons
(8) Rule 5.4 Professional Independence of a Covered USG Attorney
(9) Rule 8.4 Misconduct

9. **RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS. A covered attorney 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 3.3a through c, 3.4a through c, and 3.5.**

a. COMMENT

(1) In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking or policy-making capacity, covered attorneys 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 covered attorney appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

(2) Attorneys have no exclusive right to appear before nonadjudicative bodies. The requirements of this Rule therefore may subject covered attorneys to regulations inapplicable to advocates who are not attorneys. Legislatures and administrative agencies, however, have a right to expect attorneys to deal with them as they deal with courts.

b. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.6 Confidentiality of Information
(3) Rule 3.3 Candor and Obligations Toward the Tribunal
(4) Rule 3.4 Fairness to Opposing Party and Counsel
(5) Rule 3.5 Impartiality and Decorum of the Tribunal
(6) Rule 4.1 Truthfulness in Statements to Others
(7) Rule 5.4 Professional Independence of a Covered USG Attorney

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

1. **RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS**

a. In the course of representing a client a covered attorney shall not knowingly;

(1) make a false statement of material fact or law to a third person; or

(2) 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.

b. COMMENT

(1) Misrepresentation. A covered attorney 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 covered attorney incorporates or affirms a statement of another person that the covered attorney knows is false. Misrepresentations can also occur by failure to act.

(2) 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.

(3) Fraud by Client. Paragraph a(2) recognizes that substantive law may require a covered attorney 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.

c. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.3 Candor and Obligations Toward the Tribunal
(3) Rule 3.4 Fairness to Opposing Party and Counsel

2. **RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL. In representing a client, a covered attorney shall not communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.**

a. COMMENT

(1) 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 covered USG attorney from communicating with non-attorney representatives of the other party regarding a separate matter. Also, parties to a matter may communicate directly with each other and a covered attorney having independent justification for communicating with the other party is permitted to do so.

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

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

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

(5) The prohibition on communications with a represented person only applies, however, in circumstances where the covered

attorney knows that the person is in fact represented in the matter to be discussed. This means that the covered attorney has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a covered attorney cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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

b. CROSS REFERENCES

(1) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(2) Rule 4.1 Truthfulness in Statements to Others
(3) Rule 4.4 Respect for Rights of Third Persons

3. **RULE 4.3 DEALING WITH AN UNREPRESENTED PERSON. When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney's role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.**

a. COMMENT. An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a covered attorney is disinterested in loyalties or is a disinterested authority on the law even when the covered attorney represents a client. During the course of a covered attorney's representation of a client, the covered attorney should not give advice to an unrepresented person other than the advice to obtain counsel.

b. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 3.4 Fairness to Opposing Party and Counsel
(3) Rule 4.1 Truthfulness in Statement to Others
(4) Rule 4.4 Respect for Rights of Third Persons

4. **RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS. In representing a client, a covered attorney 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.**

a. COMMENT. Responsibility to a client requires a covered attorney to subordinate the interests of others to those of the client, but that responsibility does not imply that a covered attorney may disregard the rights of third persons. The duty of a covered attorney to represent the client with zeal does not militate against his or her 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.

b. CROSS REFERENCES

(1) Rule 3.2 Expediting Litigation
(2) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(3) Rule 4.1 Truthfulness in Statements to Others
(4) Rule 4.2 Communication with Person Represented by Counsel
(5) Rule 4.3 Dealing with an Unrepresented Person

LEGAL OFFICES

1. **RULE 5.1 RESPONSIBILITIES OF THE JUDGE ADVOCATE GENERAL AND SUPERVISORY ATTORNEYS**

a. The Judge Advocate General and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to these Rules.

b. A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to these Rules.

c. A supervisory attorney shall be responsible for another subordinate covered attorney's violation of these Rules if:

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

(2) the supervisory attorney has direct supervisory authority over the other attorney 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 attorney is responsible for ensuring that the subordinate covered attorney is properly trained and is competent to perform the duties to which the subordinate covered attorney is assigned.

e. COMMENT

(1) Paragraph a recognizes the responsibilities of the JAG and supervisory attorneys to implement and ultimately enforce these Rules. For purposes of this Rule, a "supervisory attorney" refers to a covered USG attorney.

(2) Paragraph b requires all covered attorneys who directly supervise other covered attorneys to take reasonable measures to ensure that such subordinates conform their conduct to these Rules. The measures required to fulfill the responsibility prescribed in paragraph b can depend on the office's structure and the nature of its practice. In a small office, informal supervision and occasional admonition ordinarily might be sufficient. In a large office, or in practice situations in which difficult ethical problems frequently arise, more elaborate procedures may be necessary. In some offices, for example, junior covered attorneys can make confidential referral of ethical problems directly to a senior attorney. See Rule 1.13, 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 of its members and a covered attorney having authority over the work of another may not assume that the subordinate covered attorney will inevitably conform to these Rules.

(3) Supervisory covered attorneys must be careful to avoid conflicts of interest in providing advice to subordinate covered attorneys. For example, the head of the defense department of a NLSO may be the supervisory attorney for two attorneys representing clients with adverse interests. In such a situation, the supervisory attorney should not advise both subordinate covered attorneys. Depending on the circumstances, the supervisory attorney may advise one subordinate covered attorney and refer the other subordinate covered attorney to another supervisory attorney in the office, or the supervisory attorney may refer both subordinate covered attorneys to separate supervisory attorneys in the office.

(4) Paragraph c(1) expresses a general principle of supervisory responsibility for acts of another. See also Rule 8.4(a).

(5) Paragraph c(2) defines the duty of a covered attorney having direct supervisory authority over performance of specific legal work by another covered attorney. Whether a covered attorney has such supervisory authority in particular circumstances is a question of fact. Appropriate remedial action would depend on the timing of the supervisor's involvement and the seriousness of the misconduct. Apart from the responsibility that may be incurred for ordering or ratifying another covered attorney's conduct under paragraph c(1), the supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervisory attorney 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.

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

(7) Apart from this Rule and Rule 8.4a(1), a covered attorney does not have liability under these Rules for the conduct of subordinate covered attorneys. Whether a covered attorney may be liable civilly or criminally for another covered attorney's conduct is a question of law beyond the scope of these Rules.

f. CROSS REFERENCES

(1) Rule 1.13 Department of the Navy as Client
(2) Rule 5.2 Responsibilities of a Subordinate Attorney
(3) Rule 5.3 Responsibilities Regarding Non-Attorney Assistants
(4) Rule 5.4 Professional Independence of a Covered USG Attorney
(5) Rule 8.3 Reporting Professional Misconduct
(6) Rule 8.4 Misconduct

2. RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE ATTORNEY

a. A covered attorney is bound by these Rules notwithstanding that the covered attorney acted at the direction

of another person.

b. In recognition of the judge advocate's unique dual role as a commissioned officer and attorney, subordinate judge advocates shall obey lawful directives and regulations of supervisory attorneys when not inconsistent with these Rules or the duty of a judge advocate to exercise independent professional judgment as to the best interest of an individual client.

c. A subordinate covered attorney does not violate these Rules if that covered attorney acts in accordance with a supervisory attorney's written and reasonable resolution of an arguable question of professional duty.

d. COMMENT

(1) Although a covered attorney is not relieved of responsibility for a violation by the fact that the covered attorney acted at the direction of a supervisor, that fact may be relevant in determining whether a covered attorney 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.

(2) When covered attorneys 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 covered attorneys 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. To minimize the chances for misunderstanding, advice in questionable cases should be issued in writing. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's written, reasonable resolution of the question will protect the subordinate professionally if the resolution is subsequently challenged.

e. CROSS REFERENCES

(1) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys

(2) Rule 5.4 Professional Independence of a Covered USG Attorney
(3) Rule 8.4 Misconduct

3. **RULE 5.3 RESPONSIBILITIES REGARDING NON-ATTORNEY ASSISTANTS**

a. With respect to a non-attorney acting under the authority, supervision, or direction of a covered attorney:

(1) the senior supervisory attorney in an office shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney;

(2) a covered attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of a covered attorney; and

(3) a covered attorney shall be responsible for conduct of such a person that would be a violation of these Rules if engaged in by a covered attorney if:

(a) the covered attorney orders or, with the knowledge of the specific conduct, explicitly or impliedly ratifies the conduct involved; or

(b) the covered attorney 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.

b. COMMENT. Covered attorneys generally supervise assistants in their practice, including paralegals, secretaries, clerks, investigators, law student interns, and others. Such assistants act for the covered attorney in rendition of the covered attorney's professional services. A covered attorney 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 non-attorneys should take account of the fact that they do not have legal training and are not subject to professional discipline.

c. CROSS REFERENCES

(1) Rule 1.6 Confidentiality of Information
(2) Rule 3.8 Special Responsibilities of a Trial Counsel and Other Government Counsel
(3) Rule 4.1 Truthfulness in Statements to Others
(4) Rule 4.4 Respect for Rights of Third Persons
(5) Rule 5.5 Unauthorized Practice of Law

4. **RULE 5.4 PROFESSIONAL INDEPENDENCE OF A COVERED USG ATTORNEY**

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

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

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

d. COMMENT

(1) This Rule recognizes that a judge advocate is a military officer required by law to obey the lawful orders of superior officers. It also recognizes the similar status of a civilian USG attorney. 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 covered USG attorney is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.

(2) Not all direction given to a subordinate covered attorney is an attempt to influence improperly the covered

attorney'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 covered attorney subjected to outside pressures should make full disclosure of them to the client. If the covered attorney or the client believes the effectiveness of the representation has been or will be impaired thereby, the covered attorney should take proper steps to withdraw from representation of the client.

(3) Additionally, a judge advocate has a responsibility to report any instances of unlawful command influence. See R.C.M. 104, MCM, 1984.

e. CROSS REFERENCES

(1) Rule 1.1 Competence
(2) Rule 1.2 Establishment and Scope of Representation
(3) Rule 1.3 Diligence
(4) Rule 1.7 Conflict of Interest: General Rule
(5) Rule 1.13 Department of the Navy as Client
(6) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys

5. **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW**

a. A covered USG attorney shall not:

(1) except as authorized by an appropriate military department, practice law in a jurisdiction where doing so is prohibited by the regulations of the legal profession in that jurisdiction;

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

(3) engage in the outside practice of law without receiving proper authorization from the Judge Advocate General.

b. COMMENT.

(1) Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. A covered USG attorney'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 covered USG attorney may

perform legal assistance duties even though the covered attorney is not licensed to practice in the jurisdiction within which the covered attorney's duty station is located. Paragraph a(2) does not prohibit a covered USG attorney from using the services of non-attorneys and delegating functions to them, so long as the covered attorney supervises the delegated work and retains responsibility for it. See Rule 5.3. Likewise, it does not prohibit covered USG attorneys from providing professional advice and instruction to non-attorneys whose employment requires knowledge of law; for example, claims adjusters, social workers, accountants and persons employed in Government agencies. In addition, a covered USG attorney may counsel individuals who wish to proceed pro se or non-attorneys authorized by law or

regulation to appear and represent themselves or others before military proceedings.

(2) Outside law practice is defined as any single or regular provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to duties as a covered USG attorney (including while on terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of this instruction.

(3) A covered USG attorney's primary professional responsibility is to the client and he or she is expected to ensure that representation of such client is free from conflicts of interest and otherwise conforms to the requirements of these rules and other regulations concerning the provision of legal services within the DON. The outside practice of law, therefore, must be carefully monitored. Covered USG attorneys who wish to engage in the outside practice of law must first obtain permission from JAG. Further details are contained in Paragraph 13 and enclosure (3) of this instruction. This requirement does not apply to non-USG attorneys, or to Reserve or Retired judge advocates unless serving on active-duty for more than 30 consecutive days.

c. CROSS REFERENCES

(1) Rule 1.2 Establishment and Scope of Representation
(2) Rule 5.3 Responsibilities Regarding Non-Attorney Assistants
(3) Rule 8.5 Jurisdiction

MAINTAINING THE INTEGRITY OF THE LEGAL ORGANIZATION

1. **RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS**

a. A covered attorney, in connection with any application for bar admission, appointment as a judge advocate, employment as a civilian USG attorney, certification by the Judge Advocate General or his designee, or in connection with any disciplinary matter, shall not:

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

(2) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

b. COMMENT

(1) The duty imposed by this Rule extends to covered attorneys and other attorneys seeking admission to a bar, application for appointment as a covered USG attorney (military or civilian) or certification by the JAG or his designee. Hence, if a person makes a false statement in connection with an application for admission or certification (e.g., misstatement by a civilian attorney before a military judge regarding qualifications under Rule for Courts-Martial 502), it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a covered attorney's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a covered attorney to make a knowing misrepresentation or omission in connection with a disciplinary investigation of the covered attorney's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions, certification, or disciplinary authority of which the person involved becomes aware.

(2) This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article 31, 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.

(3) A covered attorney sponsoring an applicant for admission to the bar, or representing a covered attorney who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the attorney-client relationship.

c. CROSS REFERENCES

(1) Rule 8.3 Reporting Professional Misconduct
(2) Rule 8.4 Misconduct
(3) Rule 8.5 Jurisdiction

2. **RULE 8.2 JUDICIAL AND LEGAL OFFICIALS**

a. A covered attorney shall not make a statement that the covered attorney knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

b. COMMENT

(1) Assessments by covered attorneys 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 covered attorney can unfairly undermine confidence in the administration of justice.

(2) To maintain the fair and independent administration of justice, covered attorneys are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

c. CROSS REFERENCES

(1) Rule 3.5 Impartiality and Decorum of the Tribunal
(2) Rule 3.6 Extra-Tribunal Statements
(3) Rule 4.1 Truthfulness in Statements to Others
(4) Rule 4.4 Respect for Rights of Third Persons
(5) Rule 8.4 Misconduct

3. **RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT**

a. A covered attorney having knowledge that another covered attorney has committed a violation of these Rules that raises a

substantial question as to that covered attorney's honesty, trustworthiness, or fitness as a covered attorney in other respects, shall report such violation in accordance with the procedures set forth in this instruction.

b. A covered attorney 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 report such violation in accordance with the procedures set forth in this instruction.

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

d. COMMENT

(1) Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of Rules of Professional Conduct. Covered attorneys 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 when the victim is unlikely to discover the offense.

(2) A report about misconduct is not required when it would involve violation of Rule 1.6. However, a covered attorney should encourage a client to consent to disclosure where such disclosure would not substantially prejudice the client's interests.

(3) 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 covered attorney is aware. Any report should be made in accordance with this instruction.

(4) The duty to report professional misconduct does not apply to a covered attorney appointed, detailed, or retained to represent a covered attorney whose professional conduct is in question. Such a situation is governed by the Rules applicable to the attorney-client relationship.

e. CROSS REFERENCES

(1) Rule 5.1 Responsibilities of the Judge Advocate

General and Supervisory Attorneys
(2) Rule 8.4 Misconduct
(3) Rule 8.5 Jurisdiction

4. **RULE 8.4 MISCONDUCT**

a. It is professional misconduct for a covered attorney to:

(1) violate or attempt to violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another;

(2) commit a criminal act that reflects adversely on the covered attorney's honesty, trustworthiness, or fitness as an attorney in other respects;

(3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(4) engage in conduct that is prejudicial to the administration of justice;

(5) state or imply an ability to influence improperly a government agency or official; or

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

b. COMMENT

(1) 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 offenses 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 covered attorney is personally answerable to the entire criminal law, a covered attorney 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 covered

attorneys who are known or reasonably should be known to be representing a client. Misconduct 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.

(2) Covered non-USG attorneys, Reservists, and Retirees (acting in their civilian capacity), like their active-duty counterparts, are expected to demonstrate model behavior and exemplary integrity at all times. JAG may consider any and all derogatory or beneficial information about a covered attorney, for purposes of determining the attorney's qualification, professional competence, or fitness to practice law in DON matters, or to administer discipline under this instruction. Such consideration shall be made, except in emergency situations necessitating immediate action, according to the procedures established in this instruction.

(3) A covered attorney may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2e concerning a good faith challenge to the validity, scope, meaning or application of the law also apply to challenges of legal regulation of the practice of law.

(4) Judge advocates hold a commission as an officer in the Navy or Marine Corps 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 attorney. This concept has similar application to civilian USG attorneys.

c. CROSS REFERENCES

(1) Rule 8.3 Reporting Professional Misconduct
(2) Rule 8.5 Jurisdiction

5. **RULE 8.5 JURISDICTION. All covered attorneys shall be governed by these Rules.**

a. COMMENT

(1) Many covered USG attorneys practice outside the territorial limits of the jurisdiction in which they are licensed. While covered attorneys remain subject to the governing authority of the jurisdiction in which they are licensed to practice, they are also subject to these Rules.

(2) When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, these Rules supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed. However, covered attorneys practicing in State or Federal civilian court proceedings will abide by the rules adopted by that State or Federal civilian court during the proceedings. As for covered non-USG attorneys practicing under the supervision of the JAG, violation of these Rules may result in suspension from practice in DON proceedings.

(3) Covered non-USG attorneys, Reservists, or Retirees (acting in their civilian capacity) who seek to provide legal services in any DON matter under JAG cognizance and supervision, may be precluded from such practice of law if, in the opinion of the JAG (as exercised through this instruction) the attorney's conduct in any venue renders that attorney unable or unqualified to practice in DON programs or proceedings.

b. CROSS REFERENCES

(1) Rule 5.1 Responsibilities of the Judge Advocate General and Supervisory Attorneys
(2) Rule 8.3 Reporting Professional Misconduct

6. **RULE 8.6 REQUIREMENT TO REMAIN IN GOOD STANDING WITH LICENSING AUTHORITIES**

a. Each officer of the Navy appointed as a member of the Judge Advocate General's Corps, each officer of the Marine Corps designated a judge advocate, and each civil service and contracted civilian attorney who practices law under the cognizance and supervision of the Judge Advocate General shall maintain a status considered "in good standing" at all times with the licensing authority admitting the individual to the practice of law before the highest court of at least one State, Territory, Commonwealth, or the District of Columbia.

b. The Judge Advocate General, the Director, Judge Advocate Division, HQMC, or any other supervisory attorney may require any covered USG attorney over whom they exercise authority to establish that the attorney continues to be in good standing with his or her licensing authority. Representatives of the Judge Advocate General or of the Director, Judge Advocate Division, HQMC, may also inquire directly of any such covered USG attorney's licensing authority to establish whether he or she

continues to be in good standing and has no disciplinary action pending.

c. Each covered USG attorney shall immediately report to the Judge Advocate General if any jurisdiction in which the covered USG attorney is or has been a member in good standing commences disciplinary investigation or action against him or her or if the covered USG attorney is disciplined, suspended, or disbarred from the practice of law in any jurisdiction.

d. Each covered non-USG attorney representing an accused in any court-martial or administrative separation proceeding shall be a member in good standing with, and authorized to practice law by, the bar of a Federal court or of the bar of the highest court of a State, or a lawyer otherwise authorized by a recognized licensing authority to practice law and found by the military judge to be qualified to represent the accused.

e. COMMENT

(1) Generally, the Judge Advocate General relies on the licensing authority granting the certification or privilege to practice law to define the phrase "good standing." However, as circumstances require, the Judge Advocate General may, instead, use separate criteria to determine compliance. At a minimum, "good standing" means the individual

(a) is subject to the jurisdiction's disciplinary review process;

(b) has not been suspended or disbarred from the practice of law within the jurisdiction;

(c) is current in the payment of all required fees;

(d) has met applicable continuing legal education requirements which the jurisdiction has imposed (or the cognizant authority has waived); and

(e) has met such other requirements as the cognizant authority has set for eligibility to practice law. So long as these conditions are met, a covered USG attorney may be "inactive" as to the practice of law within a particular jurisdiction and still be "in good standing" for purposes of this Rule.

(2) Rule for Court-Martial 502(d)3(A) requires that any civilian defense counsel representing an accused in a court-martial be a member of the bar of a Federal court or of the bar

of the highest court of a State. This civilian defense counsel qualification only has meaning if the attorney is a member "in good standing," and is then authorized to practice law within that jurisdiction. See U.S. v. Waggoner, 22 M.J. 692 (AFCMR 1986). It is appropriate for the military judge, in each and every case, to ensure that a civilian defense counsel is qualified to represent the accused.

(3) Failure of a judge advocate to comply with the requirements of this Rule may result in professional disciplinary action as provided for in this instruction, loss of certification under Articles 26 and/or 27(b), UCMJ, adverse entries in military service records, and administrative separation under SECNAVINST 1920.6(series) based on the officer's failure to maintain professional qualifications. In the case of civil service and contracted civilian attorneys practicing under the JAG's cognizance and supervision, failure to maintain good standing or otherwise to comply with the requirements of this Rule may result in adverse administrative action under applicable personnel regulations, including termination of employment.

(4) A covered USG attorney need only remain in good standing in one jurisdiction. If admitted to the practice of law in more than one jurisdiction, however, and any jurisdiction commences disciplinary action against or disciplines, suspends or disbars the covered USG attorney from the practice of law, the covered USG attorney must so advise the JAG.

(5) An essential time to verify that a judge advocate is currently in good standing is upon accession. Other appropriate times for verification are before a judge advocate is promoted to a higher grade, detailed to a new command, or assigned to duties where there is a statutory requirement to be a member of the bar, such as a military judge per 10 U.S.C. § 826(b). The JAG, the Director, JA Division, HQMC, or any other supervisory attorney may need to verify the professional qualifications of a judge advocate, either periodically or on an occasional basis. JAGINST 5803.2 establishes a biennial requirement for all covered attorneys to provide proof of good standing.

(6) Certification by the United States Court of Appeals for the Armed Forces that a judge advocate is in good standing with that court will not satisfy the requirement of this section, since such status is normally dependent on Article 27 UCMJ certification alone.

COMPLAINT PROCESSING PROCEDURES

1. Policy

a. It is JAG's policy to investigate and resolve, expeditiously and fairly, all allegations of professional impropriety lodged against covered attorneys under JAG supervision.

b. Rules Counsel approval will be obtained before conducting any preliminary inquiry or formal investigation into an alleged violation of the Rules or the Code of Judicial Conduct. The Rules Counsel will notify the JAG prior to the commencement of any preliminary inquiry or investigation. The preliminary inquiry and any subsequent investigation will be conducted according to the procedures set forth in this enclosure.

c. In cases involving trial or appellate court judges, Rules Counsel shall consult with the relevant Chief Judge (Navy-Marine Corps Trial Judiciary or Navy-Marine Corps Court of Criminal Appeals) prior to commencing a preliminary inquiry and/or investigation; closing a case with a conclusion that a minor and/or technical violation occurred; or forwarding the case to the Judge Advocate General recommending interim suspension or final disposition. Requiring such consultation is intended to ensure Rules Counsel is aware of concerns the Chief Judge may have prior to exercising significant authority under this instruction.

2. Related Investigations and Actions. Acts or omissions by covered attorneys may constitute professional misconduct, criminal misconduct, poor performance of duty, or a combination of all three. Care must be taken to characterize appropriately the nature of a covered attorney's conduct to determine who may and properly should take official action.

a. Questions of legal ethics and professional misconduct by covered attorneys are within the exclusive province of JAG. Ethical or professional misconduct will not be attributed to any covered attorney in any official record without a final JAG determination, made in accordance with this instruction, that such misconduct has occurred.

b. Criminal misconduct is properly addressed by the covered USG attorney's commander through the disciplinary process provided under the UCMJ and implementing regulations, or through referral to appropriate civil authority.

c. Poor performance of duty is properly addressed by the covered USG attorney's reporting senior through a variety of

administrative actions, including documentation in fitness reports or employee appraisals.

d. Prior JAG approval is not required to investigate allegations of criminal conduct or poor performance of duty involving covered attorneys. When, however, investigations into criminal conduct or poor performance reveal conduct that constitutes a violation of this instruction, or of the Code of Judicial Conduct in the case of judges, such conduct shall be reported to the Rules Counsel immediately.

e. Generally, professional responsibility complaints will be processed in accordance with this instruction upon receipt. Rules Counsel may, however, on a case-by-case basis, delay such processing to await the outcome of pending related criminal, administrative, or investigative proceedings.

3. Informal Complaints. Informal, anonymous, or "hot line" type complaints alleging professional misconduct must be referred to the appropriate authority (such as the JAG IG or the concerned supervisory attorney) for inquiry. Such complaints are not, by themselves, cognizable under this instruction but may, if reasonably confirmed, be the basis of a formal complaint described below.

4. The Formal Complaint

a. The formal complaint shall:

(1) be in writing and be signed by the complainant;

(2) state that the complainant has personal knowledge, or has otherwise received reliable information indicating, that:

(a) the covered attorney concerned is, or has been, engaged in misconduct that demonstrates a lack of integrity, that constitutes a violation of these Rules or the Code of Judicial Conduct or a failure to meet the ethical standards of the profession; or

(b) the covered attorney concerned is ethically, professionally, or morally unqualified to perform his or her duties; and

(3) contain a complete, factual statement of the acts or omissions constituting the substance of the complaint, as well as a description of any attempted resolution with the covered attorney concerned. Supporting statements, if any, should be attached to the complaint.

b. A complaint may be initiated by any person, including the Administrative Law Division of the Office of JAG (JAG (13)), or the Judge Advocate Research and Civil Law Branch, JA Division, HQMC (JAR).

5. Initial Screening

a. Complaints shall be forwarded to JAG(13) or, in cases involving Marine Corps judge advocates or civil service and contracted civilian attorneys who perform legal services under the cognizance and supervision of Director, JA Division, HQMC, to JAR.

b. JAG(13) and JAR shall log all formal complaints received and will ensure a copy of the complaint and allied papers is provided to the covered attorney who is the subject of the complaint. Service of the formal complaint and other materials on the covered attorney must be accomplished through personal service or registered/certified mail sent to the covered attorney's last known address reflected in official Navy and Marine Corps records or in the records of the state bar(s) that licensed the attorney to practice law. The covered attorney's supervisory attorney must also be provided notice of the complaint.

c. The covered attorney concerned may elect to provide an initial statement regarding the complaint for the Rules Counsel's consideration. The covered attorney will promptly inform JAG(13) or JAR if he or she intends to submit any such statement. At this screening stage, forwarding of the complaint to the Rules Counsel will not be unduly delayed to await the covered attorney's submission.

d. The Rules Counsel shall initially review the complaint, and any statement submitted by the covered attorney complained of, to determine whether it complies with the requirements set forth in paragraph 4 of this enclosure. The Rules Counsel is not required to delay the initial review of the complaint awaiting the covered attorney's submission.

(1) Complaints that do not comply with the requirements may be returned to the complainant for correction or completion, and resubmission to JAG(13) or JAR. If the complaint is not corrected or completed and resubmitted within 30 days of the date of its return, the Rules Counsel may close the file without further action. JAG(13) and JAR will maintain copies of all correspondence relating to the return and resubmission of a complaint, and shall notify the covered attorney concerned, as

well as the supervisory attorney, if and when the Rules Counsel takes action to close the file.

(2) Complaints that comply with the requirements shall be further reviewed by the Rules Counsel to determine whether the complaint establishes probable cause to believe that a violation of the Rules or Code of Judicial Conduct has occurred.

e. The Rules Counsel shall close the file without further action if the complaint does not establish probable cause to believe a violation has occurred. The Rules Counsel shall notify the complainant, the covered attorney concerned, and the supervisory attorney, that the file has been closed. JAG(13) and JAR will maintain copies of all correspondence related to the closing of the file.

f. The Rules Counsel may close the file if there is a determination that the complaint establishes probable cause but the violation is of a minor or technical nature appropriately addressed through corrective counseling. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and the supervisory attorney that the file has been closed. JAG(13) and JAR will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting of such action.

6. Forwarding the Complaint

a. If the Rules Counsel determines there is probable cause to believe a violation of the Rules or Code of Judicial Conduct has occurred, and the violation is not of a minor or technical nature, the Rules Counsel shall notify JAG and forward the complaint and any allied papers, as follows:

(1) in cases involving Marine Corps attorneys not serving as defense counsel or military judge or attached to Navy units, to the officer exercising general court-martial jurisdiction (OEGCMJ) over the covered attorney, and request that the OEGCMJ appoint a covered attorney (senior to the covered attorney and not previously involved in the case) to conduct a preliminary inquiry into the matter;

(2) in cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to the covered attorney complained

of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(3) in cases involving a military appellate judge, if practicable, to a covered attorney with experience as a military appellate judge (normally senior to the covered attorney complained of and not previously involved in the case) and assign the officer to conduct a preliminary inquiry into the matter;

(4) in all other cases, to such covered attorney as Rules Counsel may designate (normally senior to the covered attorney complained of and not previously involved in the case), and assign the officer to conduct a preliminary inquiry into the matter.

b. The Rules Counsel shall provide notice of the complaint (if not previously informed) as well as notice of the preliminary inquiry:

(1) to the covered attorney against whom the complaint is made as well as the supervisory attorney;

(2) in cases involving a covered USG attorney on active duty or in civilian Federal service, to the commanding officer, or equivalent, of the covered USG attorney concerned;

(3) in cases involving Navy or Marine Corps judge advocates serving in Naval Legal Service Command (NLSC) units, to Vice Commander, NLSC;

(4) in cases involving Navy attorneys serving in Marine Corps units, or involving Marine Corps attorneys serving in Navy units, to the Commandant of the Marine Corps (Attn: JA);

(5) in cases involving trial or appellate court judges, to either the Chief Judge, Navy-Marine Corps Trial Judiciary or Chief Judge, Navy-Marine Corps Court of Criminal Appeals, as appropriate; and

(6) in cases involving covered attorneys certified by the Judge Advocates General/Chief Counsel of the other uniformed services, to the appropriate military service attorney discipline section.

7. <u>Interim Suspension</u>

a. Where the Rules Counsel determines there is probable cause to believe that a covered attorney has committed misconduct

and poses a substantial threat of irreparable harm to his or her clients or the orderly administration of military justice, the Rules Counsel shall so advise the JAG. Examples of when a covered attorney may pose a "substantial threat of irreparable harm" include, but are not limited to:

(1) when charged with the commission of a crime which involves moral turpitude or reflects adversely upon the covered attorney's fitness to practice law, and where substantial evidence exists to support the charge;

(2) when engaged in the unauthorized practice of law (e.g., failure to maintain good standing in accordance with Rule 8.6); or

(3) when unable to represent client interests competently.

b. Upon receipt of information from the Rules Counsel, JAG may order the covered attorney to show cause why he or she should not face interim suspension pending completion of a professional responsibility investigation. The covered attorney shall have 10 calendar days in which to respond. Notice of the show cause order shall be provided as outlined above in paragraph 6b.

c. If an order to show cause has been issued under paragraph (b), and the period for response has passed without a response, or after consideration of any response and finding sufficient evidence demonstrating probable cause to believe that the covered attorney is guilty of misconduct and poses a substantial threat of irreparable harm to his or her client or the orderly administration of military justice, JAG may direct an interim suspension of the covered attorney's certification under Articles 26(b) or 27(b), UCMJ, or R.C.M. 502(d)(3), or the authority to provide legal assistance, pending the results of the investigation and final action under this instruction. Notice of such action shall be provided as outlined above in paragraph 6b.

d. Within 10 days of JAG's decision to impose an interim suspension, the covered attorney may request an opportunity to be heard before an impartial officer designated by JAG. Where so requested, that opportunity will be scheduled within 10 calendar days of the request. The designated officer shall receive any information that the covered attorney chooses to submit on the limited issue of whether to continue the interim suspension. The designated officer shall submit a recommendation to JAG within 5 calendar days of conclusion.

e. A covered attorney may, based upon a claim of changed circumstances or newly discovered evidence, petition for

dissolution or amendment of JAG's imposition of interim suspension.

f. Any professional responsibility investigation involving a covered attorney who has been suspended pursuant to this rule shall proceed and be concluded without appreciable delay. However, JAG may determine it necessary to await completion of a related criminal investigation or proceeding, or completion of a professional responsibility action initiated by other licensing authorities. In such cases, JAG shall cause the Rules Counsel to so notify the covered attorney under interim suspension as well as those officials outlined above in paragraph 6b. Where necessary, continuation of the interim suspension shall be reviewed by JAG every 6 months.

8. Preliminary Inquiry

a. The purpose of the preliminary inquiry is to determine whether, in the opinion of the officer appointed to conduct the preliminary inquiry (PIO), the questioned conduct occurred and, if so, whether it constitutes a violation of the Rules or the Code of Judicial Conduct. The PIO is to recommend appropriate action in cases of substantiated violations.

b. Upon receipt of the complaint, the PIO shall promptly investigate the allegations, generally following the format and procedures set forth in the Manual of the Judge Advocate General (JAGMAN) for the conduct of command investigations. Reports of relevant investigations by other authorities including, but not limited to, the command, the Inspector General, and State licensing authorities should be used. The PIO should also:

(1) identify and obtain sworn affidavits or statements from all relevant and material witnesses to the extent practicable;

(2) identify, gather, and preserve all other relevant and material evidence; and

(3) provide the covered attorney concerned an opportunity to review all evidence, affidavits, and statements collected and a reasonable period of time (normally not exceeding 7 days) to submit a written statement or any other written material that the covered attorney wishes considered.

c. The PIO may appoint and use such assistants as may be necessary to conduct the preliminary inquiry.

d. The PIO shall personally review the results of the preliminary inquiry to determine whether, by a preponderance of the evidence, a violation of the Rules or the Code of Judicial Conduct has occurred.

(1) If the PIO determines that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the PIO determines by a preponderance of the evidence that a violation did occur, and that corrective action greater than counseling may be warranted, he or she shall:

(a) draft a list of substantiated violations of these Rules or the Code of Judicial Conduct;

(b) recommend appropriate action; and

(c) forward (via the OEGCMJ in appropriate Marine cases) the preliminary inquiry to the Rules Counsel, providing copies to the covered attorney concerned and the supervisory attorney.

e. The Rules Counsel shall review all preliminary inquiries. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the PIO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the PIO recommendation or through the Rules Counsel's own review of the report, that a violation of the Rules has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously provided notice of the complaint. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that a violation of the Rules has occurred but that the violation is of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials

previously provided notice of the complaint that the file has been closed. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel determines, either consistent with a PIO recommendation or through the Rules Counsel's own review of the report, that further professional discipline or corrective action may be warranted, the Rules Counsel shall notify the JAG and take the following action:

(a) in cases involving Marine Corps attorneys not serving as a defense counsel or military judge or attached to Navy units, request the subject attorney's OEGCMJ appoint a covered attorney (normally senior to the covered attorney complained of and not previously involved in the case) to conduct an ethics investigation into the matter;

(b) in cases involving a military trial judge, if practicable, to a covered attorney with experience as a military trial judge (normally senior to the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of reference (b));

(c) in cases involving a military appellate judge, to a covered attorney with experience as a military appellate judge (normally senior to the covered attorney complained of and not previously involved in the case) and assign the officer to conduct an ethics investigation into the matter (see R.C.M. 109 of reference (b)); or

(d) in all other cases, assign a covered attorney (normally senior to the covered attorney complained of and not previously involved in the case) to conduct an ethics investigation.

9. Ethics Investigation

a. When an ethics investigation is initiated, the covered attorney concerned shall be so notified, in writing, by the Rules Counsel. Notice of such action shall also be provided as outlined above in paragraph 6b.

b. The covered attorney concerned will be provided written notice of the following rights in connection with the ethics investigation:

(1) to request a hearing before the investigating officer (IO);

(2) to inspect all evidence gathered;

(3) to present written or oral statements or materials for consideration;

(4) to call witnesses at his or her own expense (local military witnesses should be made available at no cost);

(5) to be assisted by counsel (see subparagraph c below);

(6) to challenge the IO for cause (such challenges must be made in writing and sent to the Rules Counsel via the challenged officer); and

(7) to waive any or all of these rights.

c. The covered attorney may be represented by counsel at the hearing. Such counsel may be:

(1) a civilian attorney retained at no expense to the Government; or,

(2) in the case of a covered USG attorney, another USG attorney:

(a) detailed by the cognizant Naval Legal Service Office (NLSO), Law Center, or Legal Service Support Section (LSSS); or

(b) requested by the covered attorney concerned, if such counsel is deemed reasonably available in accordance with section 0131 of the JAGMAN. There is no right to detailed counsel if requested counsel is made available.

d. If a hearing is requested, the IO will conduct the hearing after reasonable notice to the covered attorney concerned. The hearing will not be unreasonably delayed. The hearing is not adversarial in nature and there is no right to subpoena witnesses. Rules of evidence do not apply. The covered attorney concerned or his or her counsel may question witnesses that appear. The proceedings shall be recorded but no transcript of the hearing need be made. Evidence gathered during, or subsequent to, the preliminary inquiry and such additional

evidence as may be offered by the covered attorney shall be considered.

e. The IO may appoint and use such assistants as may be necessary to conduct the ethics investigation.

f. The IO shall prepare a report which summarizes the evidence, to include information presented at any hearing.

(1) If the IO believes that no violation has occurred or that the violation is minor or technical in nature and warrants only corrective counseling, then he or she may recommend that the file be closed.

(2) If the IO believes that a violation did occur, and that corrective action greater than counseling is warranted, he or she shall:

(a) modify, as necessary, the list of substantiated violations of these Rules or, in the case of a military trial or appellate judge, the Code of Judicial Conduct;

(b) recommend appropriate action; and

(c) forward (via the OEGCMJ in appropriate Marine cases) the ethics investigation to the Rules Counsel with a copy to the attorney investigated.

g. The Rules Counsel shall review all ethics investigations. If the report is determined by the Rules Counsel to be incomplete, the Rules Counsel shall return it to the IO, or to another inquiry officer, for further or supplemental inquiry. If the report is complete, then:

(1) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of the Rules or Code of Judicial Conduct has not occurred and that further action is not warranted, the Rules Counsel shall close the file and notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file.

(2) If the Rules Counsel determines, either consistent with the IO recommendation or through the Rules Counsel's own review of the investigation, that a violation of the Rules or Code of Judicial Conduct has occurred but that the violation is

of a minor or technical nature, then the Rules Counsel may determine that corrective counseling is appropriate and close the file. The Rules Counsel shall report any such decision, to include a brief summary of the case, to the JAG. The Rules Counsel shall ensure that the covered attorney concerned receives appropriate counseling and shall notify the complainant, the covered attorney concerned, and all officials previously notified of the complaint that the file has been closed. JAG(13) and/or JAR, as appropriate, will maintain copies of all correspondence related to the closing of the file. The covered attorney concerned is responsible, under these circumstances, to determine if his or her Federal, state, or local licensing authority requires reporting such action.

(3) If the Rules Counsel believes, either consistent with the IO recommendation or through the Rules Counsel's own review of the inquiry report, that professional disciplinary action greater than corrective counseling is warranted, the Rules Counsel shall forward the investigation, with recommendations as to appropriate disposition, to JAG.

10. Effect of Separate Proceeding

a. For purposes of this paragraph, the term "separate proceeding" includes, but is not limited to, court-martial, non-judicial punishment, administrative board, or similar civilian or military proceeding.

b. In cases in which a covered attorney is determined, at a separate proceeding determined by the Rules Counsel to afford procedural protection equal to that provided by a preliminary inquiry under this instruction, to have committed misconduct which forms the basis for ethics charges under this instruction, the Rules Counsel may dispense with the preliminary inquiry and proceed directly with an ethics investigation.

c. In those cases in which a covered attorney is determined to have committed misconduct at a separate proceeding which the Rules Counsel determines has afforded procedural protection equal to that provided by an ethics investigation under this instruction, the previous determination regarding the underlying misconduct is res judicata with respect to that issue during an ethics investigation. A subsequent ethics investigation based on such misconduct shall afford the covered attorney a hearing into whether the underlying misconduct constitutes a violation of these Rules, whether the violation affects his or her fitness to practice law, and what sanctions, if any, are appropriate.

d. Notwithstanding paragraphs 10(b) and (c) above, the Rules Counsel may dispense with the preliminary inquiry and ethics

investigation and, after affording the covered attorney concerned written notice and an opportunity to be heard in writing, recommend to JAG that the covered attorney concerned be disciplined under this instruction when the covered attorney has been:

(1) decertified or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Judge Advocate General or Chief Counsel of another Military Department;

(2) disbarred or suspended from the practice of law or otherwise subjected to professional responsibility discipline by the Court of Appeals for the Armed Forces or by any Federal, State, or local bar; or

(3) convicted of a felony (or any offense punishable by one year or more of imprisonment) in a civilian or military court which, in the opinion of the Rules Counsel, renders the attorney unqualified or incapable of properly or ethically representing the DON or a client when the Rules Counsel has determined that the attorney was afforded procedural protection equal to that provided by an ethics investigation under this instruction.

11. Action by JAG

a. JAG is not bound by the recommendation rendered by the Rules Counsel, IO, PIO, or any other party, but will base any action on the record as a whole. Nothing in this instruction limits JAG's authority to suspend from the practice of law in DON matters any covered attorney alleged or found to have committed professional misconduct or violated these Rules, either in DON or civilian proceedings, as detailed in this instruction.

b. JAG may, but is not required to, refer any case to the Professional Responsibility Committee for an advisory opinion on interpretation of the Rules or their application to the facts of a particular case.

c. Upon receipt of the ethics investigation, and any requested advisory opinion, JAG will take such action as JAG considers appropriate in JAG's sole discretion. JAG may, for example:

(1) Direct further inquiry into specified areas.

(2) Determine the allegations are unfounded, or that no further action is warranted, and direct the Rules Counsel to make

appropriate file entries and notify the complainant, covered attorney concerned, and all officials previously notified of the complaint.

(3) Determine the allegations are supported by clear and convincing evidence, and take appropriate corrective action including, but not limited to:

(a) limiting the covered attorney to practice under direct supervision of a supervisory attorney;

(b) limiting the covered attorney to practice in certain areas or forbidding him or her from practice in certain areas;

(c) suspending or revoking, for a specified or indefinite period, the covered attorney's authority to provide legal assistance;

(d) finding that the misconduct so adversely affects the covered attorney's ability to practice law in the naval service or so prejudices the reputation of the DON legal community, the administration of military justice, the practice of law under the cognizance of JAG, or the armed services as a whole, that certification under Article 27(b), UCMJ, or R.C.M. 502(d)(3), should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or permanently revoked;

(e) in the case of a judge, finding that the misconduct so prejudices the reputation of military trial and/or appellate judges that certification under Article 26(b), UCMJ, should be suspended or is no longer appropriate, and directing such certification to be suspended for a prescribed or indefinite period or to be permanently revoked; and

(f) directing the Rules Counsel to contact appropriate authorities such as the Chief of Naval Personnel or the Commandant of the Marine Corps so that pertinent entries in appropriate DON records may be made; notifying the complainant, covered attorney concerned, and any officials previously notified of the complaint; and notifying appropriate tribunals and authorities of any action taken to suspend, decertify, or limit the practice of a covered attorney as counsel before courts-martial or the U.S. Navy-Marine Corps Court of Criminal Appeals, administrative boards, as a legal assistance attorney, or in any other legal proceeding or matter conducted under JAG cognizance and supervision.

12. Finality. Any action taken by JAG is final, subject to any remedies afforded by Navy Regulations or any other regulation to the covered attorney concerned.

13. Report to Licensing Authorities. Upon determination by JAG that a violation of the Rules or the Code of Judicial Conduct has occurred, JAG may cause the Rules Counsel to report that fact to the Federal, state, or local bar or other licensing authority of the covered attorney concerned. If so reported, notice to the covered attorney shall be provided by the Rules Counsel. This decision in no way diminishes a covered attorney's responsibility to report adverse professional disciplinary action as required by the attorney's Federal, state, and local bar or other licensing authority.

OUTSIDE PRACTICE OF LAW BY COVERED USG ATTORNEYS

1. Background

a. A covered USG attorney's primary professional responsibility is to the DON, and he or she is expected to devote the required level of time and effort to satisfactorily accomplish assigned duties. Covered USG attorneys engaged in the outside practice of law, including while on terminal leave, must comply with local bar rules governing professional responsibility and conduct and obtain proper authorization from JAG as required by paragraph 13 and Rule 5.5 of this instruction.

b. Outside employment of DON personnel, both military and civilian, is limited by references (a) through (c). A covered USG attorney may not provide compensated legal services, while working in a private capacity, to persons who are eligible for legal assistance, unless specifically authorized by JAG. See Rule 1.5. Because of the appearance of misuse of public office for private gain, this prohibition is based upon the status of the proposed client and applies whether or not the services provided are actually available in a DON/DOD legal assistance office.

c. Additionally, DON officers and employees are prohibited by 18 U.S.C. § 209 from receiving pay or allowances from any source other than the United States for the performance of any official service or duty unless specifically authorized by law. Furthermore, 18 U.S.C. §§ 203 and 205 prohibit Federal officers and employees from personally representing or receiving, directly or indirectly, compensation for representing any other person before any Federal agency or court on matters in which the United States is a party or has an interest.

d. These limitations are particularly significant when applied to covered USG attorneys who intend to engage concurrently in a civilian law practice. In such a situation, the potential is high for actual or apparent conflict arising from the mere opportunity to obtain clients through contacts in the course of official business. Unique conflicts or adverse appearances may also develop because of a covered USG attorney's special ethical responsibilities and loyalties.

2. Definition

a. Outside part-time law practice is defined as any provision of legal advice, counsel, assistance or representation, with or without compensation, that is not performed pursuant or incident to duties as a covered USG attorney (including while on

terminal leave). Occasional uncompensated assistance rendered to relatives or friends is excluded from this definition (unless otherwise limited by statute or regulation). Teaching a law course as part of a program of education or training offered by an institution of higher education is not practicing law for purposes of this instruction.

b. The requirement to seek permission prior to engaging in the outside practice of law does not apply to non-USG attorneys, or to Reserve or Retired judge advocates unless serving on active-duty for more than 30 consecutive days.

3. Policy

a. As a general rule, JAG will not approve requests by covered USG attorneys to practice law part-time in association with attorneys or firms which represent clients with interests adverse to DON.

b. JAG's approval of a particular request does not constitute DON certification of the requesting attorney's qualifications to engage in the proposed practice or DON endorsement of activities undertaken after such practice begins. Furthermore, because any outside law practice is necessarily beyond the scope of a covered USG attorney's official duties, the requesting attorney should consider obtaining personal malpractice insurance coverage.

4. Action

a. Covered USG attorneys, who contemplate engaging in the outside practice of law, including while on terminal leave, must first obtain approval from JAG. Requests should be forwarded in the form prescribed below to JAG (Code 13) or JAR, as appropriate, via the attorney's chain of command.

b. The requesting attorney's commanding officer may:

(1) disapprove and return the request if he or she perceives actual or apparent conflicts of interests;

(2) recommend disapproval of the request and forward it, along with his or her rationale for such a recommendation; or

(3) forward the request recommending approval and providing such other information as may be relevant.

c. JAG will review the request and advise applicants in writing of the decision, and of any conditions and limitations under which a particular practice may be undertaken. Until

permission is granted, applicants will not commence any outside law practice.

5. Revalidation

a. Covered USG attorneys to whom permission is given to engage in the outside practice of law will notify JAG in writing, via their chain of command, within 30 days of any material change in:

(1) the nature or scope of the outside practice described in their requests, including termination, or

(2) their DON assignment or responsibilities.

b. Covered USG attorneys to whom permission is given to engage in the outside practice of law will annually resubmit an application to continue the practice, with current information, by 1 October each year.

OUTSIDE LAW PRACTICE QUESTIONNAIRE AND REQUEST

DATE

From: (Attorney Requesting Outside Practice of Law)
To: Deputy Assistant Judge Advocate General (Administrative Law)/ Head, Judge Advocate Research and Civil Law Branch, Judge Advocate Division

Via: (Chain of Command)

Subj: OUTSIDE PRACTICE OF LAW REQUEST ICO (Name of attorney)

1. Background Data

a. Name, rank/pay grade:

b. Current command and position:

c. Description of duties and responsibilities (including collateral duty assignments):

d. Describe any DON responsibilities which require you to act officially in any way with respect to any matters in which your anticipated outside employer or clients have interests:

e. Normal DON working hours:

2. Proposed Outside Part-Time Law Practice Information

a. Mailing address and phone number:

b. Working hours:

c. Number of hours per month:

d. Description of proposed practice (indicate the type of clientele you anticipate serving, as well as the type of work that you will perform):

e. Describe whether you will be a sole practitioner, or collocated, renting from, or otherwise affiliated or associated in any matter with other attorneys:

f. Describe, in detail, any anticipated representation of any client before the United States or in any matter in which the United States has an interest:

g. Describe the manner in which you will be compensated (hourly, by case, fixed salary, and how much of your fees will be

related in any way to any representational services before the Federal Government by yourself or by another):

h. Provide a description of any military related work to which your proposed practice may be applied including, but not limited to, courts-martial, administrative discharge boards, claims against DON, and so forth:

3. Attorneys With Whom Outside Practice is/will be Affiliated, Collocated, or Otherwise Associated

a. Identify the type of organization with which you will be affiliated (sole practitioner, partnership, and so forth), the number of attorneys in the firm, and the names of the attorneys with whom you will be working:

b. Identify the attorneys in the firm who are associated in any way with the military legal community (e.g., active, Reserve, or retired judge advocate), and specify their relationship to any of the military services:

c. Identify the nature of your affiliation with the organization with which you intend to be associated (staff attorney, partner, associate, space-sharing, rental arrangement, other):

d. Provide a brief description of the type of legal practice engaged in by the organization with which you intend to affiliate, including a general description of the practice, as well as the clientele:

e. Describe the clientele who are military personnel or their dependents, and the number and type of cases handled:

f. Describe whether your affiliates will refer clients to you, and the anticipated frequency of referral:

g. Describe:

(1) whether your associates will assist or represent clients with interests adverse to the United States or in matters in which the United States has an interest:

(2) those clients, matters, and interests in detail:

(3) what support will you provide in such cases:

(4) what compensation, in any form, that you will receive which is related to such cases:

4. Desired Date of Commencement of Outside Practice.

a. Identify if this is your first request or an annual submission for re-approval:

b. If this is an annual submission, indicate when your outside practice began:

c. If this is your first request, indicate when you wish to begin your part-time practice:

5. Conflicts of Interest and Professional Conduct. (Include the following statement in your request)

"I certify that I have read and understand my obligations under enclosure (3) to JAGINST 5803.1C, DOD 5500.7-R, Joint Ethics Regulation, JAGMAN Chapter VII, the Legal Assistance Manual, and Title 18, U.S.C. §§ 203, 205, and 209. I certify that no apparent or actual conflict of interests or professional improprieties are presented by my proposed initiation/ continuation of an outside law practice. I also certify that if an apparent conflict of interest or impropriety arises during such outside practice, I will report the circumstances to my supervisory attorney immediately."

6. Privacy Act Statement. I understand that the preceding information is gathered per the Privacy Act as follows:

Authority: Information is solicited per Executive Order 12731 and DOD 5500.7-R.

Principal purpose: To determine whether outside employment presents conflicts of interest with official duties.

Routine use: Information will be treated as sensitive and used to determine propriety of outside employment.

Disclosure: Disclosure is voluntary. Failure to provide the requested information will preclude the Judge Advocate General from approving your outside part-time practice of law request.

Signature

RELATIONS WITH NON-USG COUNSEL

1. Employment of a non-USG attorney by an individual client does not alter the responsibilities of a covered USG attorney to that client.

a. When a non-USG attorney is retained by an individual client, the covered USG attorney detailed or otherwise assigned to that client shall inform the civilian attorney:

(1) of the contents of this instruction;

(2) that these Rules apply to civilian counsel practicing before military tribunals, courts, boards, or in any legal matter under the supervision of JAG as a condition of such practice; and

(3) that the Rules take precedence over other rules of professional conduct that might otherwise apply, but that the attorney may still be subject to rules and discipline established by the attorney's Federal, state, or local bar association or other licensing authority.

b. If an individual client designates a non-USG attorney as chief counsel, the detailed USG attorney must defer to civilian counsel in any conflict over trial tactics. If, however, the attorneys have "co-counsel" status, then conflict in proposed trial tactics requires the client to be consulted to resolve the conflict.

c. If the non-USG attorney has, in the opinion of the involved covered USG attorney, acted or failed to act in a manner which is contrary to the Rules, the matter should be brought to the attention of the civilian attorney. If the matter is not resolved with the civilian counsel, the covered USG attorney should discuss the situation with the supervisory attorney. If not resolved between counsel, the client must be informed of the matter by the covered USG attorney. If, after being apprised of possible misconduct, the client approves of the questioned conduct, the covered USG attorney shall attempt to withdraw from the case in accordance with Rule 1.16. The client shall be informed of such intent to withdraw prior to action by the covered USG attorney.