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### The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers

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in cases of indebtedness owed the United States. Services under such contracts may extend to collection of claims through litigation. The Attorney General is directed to make his best efforts to enter into contracts with firms owned or controlled by socially and economically disadvantaged individuals, to allow agencies to meet their statutory goal of referring ten percent of all amounts of claims submitted to private counsel to socially and economically disadvantaged firms. The amendments also direct the Attorney General to provide Congress an annual report on Department of Justice activities to recover debts owed the United States that were referred to the Department for collection.

## Conclusion

We hope this article will serve as a reference tool to aid field attorneys in staying current in subjects relating to acquisition law. We expect developments to continue at a rapid pace throughout 1987. We will continue our efforts to keep you informed through publication of contract law notes in the TJAGSA Practice Notes section of *The Army Lawyer* as these changes occur.

## The Proposed Rules of Professional Conduct: Critical Concerns for Military Lawyers

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They started slowly. But state by state, with increasing momentum, the new Model Rules of Professional Conduct have begun to displace the Code of Professional Responsibility.<sup>1</sup> The Department of the Army and the other uniformed services now must decide which set of standards will govern military lawyers in the future. This article summarizes the evolution of the new Rules and identifies salient issues arising from application of the Rules in a military environment.

### Back to the Future: A Glimpse of History

In 1836, Baltimore practitioner David Hoffman published "Fifty Resolutions" containing standards of lawyer behavior. Two decades later, in 1854, George Sharswood, Dean of the University of Pennsylvania Law School and eventual Chief Justice of the Pennsylvania Supreme Court, delivered a series of lectures on legal ethics. These lectures formed the basis of the Canons of Professional Ethics adopted by the Alabama State Bar Association in 1887. The Canons, in turn, were adopted with modifications by the American Bar Association (ABA) in 1908.

The Canons contained aspirational statements about lawyers and law practice. By the 1960s, aspirations alone had proven unsatisfactory as tools to regulate lawyer conduct. The Canons suffered from excess generality and ambiguity, causing Professor Anthony Amsterdam to opine that they provided lawyers with as much useful guidance in their work as a valentine would furnish a heart surgeon.<sup>2</sup>

In 1964, ABA President Lewis F. Powell, Jr., appointed a special committee to develop standards "capable of enforcement."<sup>3</sup> Powell's Committee on Evaluation of Professional Standards authored the Model Code of Professional Responsibility. The Code was approved by the ABA House of Delegates in 1970, and soon was adopted by jurisdictions throughout the United States. The Department of the Army adopted the Code by regulation, applying it to all judge advocates as well as to other lawyers involved in court-martial proceedings.<sup>4</sup> To make the standards of conduct more readily enforceable, the Code coupled "Ethical Considerations" (ECs) with "Disciplinary Rules" (DRs). The DRs provided grounds to impose sanctions for professional misconduct. The ECs, retaining the flavor of the former Canons, were described in the Code as "aspirational in character, represent[ing] the objectives toward which every member of the profession should strive."

The Code had been in existence less than a decade when a movement began to modify or to abolish it. The Code's schizoid presentation of DRs and ECs created confusion as to what was enforceable and what was not. Some states arguably distorted the Code by adopting the DRs without the ECs. Moreover, neither the DRs nor the ECs covered many practical questions encountered in the practice of law. These questions were addressed by "ethics opinions" of the ABA and of the adopting jurisdictions. The opinions varied considerably in content, quality, and accessibility.

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<sup>1</sup> During 1983 and 1984, only two states substantially adopted the Model Rules. From January, 1985, through December, 1986, however, several more states followed suit and the bar associations of other additional states recommended similar action. The jurisdictions where the new Rules now stand approved entirely or in principle, by court rule or legislation, are New Jersey, Arizona, Delaware, Montana, Minnesota, Missouri, Washington, Arkansas, Nevada, New Hampshire, North Carolina, Maryland, New Mexico, Connecticut, Florida, and Idaho.

<sup>2</sup> *Time Magazine*, May 13, 1966, at 81, cited in Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 Am. B. F. Res. J. 939, 939 (1980).

<sup>3</sup> Armstrong, *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978).

<sup>4</sup> See Dep't of Army, Reg. No. 27-1, Legal Services—Judge Advocate Legal Services para. 5-3 (1 Aug. 1984) ("all JAs and civilian attorneys of the JALS"); Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, para. 5-8 (1 July 1984). ("military judges, counsel and clerical personnel of Army courts-martial").

In 1977, the ABA created another committee, the Commission on Evaluation of Professional Standards. This body came to be known as the "Kutak Commission," in honor of its chairman, the late Robert J. Kutak, a lawyer from Omaha, Nebraska. During 1980 and 1981, the Kutak Commission issued a "discussion draft," followed by a "tentative draft," of proposed new Model Rules of Professional Conduct. After a spirited—and, in some instances, acrimonious—response from state and local bars, as well as from special interest organizations, practitioners, and professors, the Committee prepared a revised "final draft" in 1982. The draft was adopted, with further amendments, by the ABA House of Delegates in 1983.

In 1984, a working group drawn from the various uniformed services studied the feasibility of adopting the new ABA Rules in the military. The group prepared, and forwarded to The Judge Advocate General of each service, a proposed set of Rules corresponding to the ABA model, with modifications deemed appropriate to military needs and situations. The proposed military Rules now await action by the services.

During their evolution, the ABA and military Rules have come to differ from the existing Code in three fundamental respects. First, the *structure* is different. The existing Code is organized around broad statements of ethical aspirations carried over from the old Canons of Ethics. The proposed Rules are organized by specific professional functions and relationships—e.g., the lawyer-client relationship, the lawyer as a counselor, the lawyer as an advocate, etc. This structure now pervades the current literature on professional standards.<sup>5</sup>

The second fundamental difference is *substantive*. The proposed Rules explicitly provide, while the existing Code scarcely recognizes, that lawyers today are not merely representatives of their clients. They also are officers of the legal system and public citizens with special responsibilities for the fair resolution of disputes and the effective administration of justice. The Rules acknowledge that many ethical problems arise not from dishonesty but from the conflicting demands placed upon lawyers by these competing roles. The Rules laudably undertake to resolve such conflicts by striking balances or assigning priorities among the role requirements. Although the Rules may accomplish this daunting task imperfectly, they still provide more comprehensive and useful guidance than does the Code.

The third difference relates to *enforcement*. The proposed Rules define minimum acceptable behavior. They are not aspirational. As one distinguished commentator has noted:

The Model Rules . . . represent the culmination of a historical process that began a century and a half ago: the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if

at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach.<sup>6</sup>

Some might say this is a melancholy comment on the legal profession. It signifies that lawyers are not unique; they, like everyone else, need specific rule rather than lofty goals to guide their behavior. Others would say that the new Rules are realistic in this regard and may be more effective in producing ethical conduct than were its aspirational predecessors.

#### Whose Rules Apply? Questions and Caveats about Jurisdiction

The proposed military Rules undertake not only to address the competing roles that lawyers play, but also to prescribe standards broadly applicable to diverse categories of lawyers who populate the military legal system. "Military lawyers" include: judge advocates serving a command; legal assistance officers engaged in office practice or, where permitted, representing soldiers in civilian courts;<sup>7</sup> Reservists performing a variety of tasks on temporary duty; civilian attorneys who practice law under the disciplinary control of The Judge Advocate General; and civilian attorney representing soldiers before military tribunals. The difficulties of balancing and assigning priorities to competing roles are greatly increased by the heterogeneous characteristics of the role players. These difficulties are illustrated by the question of disciplinary jurisdiction.

Proposed military Rule 8.5 is disarmingly straightforward. It simply states, "Lawyers shall be governed by these Rules of Professional Conduct." On the surface, this language does not seem to conflict with the ABA's Model Rule 8.5: "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The comments appended to the Rules, however, disclose that the underlying policies are profoundly different.

Although the ABA and military comments both recognize the concurrent jurisdiction of disciplinary authorities, the military comment declares that the military standards of conduct shall govern. "To the extent that these Rules conflict with a lawyer's obligations under the licensing jurisdiction's ethical standards, these Rules are controlling."<sup>8</sup> In contrast, the ABA's comment genuflects toward pluralism among the states and toward comity between the states and the federal government:

If the Rules of Professional Conduct in . . . two jurisdictions differ, principles of conflict of laws may apply. . . . [T]he general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

<sup>5</sup> See, e.g., C. Wolfram, *Modern Legal Ethics* (1986); ABA/BNA *Lawyers' Manual on Professional Conduct* (1984 and supplements) [hereinafter *Lawyers' Manual*]. The structure of the Rules also has proven beneficial in a practical sense. In Idaho and Nevada—two states with which the author is personally familiar—disciplinary bar counsel found the organization of the ABA's new Rules so plainly superior to the Code that they regularly employed the Rules as a research aid even before the Rules were substantively adopted.

<sup>6</sup> Schwartz, *The Death and Regeneration of Ethics*, 1980 Am. B. Found. Res. J. 953, 953-54 (1980).

<sup>7</sup> Criteria governing practice in civilian courts are set forth in Dep't of Army, Reg. No. 27-3, *Legal Services—Legal Assistance*, paras. 2-5 and 2-6 (1 Mar. 1984).

<sup>8</sup> The comments to the Rule advise that state or federal ethical rules will be followed when lawyers are practicing in state or federal civilian courts *during these civilian court proceedings*.

The ABA Rule and its comment invite criticism for begging the question of how a lawyer should proceed when faced with inconsistent standards. The ABA's invocation of "principles of conflict of laws" simply tells the lawyer that he or she must guess which of the jurisdictional authorities has the most significant relationship to the lawyer and his or her conduct.<sup>9</sup> The military rule and its comment seemingly avoid such uncertainty by propounding a bright line requirement: never stray from the military standard.

The sharp clarity of the military approach is intuitively appealing. A tension may exist, however, between proclaiming, on one hand, that military standards of conduct prevail over conflicting state standards, but, on the other hand, making possession of a valid state license a requirement to become a judge advocate or to represent clients before military tribunals. Suppose a lawyer represents a soldier before a court-martial located in the lawyer's state of licensure. During the representation, the lawyer performs an act mandated by military standards but prohibited by state standards. The allegedly aggrieved client files a complaint with the state's disciplinary authority, claiming that a condition of the lawyer's license has been violated. Will the state investigate? If so, is the security afforded by the clear language of military Rule 8.5 simply an illusion?

A state might decline to investigate if it is persuaded that the lawyer's conduct, having been authorized by a federal regulation, is insulated from state intrusion by the preemption doctrine. The United States Supreme Court has held, in *Capital Cities Cable, Inc. v. Crisp*,<sup>10</sup> that the preemption doctrine applies to federal regulations as well as to federal statutes. The doctrine logically cannot apply with greater force to regulations than to statutes, however. Preemptive force is not ascribed to statutes unless Congress specifically expresses its intent to displace state law or congress legislates so pervasively in the subject area that its intent to occupy the entire field is manifest.<sup>11</sup>

Can it fairly be said that Congress has evinced an intent to displace, or an intent that The Judge Advocates General displace, the states' traditional power to license lawyers—particularly those who eventually choose to practice in the military or before military tribunals? Are The Judge Advocates General acting as though they have been so charged? The answers to these questions are unclear. Indeed, the entire issue of federal administrative regulation of lawyer conduct has sparked widespread controversy.<sup>12</sup>

As a practical matter, it is unlikely that a state would challenge the power of a uniformed service to prescribe and enforce standards relating solely to representation of soldiers by service-employed (albeit state-licensed) lawyers in matters before military tribunals. Neither is a state likely to concern itself with practice outside the state that complies with rules of the foreign jurisdiction.<sup>13</sup> The state may resist, however, if the uniformed service seek broadly to displace the state's standards governing all aspects of an

attorney-client relationship in that state between a civilian attorney and a soldier whom he or she represents before a military tribunal, or the relationship in that state between a service-employed lawyer and a soldier whom he or she represents in a civilian court.

Nevertheless, on a case-by-case basis, the state might be persuaded to defer to a military standard of conduct for another reason. Applying the "conflict of laws" approach embodied in the ABA Model Rule, the state might conclude that the military had a more significant relationship with the lawyer and with the conduct in question. The state could reach this conclusion in light of important policies underlying the military standards and the desirability of maximizing the predictability of rules that govern military lawyers' conduct. Moreover, state disciplinary authorities, who are typically understaffed and overworked, might be reluctant to accept the burden of a case colored by the prospect of litigation with a federal agency over a threshold question of jurisdiction.

If a particularly important state policy were at stake, however, a lawyer governed by the military rules would risk an inquiry by state authorities into his or her conduct. The risk would be analogous to the uncertainty the lawyer would have faced if the military had written the ABA's "conflict of laws" approach into Rule 8.5 at the outset. Consequently, the difference between the ABA and military Rules on jurisdiction may be more apparent than real.

#### Matters of Substance: Confidentiality, Conflicts, and Organizations

If proposed Rule 8.5 were to prove unsuccessful in preventing states from investigating complaints against military lawyers, the differences between state and military standards of conduct could become critically important. Although such differences exist in many substantive areas, no topics affect a lawyer's work more fundamentally than confidentiality, conflicts of interest, and the needs of organizational clients.

#### Confidentiality

At common law, as well as by statute and court rule, communications between lawyer and client have been treated as privileged.<sup>14</sup> From this evidentiary doctrine has grown a corollary that the lawyer, as the client's representative, is required to maintain the confidentiality of all communications, disclosing only what the client expressly or impliedly authorizes. As an officer of the legal system and as a public citizen, however, the lawyer arguably has a separate duty to prevent perjury, fraud, or other harm to society.

Three broad approaches to the choice of values between client confidentiality and third-party and other social interests are discernible. First, confidentiality

<sup>9</sup> The "most significant relationship" test is articulated and explained in the Restatement (Second) of the Conflict of Laws (1969).

<sup>10</sup> 467 U.S.C. 691 (1984).

<sup>11</sup> *Michigan Cannery v. Agricultural Board*, 467 U.S. 461 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul* 373 U.S. 132 (1963).

<sup>12</sup> See generally C. Wolfram, *supra* note 5, at 143-44.

<sup>13</sup> See, e.g., Maryland State Bar Ass'n Comm. on Ethics, Opinion No. 86-28, reported in *Lawyers' Manual*, *supra* note 5, at 1122-23 (1986 Supp.). The Committee declared that conduct in another jurisdiction by a Maryland-licensed attorney, consistent with standards of that jurisdiction although inconsistent with those of Maryland, raised no ethical issue in Maryland.

<sup>14</sup> A typical formulation of the attorney-client privilege is found in 8 J. Wigmore, *Evidence* § 2292, at 554 (J. McNaughton rev. ed. 1961).

could be raised from doctrine to overriding principle, such that a lawyer would always be required to protect a client's interests regardless of impacts on third parties. That would treat the values of confidentiality and the adversary system as absolutes and would require defense of the implied proposition that their social or other values are uniformly superior to those of competing interests and proposed resolutions. Second, and conversely, third-party and other social interests could be made predominant, so that interests of client confidentiality and loyalty would have to yield uniformly in instances of client wrongdoing. A third, much more complex approach would be to develop criteria or categories that attempt to differentiate instances in which either client interests or public interests are to be given preference. To a large extent, the variegated treatment of disclosure problems in the 1969 Code and the 1983 Model Rules reflects such a sophisticated approach.<sup>15</sup>

What does "variegated treatment" mean in the real world? Suppose a client insists on committing perjury, undertakes a fraud, or threatens physical harm to someone else. What should the lawyer do? As to perjury or fraud, the existing Code has furnished little help. DR 7-102(A) states that the lawyer shall not "knowingly use perjured testimony or false evidence." the same DR further states that a lawyer shall reveal a "perpetrated" fraud (saying nothing about a contemplated future fraud). Unfortunately, what little guidance DR 7-102(A) gives, DRs 4-101(B) and (C) may take away. They provide that a lawyer's right to make corrective disclosures does not extend to "confidences" of the client. "Confidences," as opposed to "secrets," are broadly defined as all communications protected by the lawyer-client privilege. As to other kinds of harm, DR 4-101(C)(3) states that a lawyer "may" reveal the client's intent "to commit a crime, and the information necessary to prevent the crime." This disclosure apparently is not subject to the "confidences" exception of DR's 4-101(B) and (C).

The Code has been criticized for ambiguities lurking in the terms "confidences" and "crimes," and for prohibiting the use of perjury without taking account of how difficult it is to ascertain whether proffered testimony is false. To achieve greater clarity, the new ABA Model Rules abolish any distinction between "confidences" and other communications. Broadly speaking, Rule 1.6 protects from disclosure any information relating to the lawyer's representation of the client, except as the client may authorize. Rule 3.3 qualifies this sweeping proposition by providing that a lawyer "shall" refuse to offer evidence he or she "knows" to be false and that the lawyer "may" refuse to offer evidence he or she "reasonably believes" to be false. Rule 1.6 contains a further exception. The lawyer "may" reveal information to prevent the client from committing "a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." The Model Rules contain no exception for fraud or nonphysical harm;

consequently, such disclosure without the client's consent is prohibited.

Although the ABA Model Rules may be clearer than the Code, not everyone has agreed with the clarification. The provision in Rule 3.3 concerning false evidence has been criticized on one hand as going too far, and on the other as not going far enough, in preventing perjury. The United States Supreme Court may have muted some criticism about going too far in *Nix v. Whiteside*.<sup>16</sup> The Court there held that a criminal defendant's right to effective assistance of counsel did not oblige the lawyer to cooperate in presenting perjured testimony. Thus any concern that Rules 1.6 and 3.3 would conflict with a constitutional right in criminal cases seems to have been alleviated.

The subjects of fraud and other harm have generated louder debate. In 1980, the Kutak Commission's "discussion draft" would have *required* disclosure to prevent criminal acts likely to result in death or serious physical harm, and would have *allowed* disclosure to prevent fraud or other nonphysical harm. In 1981, the "tentative draft" was watered down to provide that both kinds of disclosure would be merely *allowed*. Nevertheless, some national organizations of general practitioners and trial lawyers were dissatisfied. They felt that even the 1981 version encroached too far upon client confidentiality. They urged that disclosures relating to death or serious physical harm merely should be *allowed* and that disclosures of fraud and criminal acts against property or financial interests should be *prohibited*. After a close and sharply divided vote, the ABA House of Delegates ultimately adopted this position. The language of Model Rule 1.6 reflects the outcome.

Many states have disagreed. Even among jurisdictions that have adopted the ABA Rules in substance, several have departed from Rule 1.6 by mandating disclosure of threatened death or serious physical harm, or by permitting disclosure of fraud or other kinds of nonphysical harm.<sup>17</sup>

Drafters of the proposed military Rules have charted their own path away from Model Rule 1.6. The military version of the rule echoes the 1980 Kutak draft by *requiring* disclosure of client information "to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." This mandatory duty also extends to information concerning a "significant and imminent impairment of national security or to the readiness or capability of a military unit, vessel, aircraft, or weapon system." Like its ABA counterpart, military Rule 1.6 contains no authorization, mandatory or permissive, to reveal a fraud or other kinds of nonphysical harm.<sup>18</sup>

The military and ABA versions of Rules 1.6 undertake to balance the value of free and protected communication between lawyer and client against the social cost of

<sup>15</sup> C. Wolfram, *supra* note 5, at 665-66.

<sup>16</sup> 106 S. Ct. 988 (1986).

<sup>17</sup> Summaries of state action on the ABA Rules are contained in the Lawyers' Manual, *supra* note 5.

<sup>18</sup> In both the ABA and the military versions, Rule 3.3 carves out a narrow exception to the general prohibition against disclosing a fraud. Rule 3.3 provides, in part, that a lawyer "shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client." (Emphasis added.) On a related point, Rule 1.2(d) provides that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent."

nondisclosure where harm ultimately occurs. This balancing approach presents two problems for the military lawyer. First, the military Rules may strike one balance while state standards may strike another—or several others. Suppose a legal assistance officer representing a soldier discovers that the client has perpetrated a fraud upon a third party. If the state's standards follow the existing Code, or if the state has adopted the ABA Rules with a modification permitting disclosure of fraud, then the lawyer could make a disclosure and take remedial action. But the lawyer could not do so under the proposed military Rule. As the lawyer attempts to reconcile this conflict, he or she will find that his or her conduct is dictated by the least flexible standard. Because the proposed military Rule is rigid—mandating some disclosure, prohibiting others, and leaving nothing to discretion—it invariably will prevail over any state standard merely permitting disclosure. Permissive rules are offended neither by disclosure nor by nondisclosure. They yield to the force of mandates and prohibitions. Thus, in the example, given, the military Rule will prevail and the lawyer will choose not to disclose the perpetrated fraud.

Although some lawyers may chafe at this result, at least the problem of choice is clearly resolved. A second, more vexing problem may be harbored by the military Rule itself. When is an act "likely to result in imminent death or substantial bodily harm"? Just what is a "significant and imminent impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system"? Differing interpretations of these phrases would evoke little concern if disclosures were merely permissive. But under the military Rule, disclosures are either mandatory or prohibited. The interpretation controls the outcome.

Consequently, military lawyers in the future may find it necessary to decide whether a soldier's expressed desire to "get even" with his estranged spouse is a threat to do "substantial bodily harm." Or a soldier with a highly specialized, weapons-related military occupational specialty may tell his lawyer that he will be temporarily absent without leave in order to resolve a personal problem. Does this information relate to a "significant and imminent impairment of national security or the readiness or capability of a . . . weapons system"? The comments to the proposed military Rule contain no illustrative fact patterns or other specific guidance to help resolve such questions.

This does not mean that mandatory disclosure was mistakenly written into the military version of Rule 1.6. Required disclosure may represent an appropriate weighing of the value of confidentiality against the unique risks of harm found in a military environment. The Rule and its present comment, however, will subject military lawyers to determinations after the fact concerning the propriety of their conduct. That, ironically, is one of the evils that led to disaffection with the existing Code.

#### *Conflicts and imputed disqualification*

Rules prohibiting conflicts of interest arise from two fundamental principles in lawyer-client relationships: confidentiality and loyalty. The Code currently provides, in DRs 5-101(A) and 5-105(C), that a lawyer shall not accept employment if the exercise of his other professional judgment on behalf of the client is reasonably likely to be

adversely affected by the differing interests of other clients or by the lawyer's own personal interests—*unless* the client consents after full disclosure. The ABA's Model Rule 1.7 strengthens the safeguard against conflicting interests by requiring that the client give consent after full disclosure *and* that the lawyer "reasonably" believe the client's interests will not be adversely affected. The proposed military Rule is the same. In one important application of the safeguard against conflicts, however, the ABA and the military diverge. That area is imputed disqualification.

Lawyers practicing together are in a poor position to give the world assurance that one lawyer is not for many purposes the alter ego of the other. Ties of friendship and finance and ready access to each other's files unite their efforts and interests. . . . In recognition of such realities, common law doctrine and professional codes have developed rules that impute to associated lawyers the conflict of interest disabilities of each other. In general, if a lawyer is disabled by a conflict, his or her partners and associates are similarly disabled. Yet, once under way, an "imputed disqualification" rule can gather relentless momentum and be given senseless applications. Courts accordingly have been alert to confine the operation of the imputed-disqualification doctrine to situations that are likely to present substantial risks that the principles of confidentiality and loyalty will be seriously impaired.<sup>19</sup>

Notwithstanding this admonition, the ABA's Model Rule 1.10 flatly provides that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [rules relating to general conflict of interest, prohibited transactions, former clients or functioning as an intermediary]."

This language embodies a judgment that conflicts of interest cannot be avoided realistically by anything less than a blanket rule of imputed disqualification.

In contrast, proposed military Rule 1.10 states that "[l]awyers 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." The comment accompanying the military Rule elaborates:

The principle of imputed disqualification is not automatically controlling for judge advocates. The knowledge, actions, and conflicts of interest of one lawyer are not to be imputed to another simply because they operate from the same office. . . . Whether a lawyer is disqualified requires a functional analysis of the facts in a specific situation. The following considerations are involved: preserving confidentiality, maintaining independence of judgment, and avoiding positions adverse to a client. . . . It is recognized that the circumstances of military service may require representation of opposing sides by military lawyers from the same 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.

<sup>19</sup>C. Wolfram, *supra* note 5, at 391.

The military Rule embodies a pragmatic compromise. Recognizing that lawyers' services are finite resources, the Rule eschews the ABA's emphasis upon outward assurances of loyalty and confidentiality in favor of specific determinations as to whether infringements upon loyalty or confidentiality actually exist. Because the information necessary to make such determinations ordinarily is available only to the lawyer, the client has a scant basis to question the lawyer's decision.

The rationale underlying the military Rule and its comment plainly suits the limited capabilities of many staff judge advocate (SJA) and legal assistance offices, particularly those at small installations and overseas sites. But it is less clear that the rationale fits a soldier's relationship with a Reserve Component lawyer providing extended legal assistance, or with a civilian lawyer representing the soldier before a military tribunal. The law practices of these attorneys are not finite government resources in the same sense as SJA and legal assistance offices. There may be no pragmatic need to provide the soldier clients of these lawyers any less assurance of loyalty and confidentiality than their civilian clients would receive.

The uncertain status of Reservists and civilian lawyers under proposed Rule 1.10 could lead to imposition of differing demands by the military and by the states. In such event, as we have seen in the foregoing discussion of confidentiality, the lawyer will find his or her conduct dictated by the least flexible rule. In cases of imputed disqualification, however—unlike cases involving disclosure of confidential information—the states rather than the military are likely to possess the dominant standard. The Code and the Model Rule mandate disqualification when an affiliated lawyer is impaired by a conflict. The military Rule neither mandates nor prohibits disqualification; it is not necessarily offended by a decision in a particular case to refuse employment by the client. Accordingly, Reservists and civilian attorneys seeking to satisfy both state and military standards may find it expedient to adhere to the imputed disqualification doctrine as though it had been preserved in the military Rule.

### *The Organizational Client*

The paradigm lawyer-client relationship exists between two individuals. The face of law practice is changing rapidly, however. A recent survey has indicated that approximately two-thirds of all lawyers work within organizations of some sort, and perform the bulk of their services for entities rather than individuals.<sup>20</sup>

In a substantial amount of legal practice, "the client" is not the "person with a problem" traditionally depicted in legal literature, but an organization with indeterminate or potentially conflicted interests. So too, the attorney often is not an independent moral agent but an employee with circumscribed responsibility, organizational loyalty, and attenuated client contact.<sup>21</sup>

The existing Code does not contain, in its DRs, a standard governing the conduct of a lawyer toward an

organizational client. Ethical Consideration 5-18, however, states that a "lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a . . . person connected with the entity." The ABA's new Model Rule 1.13 explicitly deals with organizational clients, reemphasizing the basic precept that the lawyer's client is the entity itself.

The critical question faced by lawyers representing entities is what to do if a person in authority within the organization acts, or intends to act, contrary to the organization's legal interests. Model Rule 1.13 provides no discrete answer. It offers guidelines, some of which narrow the lawyer's ethical responsibility. The lawyer need be concerned with the aberrant individual's conduct only if it relates to the subject matter of the lawyer's representation of the entity. Moreover, the lawyer must determine whether the individual's conduct is "a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization."<sup>22</sup>

If these tests are satisfied, then the lawyer must "proceed as is reasonably necessary in the best interest of the organization." The remedial measures a lawyer may undertake include requesting the individual to reconsider his or her conduct; advising the individual to seek another legal opinion; referring the matter to "higher authority" in the organization; and, as a last resort, terminating the lawyer-client relationship with the organization. Prominently omitted from the laundry list of permissible remedies is "whistle-blowing"—disclosure of information to outside parties in order to prevent the individual from harming the organization. Authority to blow the whistle was contained in the Kutak Committee's 1980, 1981 and 1982 drafts, but it was excised, and the lawyer's option to resign was inserted, by the ABA's House of Delegates.

The proposed military version of Rule 1.13 also discourages "whistle-blowing" by impliedly prohibiting disclosures to persons outside the uniformed service unless authorized by Rule 1.6. The military Rule retains many of the ABA's guidelines narrowing the circumstances in which the lawyer must be concerned with individual misconduct, and it lists the remedial measures available. Among these measures is the option to refer the matter to higher authorities in the Army. Military lawyers are encouraged to voice their concerns through supervisory judge advocate channels rather than directly employing the non-legal chain of command to resolve the perceived problem. The proposed military rule also expressly recognizes the lawyer's alternative of terminating the representation. The military rule is essentially coextensive with the ABA version.

Rule 1.13 represents a fragile consensus on minimum standards in a rapidly evolving area of professional responsibility. If the Rule seems more precatory than prescriptive, it illustrates the difficulty of distilling specific standards of conduct from general principles. As the early Canons, the present Code, and the new Rules show, this is the never-ending but ennobling task of a profession that takes ethics seriously and tries to bring its behavior closer to its aspirations.

<sup>20</sup> B. Curran, *The Legal Professions of the 1980s: Selected Statistics From the 1984 Lawyer Statistical Report* (1984).

<sup>21</sup> Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 590 (1985).

<sup>22</sup> Model Rules of Professional Conduct Rule 1.13 (Discussion Draft 1983) (emphasis added).