

“Defending Those Who Defend America”:¹ Avoiding Conflicts of Interest in Order to Provide an Ethical and Effective Defense

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Introduction

The U.S. Army’s Judge Advocate General’s Corps (JAG Corps) is this country’s oldest, and one of the largest, law firms.³ Despite its rich history, the military justice system was very slow in evolving the defense function of the JAG Corps into an independent entity. Although criticism about the lack of a separate defense service dates back to the end of World War II,⁴ the U.S. Army Trial Defense Services (TDS) was not established until 1980.⁵ The Department of the Army (DA) created TDS in order to avoid the inherent conflict of interest, or at least the appearance of conflict, involved with having defense lawyers evaluated and influenced by lawyers and commanders who were prosecuting the Soldiers they were defending.⁶ This new organization, made up solely of military defense counsel, was intended “to improve the efficiency and professionalism of counsel through direct supervision and evaluation within the defense chain.”⁷

However, the establishment of TDS did not eliminate the problem of conflicts of interest in the defense of military defendants. Because of the small military community most defense lawyers work in,⁸ the limited number of lawyers assigned to defense,⁹ and the TDS mission to “provide a full-range of defense legal services to Soldiers serving in numerous commands worldwide,”¹⁰ avoiding conflicts of interest is one of the most difficult ethical issues TDS lawyers face on a daily basis.

This article discusses the ethical rules Army lawyers must follow to avoid conflicts of interest. It presents practical guidance and advice for implementing these guidelines and providing military defendants with an ethical, effective, and conflict-free defense.

The Army Rules

The Army Rules of Professional Conduct (Army Rules) are also a new addition to the military justice system. Although it has had legal professionals in its ranks for over 230 years, the Army has had a professional code of conduct, specific to military lawyering, for less than twenty-two years.¹¹

¹ TDS, Fort Carson Field Office, <http://www.carson.army.mil/LEGAL/TDS/Jag/TDS.htm> (last visited July 6, 2009) (motto of the U.S. Army Trial Defense Services).

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³ GoArmy.com, Army JAG Corps, History, <https://www.goarmy.com/jag/history.jsp> (last visited July 6, 2009) (“General George Washington founded the U.S. Army JAG Corps on July 29th, 1775. . . . [It is] one of our country’s largest law firms, with more than 3,400 full- and part-time Attorneys.”).

⁴ Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 6–7 (1983).

⁵ *Id.* at 45.

⁶ *Fact Sheet: US Army Trial Defense Services*, ARMY LAW., Jan. 1981, at 27, available at http://www.loc.gov/rr/frd/Military_Law/pdf/01-1981.pdf.

⁷ *Id.*

⁸ Captain Nancy Higgins, *Avoiding Conflicts of Interest in the Trial Defense Practice*, ARMY LAW., June 1990, at 24, 28.

⁹ See U.S. Army Trial Defense Services (USATDS)–HQ, History, [https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/\(JAGCNetDocID\)/T+D+S+HISTORY?OpenDocument](https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/(JAGCNetDocID)/T+D+S+HISTORY?OpenDocument) (last visited Aug. 7, 2009) [hereinafter TDS Mission] (stating that TDS has approximately 130 Active Component officers and about 212 Reserve Component officers.).

¹⁰ U.S. Army Trial Defense Services (USATDS)–HQ–TDS Mission, <https://www.jagcnet.army.mil/TDS> (follow “TDS Mission” hyperlink) (last visited July 6, 2009).

¹¹ C. Peter Dungan, *Avoiding “Catch 22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31, 38 (2005/2006) (citing Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1, 2 (1989)).

Comparison to the Model Rules

In general, the Army Rules follow relatively closely with the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).¹² For instance, Army Rules 1.7 through 1.10 govern conflict of interest issues,¹³ as do Model Rules 1.7 through 1.10.¹⁴ However, there are significant changes to the text and comments of some of the Army Rules. Among the reasons for such changes are (1) an ABA Rule's inapplicability to Army practice; (2) the need for guidance tailored to Army practice; and (3) differences in approach to the resolution of specific ethical issues for Army lawyers.¹⁵

No Imputed Disqualifications

Army Rule 1.10 deals with conflicts and deviates sharply from the corresponding Model Rule 1.10.¹⁶ As mentioned above, military lawyers operate in a very small community. Most of the lawyers in TDS stay in the organization for approximately two years or less and their previous job may have been as a trial counsel in the local military justice section.¹⁷ Therefore, Army Rule 1.10 explicitly contradicts Model Rule 1.10, stating "Army lawyers working in the same Army law office are *not* automatically disqualified from representing a client because any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2."¹⁸

As the comment to Army Rule 1.10 explains, unlike most law firms in America, defense attorneys who share an office or clerical assistance, even with someone who is representing a client with competing interests, are not prohibited from representing their respective clients (such as co-accused at a court-martial).¹⁹ Rather than holding the imputed disqualification rule as controlling, the Army requires a "functional analysis of the facts" in any given situation to determine if attorney-client confidentiality or independence of judgment will be compromised before disqualifying an attorney.²⁰

Clarification Through the Comments to the Army Rules

Despite the sharp deviation from Model Rule 1.10, Army Rules 1.7 through 1.9 generally mirror the requirements of their Model Rule counterparts. The comments to the Army Rules, however, highlight the unique challenges military criminal defense lawyers may face.

The turnover rate in a TDS office is comparatively high.²¹ The comment to Army Rule 1.7 specifically addresses this by stating that "a military lawyer's desire to take leave or transfer duty stations should not motivate the lawyer to recommend a pretrial agreement in a case."²²

¹² U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 7.b (1 May 1992) [hereinafter AR 27-26].

¹³ *Id.* at 9-12.

¹⁴ MODEL RULES OF PROF'L CONDUCT, tbl. of contents, available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited July 6, 2009) [hereinafter MODEL RULES].

¹⁵ AR 27-26, *supra* note 12, para. 7.b.

¹⁶ *Id.* at 12 (Army R. 1.10: Imputed Disqualifications: General Rule).

¹⁷ E-mail from Major Jeffrey Hagler, Student, Command & General Staff College, Fort Leavenworth, Kan., to author (Nov. 7, 2006, 19:12 CST) [hereinafter Hagler e-mail] (on file with author).

¹⁸ AR 27-26, *supra* note 12, R 1.10, at 12 (Army R. 2.2 concerns mediation) (emphasis added).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Hagler e-mail, *supra* note 17.

²² AR 27-26, *supra* note 12, cmt. to R. 1.7, at 10.

Another major difference with the military justice system is that military defendants do not pay their TDS attorney nor do they pay for any of the expenses involved in litigation. Therefore, a comment allowing lawyers to pay the court costs of indigent clients is unnecessary. But, Army Rule 1.8 does assure trial defense counsels that it is permissible to “purchase . . . an authorized ribbon for wear on the accused’s uniform during court-martial proceedings.”²³ This comment is important because “[t]he Army is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform”²⁴ and uniform regulations require that “all medals and ribbons are clean and not frayed.”²⁵ It is imperative that a defense attorney ensures his client is presented in the best possible light to the court, and this small detail can go a long way in portraying a military defendant as a disciplined and dedicated Soldier.

In addition to these comments, there are two notable differences between the text of Model Rules 1.8 and Army Rule 1.8. Model Rule 1.8(j) and (k)²⁶ have no correlating sections in the Army Rules.²⁷ The deletion of subparagraph (k) follows along with the discussion above concerning Army Rules 1.10.²⁸ Model Rule 1.8(k) imputes the disqualifications of 1.8(a) though (i) to the other members of the firm, a proposition that the Army Rule explicitly does not hold as controlling.²⁹

No Prohibitions Concerning Sexual Relations

It is less clear why the Army chose to eliminate Model Rule 1.8(j) from the Army Rules. This provision states, “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.”³⁰ Adding to the confusion is the conflicting case law on the subject.³¹ Most reasonable attorneys know that they should avoid having a sexual relationship with a client. It is not as obvious why the Army, through its Rules of Professional Conduct and case law, has not offered clearer guidance on this issue.

The Disqualification Due to Familial Relationships

The Army replaced the subparagraph prohibiting sexual relations with a provision that prohibits a lawyer from representing a client if the lawyer is related to another lawyer who is representing a directly adverse position to that of the client.³² This prohibition appears nowhere in the text of Model Rules, but is rather listed as “personal interest conflict” in the comments of Model Rule 1.7.³³

The greater emphasis on this conflict in the Army Rules is also likely related to the small military community and the chance that there will be married Judge Advocate (JA) couples at some Army installations. Of all the married female officers who were in the Army in 2008, nearly thirty-eight percent were married to other servicemembers.³⁴ The JAG Corps acknowledges that “[t]here are a number of JA husband-wife teams . . . on active duty.”³⁵ While the Army Rules allow for married lawyers to represent clients with conflicting interests “upon consent by the client after consultation regarding the relationship,”³⁶ it is unlikely that two lawyers would want to strain their marital relationship or compromise their undivided

²³ *Id.* cmt. to R. 1.8, at 11.

²⁴ U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 1-7a (3 Feb. 2005).

²⁵ *Id.* para. 1-9a(3).

²⁶ MODEL RULES, *supra* note 14, R. 1.8, available at http://www.abanet.org/cpr/mrpc/rule_1_8.html (last visited July 6, 2009).

²⁷ AR 27-26, *supra* note 12, at 12.

²⁸ See discussion *supra* *No Imputed Disqualifications*.

²⁹ AR 27-26, *supra* note 12, cmt. to R. 1.10, at 12.

³⁰ MODEL RULES, *supra* note 14, R. 1.8(j), available at http://www.abanet.org/cpr/mrpc/rule_1_8.html (last visited July 6, 2009).

³¹ Compare *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988) (declining to create a per se rule that a civilian attorney’s sexual relations with his client created an actual conflict, where the client was a female Army Captain), with *United States v. Cain*, 59 M.J. 285, 296 (2004) (finding by a divided court that a per se conflict when a military lawyer has sex with his male, enlisted client).

³² AR 27-26, *supra* note 12, R. 1.8(i), at 11.

³³ MODEL RULES, *supra* note 14, R. 1.7, available at http://www.abanet.org/cpr/mrpc/rule_1_7_comm.html (last visited July 5, 2009).

³⁴ Army Profile—FY08, <http://www.armyg1.army.mil/hr/docs/demographics/FY08%20Arm%20Profile.pdf> (last visited July 24, 2009).

³⁵ PERSONNEL PLANS AND TRAINING OFFICE, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES, JAG PUB. 1-1, app. Personnel Policies, JAGC-Personnel Policies, para. 5-10a, p. 31 (1 Nov. 2008) [hereinafter THE DIRECTORY].

loyalty to their client. In order to ensure that this potential conflict will not arise, the JAG Corps has established the policy that “[w]hen a husband and wife are assigned to the same location, they will not have contemporaneous assignments as trial counsel and defense counsel.”³⁷

Resolving Discrepancies Between the Army Rules and the Model Rules

Although Army Lawyers are also bound by the rules of the state in which they are licensed,³⁸ Army Rule 8.5 states the Army Rules take precedence in the case of “a conflict between these Rules and the rules of the lawyer’s licensing authority.”³⁹ While the comment to this rule says that a conflict with a rule promulgated by a military lawyer’s licensing authority is likely to be more “theoretical than practical,”⁴⁰ this may not always be the case.

As discussed above, Army Rules 1.10 is in direct contrast to Model Rule 1.10.⁴¹ This should not be an issue because Model Rule 8.5 states that “[a] lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”⁴² Michigan, though, seemingly ignored the imperative stated in Model Rule 8.5 when it issued an opinion that stated there was “no special exception under the Rules for legal services organizations” and that Michigan’s Rule concerning imputed disqualifications applied to military lawyers.⁴³

While no other state has issued a similar opinion ignoring the requirements of Model Rule 8.5, the possibility of it happening in the future should not be completely dismissed. This issue should be of special concern to the lawyers of TDS. While military defendants generally have greater rights than their civilian counterparts, this is not the case when it comes to those prosecuted at a military tribunal.⁴⁴ Trial Defense Service lawyers who are assigned to defend the accused at such proceedings may find themselves in situations where the representation of their client is so restricted that it is in violation of the Model Rules.⁴⁵

While no state, as of yet, has attempted to condemn or disbar TDS attorneys who have defended clients under conditions that violate the Model Rules,⁴⁶ the National Association of Criminal Defense Lawyers Ethics Advisory Committee issued an opinion that stated “the conditions imposed on defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation.”⁴⁷ In light of the Supreme Court’s decision in *Hamdan v. Rumsfeld*⁴⁸ and the enactment of the Military Commissions Act of 2006,⁴⁹ the controversy surrounding deviations from the Model Rules in the practice of military law is likely to continue. Trial Defense Service attorneys should contact their supervisor for guidance on apparent conflicts between the Army Rules and state rules of professional conduct. Ultimately, some conflicts may require

³⁶ AR 27-26, *supra* note 12, R. 1.8(i), at 11.

³⁷ THE DIRECTORY, *supra* note 35, para. 5-10a.

³⁸ AR 27-26, *supra* note 12, R. 8.5(f), at 30.

³⁹ *Id.*

⁴⁰ *Id.* cmt. to R. 8.5, at 30.

⁴¹ See discussion *supra* at *No Imputed Disqualifications*.

⁴² MODEL RULES, *supra* note 14, R. 8.5(b)(2), available at, http://www.abanet.org/cpr/mrpc/rule_8_5.html (last visited July 6, 2009).

⁴³ Mich. Op. RI-172 (1993), available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-172.htm.

⁴⁴ See George P. Fletcher, *Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2002).

⁴⁵ See Dungan, *supra* note 11, at 32.

⁴⁶ See *id.* at 32–34. Captain Dungan offers a hypothetical in which a lawyer licensed in a state with a “Michigan-like” opinion on the Army Rules has his license to practice law suspended by his state bar after defending an enemy combatant at a military commission. *Id.* The prospect of this happening could have a detrimental effect on the ability of lawyer to continue to serve in the JAG Corps, since a lawyer must be a member of the bar of a federal court or the highest court of a state, and must be in good standing in order to practice law in the JAG Corps. See U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 13-2h(1) (30 Sept. 1996). Therefore, the officer in Captain Dungan’s example would also be relieved of his legal duties in the JAG Corps. Dungan, *supra* note 11, at 34.

⁴⁷ Op. 03-04 (Aug. 2003), available at <http://www.nacdl.org/public.nsf/freeform/ethicsopinions?opendocument> (follow “No. 03-04 - Representation Before Military Commissions” hyperlink).

⁴⁸ 548 U.S. 2749 (2006).

⁴⁹ Pub. L. No. 109-366, 120 Stat. 2600 (2006).

the involvement of TDS Headquarters or even the Standards of Conduct Office at the Office of The Judge Advocate General (OTJAG).

Practitioner Tools, Guidance, and Advice

TDS Standard Operating Procedures

In addition to the Army Rules and the rules promulgated by the state a lawyer is licensed in, an Army Lawyer must also be aware of, and adhere to, all the other Army rules or regulations that govern his conduct.⁵⁰ It can be a daunting task to even know which of the Army's published directives, regulations, instructions, memoranda, circulars, or pamphlets apply to daily operations.⁵¹ One of the most important sources of information for a Soldier is his unit's Standard Operating Procedures (SOP). An SOP is written and frequently updated by commanding officers and their staffs to serve as a quick reference to the voluminous rules and regulations published by the Army.⁵² The TDS SOP is especially important because many of the "Legal Services" regulatory guidelines are written for the JAG Corps as a whole. Many of the issues that TDS attorneys face on a daily basis are different from the issues that ninety percent of the JAG Corps deals with.⁵³

The TDS SOP provides important guidance for avoiding conflicts of interest, going beyond the text and comments of Army Rules 1.7 through 1.10.⁵⁴ First, and probably most importantly, the SOP lays out the duties of the Senior Defense Counsel (SDC).⁵⁵ While the Army regulation merely states that the SDC "[p]rovides technical advice to trial defense counsel,"⁵⁶ he plays the primary role in ensuring conflicts of interest do not exist in the attorney-client relationships of the lawyers supervised. The SDC assigns lawyers to the Soldiers that they will represent, and it is his responsibility to make a preliminary inquiry into the facts surrounding the representation of the accused in order to determine whether his office can adequately represent the suspect or suspects.⁵⁷

The main conflict of interest pitfall that the TDS SOP addresses is multiple accused situations.⁵⁸ While the Army Rules say that multiple representation is permissible provided "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation,"⁵⁹ the TDS SOP states that "USATDS counsel should not represent more than one client in conflict situations."⁶⁰ It is again up to the SDC to try and make this happen. For every potential case, the SDC must make a preliminary assessment of the total number of clients potentially involved and the likelihood that individual cases will go to court-martial.⁶¹ Because it is the goal that all accused are promptly provided counsel,⁶² it is important that this preliminary assessment is done in a timely manner, especially if the SDC's office will not be able to accommodate a conflict-free representation for every accused. In such cases, TDS attorneys from another field office will be brought in to provide defense services.⁶³

⁵⁰ AR 27-26, *supra* note 12, para. 7.2(a).

⁵¹ For a complete directory of the thousands of Army publications, go to the Army Publishing Directorate web page. Army Publishing, <http://www.army.mil/usapa/> (last visited July 6, 2009).

⁵² The USATDS SOP cites to twenty-eight separate statutory and regulatory sources and is published by the TDS training branch in Arlington, Va. U.S. ARMY TRIAL DEFENSE SERVICE STANDARD OPERATING PROCEDURES (n.d.) hereinafter TDS SOP]. Updates please

⁵³ About 340 of the 3400 JAG Corps attorneys work in TDS. TDS Mission, *supra* note 9.

⁵⁴ TDS SOP, *supra* note 52, ch. 3.

⁵⁵ The SDC "is responsible for the performance of the USATDS mission within the area serviced by a field office. The senior defense counsel is the direct supervisor of all trial defense counsel within a field office." U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-3f(1) (16 Nov. 2005).

⁵⁶ *Id.* para. 6-3f(2)(b).

⁵⁷ TDS SOP, *supra* note 52, para. 3-2.

⁵⁸ *Id.* para. 3-3.

⁵⁹ AR 26-27, *supra* note 12, R. 1.7(a)(1)-(2), at 9.

⁶⁰ TDS SOP, *supra* note 52, para. 3-3.

⁶¹ *Id.* para. 3-3a(1). Soldiers are guaranteed the right to counsel in courts-martial proceedings, but not at summary courts-martial, administrative proceedings, or non-judicial punishment. *Middendorf v. Henry*, 425 U.S. 25 (1976).

⁶² TDS SOP, *supra* note 52, para. 3-3a.

⁶³ *Id.* para. 3-3b.

Another complication is that the SDC job also includes “[r]epresenting Soldiers in courts-martial . . . and other proceedings.”⁶⁴ However, if the SDC were to represent one co-accused, and one of his trial defense counsels were to represent another co-accused in the same case, a potential conflict of interest is created. Since the SDC evaluate the trial defense counsels, each trial defense counsel has an interest in avoiding a potential violation of Army Rule 1.7.⁶⁵ The SOP advises that in such a situation the trial defense counsel should “review the specifics of the case and determine if they reasonably believe that their own interests will not adversely affect representation of the client.”⁶⁶ Based on the attorney’s assessment and the accused’s willingness to consent, the trial defense attorney may be allowed to continue his representation, or as discussed above, another attorney may be brought in to assume the client representation that would have been undertaken by the SDC.⁶⁷

As the guidance in the TDS SOP indicates, the Army’s lack of an imputed disqualification rule, while allowing for most accused to be represented by an attorney from their local field office, does not completely eliminate the potential for conflicts of interest due to the competing lawyers’ interests and duty requirements of the lawyers involved.

Advice from Past and Current Practitioners

None of the documents produced by the Army, whether a DA regulation or an SOP from a local TDS office, comes close to providing the straightforward, on-point, and realistic guidance that practitioners in the field could use to avoid conflicts of interest. As a means of tying together all the published guidance on conflicts of interest in the military defense practice, the observations and advice of former TDS attorneys is given below.

Multiple Representation

Going further than the TDS SOP requirements that TDS counsel *should not* represent more than one client in conflict situations, those who have served in TDS say counsel *do not* undertake such representation.⁶⁸ Additionally, the situations explained above concerning the SDC and trial defense counsel representing co-accused is not likely to happen. Generally, SDCs will not represent any of the accused when there is more than one accused.⁶⁹ This does not resolve all the conflict of interest issues. However, the SDC is supposed to provide technical advice to his trial defense counsels.⁷⁰ If several trial defense counsels are representing several co-accused, it is possible that the guidance that the SDC gives to one subordinate lawyer might hurt the case of another.⁷¹ Therefore, when such a situation arises, each lawyer representing a co-accused should have a different supervising officer available to offer advice.⁷²

Joint Defense Relationships

At least one commentator has suggested that in military cases, especially in cases involving multiple accused, conducting a joint defense can “contribute[] to the quality of legal representation” despite the ethical and tactical problems that may

⁶⁴ AR 27-10, *supra* note 55, para 6-3f(2)(d).

⁶⁵ TDS SOP, *supra* note 52, para. 3-3e.

⁶⁶ *Id.* para. 3-3e(1).

⁶⁷ *Id.* para. 3-3e(2).

⁶⁸ Interview with Captain John W. Brooker, Senior Defense Counsel, Region III (Fort Sill Field Office), U.S. Army Trial Defense Services, in Lubbock, Tex. (Sept. 22, 2006) [hereinafter Brooker Interview]; E-mail from Lieutenant Colonel Patricia Ham, Regional Defense Counsel, Region IV (U.S. Southwest), U.S. Army Trial Defense Services, Fort Hood, Tex., to author (Nov. 12, 2006, 16:22 CST) [hereinafter Ham e-mail] (on file with author); Telephone Interview with Michael R. Holley, Associate, Lanier Law Firm, in Houston, Tex. (Nov. 17, 2006) [hereinafter Holley Interview] (Mr. Holley is a former TDS Trial Defense Attorney.).

⁶⁹ Ham e-mail, *supra* note 68.

⁷⁰ AR 27-10, *supra* note 55, para. 6-3f(2)(b).

⁷¹ Ham e-mail, *supra* note 68.

⁷² *Id.*

arise.⁷³ There is no mention in the TDS SOP of the possibility of employing this tactic, nor is there any published commentary on the subject beyond the cited article. This is likely due to the fact that most TDS attorneys do not fully appreciate the advantages of a joint defense, or those who do may be too timid to advise it as a tactic to the scores of TDS attorneys who are relatively inexperienced in criminal practice.⁷⁴ When properly employed, however, a joint defense can be a highly effective tool for building a client's defense.⁷⁵ Although conducting a joint defense may raise concerns over client confidentiality, certain communications among co-accused and their counsel are protected by an evidentiary privilege known as the joint defense privilege.⁷⁶ The joint defense privilege is "an extension of the attorney client privilege and 'protects communications between an individual and an attorney for another when the communications are "part of an on-going and joint effort to set up a common defense strategy.'""⁷⁷ As Major Davidson suggested in his article more than ten years ago,⁷⁸ the joint defense privilege should be given greater attention by the military legal community, and it would probably serve TDS and its clients well to establish procedures for utilizing this privilege.⁷⁹

Portraying Yourself as a Loyal and Zealous Advocate

Compounding the problems of institutional bias are the big-picture organizational issues that cause clients to question whether an attorney in TDS can really be a zealous advocate for their defense. Some Soldiers may be completely unaware that TDS exists as a separate organization. However, they are acutely aware that the officer who has been assigned to represent him wears the same uniform of the officer who is accusing him of a crime.⁸⁰ The best tactic to gain the trust of your military client as a TDS attorney is to start by explaining, as simply as possible, the structure of TDS. The easiest way to do so is to show the Soldiers the patch that you wear⁸¹ and explain to your client that you do not belong to any unit on his post and do not answer to any commanders.⁸² This will help instill the idea of "separateness" and freedom from command influence that was the basis for the creation of TDS.

Conclusion

The role and the impact of lawyers in TDS go beyond the clients that they directly serve. By ethically and effectively representing Soldiers, these attorneys give all Soldiers confidence in the military justice system, which in turn improves the morale and discipline of the force.

The military defendant has a tremendous amount of rights, starting with the guaranteed right to counsel.⁸³ The system, however, is only as good as the lawyers entrusted to protect and advocate for those rights. By being cognizant of the potential conflicts of interest that may arise during the course of representation, military attorneys can avoid ethical and malpractice pitfalls and be zealous and unbiased advocates, thereby living up to the standard of representation sought by the creation of TDS.

⁷³ Major Michael J. Davidson, *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, ARMY LAW., June 1997, at 17.

⁷⁴ Holley Interview, *supra* note 68.

⁷⁵ *Id.*

⁷⁶ *See generally* Davidson, *supra* note 73.

⁷⁷ *Id.* at 18.

⁷⁸ *Id.*

⁷⁹ Holley Interview, *supra* note 68.

⁸⁰ The perception of TDS attorneys is not helped by the civilian defense attorneys (most of whom are former military lawyers and judges) who may talk down the capabilities of TDS attorneys in order to gain the business of military defendants.

⁸¹ A "patch," or shoulder sleeve insignia, identifies Soldiers of a common command. Having a different patch than the accused is an immediate indication that defense lawyers are separate from the command that is accusing the Soldier of a crime. The TDS patch can be viewed at the TDS web page. TDS Mission, *supra* note 9.

⁸² Brooker Interview, *supra* note 68.

⁸³ 10 U.S.C. § 827(a)(1) (2006).