

Supervising Paralegals in Accordance with the Rules of Professional Conduct

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*Leadership, the lifeblood of any army, makes a difference every day in the United States Army. Since the formation of the Continental Army until today with Soldiers deployed around the globe, Army leaders have accepted the challenge before them.*¹

I. Introduction

The *Rules of Professional Conduct for Lawyers (Rules of Professional Conduct)*² inform every duty and professional obligation of the Army judge advocate (JA). Army Regulation (AR) 27-26 details the ethical rules that guide Army law practitioners in the performance of their duties. Among the many ethical rules JAs must keep steadfastly in mind are those regarding the use of paralegals in the military practice of law. Many JAs assume they are responsible for acts of paralegals that violate the *Rules of Professional Conduct*. While a JA may be responsible for the conduct of a paralegal under certain circumstances,³ the intent of Rule of Professional Conduct 5.3 is to hold JAs accountable for their leadership failures, not for the actual conduct of the paralegals they lead.

The leadership requirement imposed by Rule 5.3(a) is quite straightforward. It requires senior supervisory lawyers to implement controls to guide subordinate JAs in supervising the paralegals in accordance with the *Rules of Professional Conduct*. These control measures, if implemented using Army leadership principles and existing Army regulatory requirements, will ensure that JAs meet their obligations under Rules 5.3 and 5.5; will improve the quality of legal services across the United States Army; and will develop better trained and more competent Army officers across the Judge Advocate General's Corps.

This article analyzes the obligation to appropriately supervise paralegals established by Rule 5.3.⁴ Part II describes the responsibilities of senior leaders and JAs in general under that rule. Part III discusses other rules within AR 27-26 that may be the most problematic for paralegals. Finally, this article suggests a supervisory system that takes advantage of existing Army leadership doctrine and tools to enable JAs to meet the ethical standard for supervising paralegals and to grow as officers and leaders.

II. The Duty to Supervise Paralegals

While the primary duty of JAs is to provide exceptional legal services, as Army officers, they also must lead Soldiers. By developing leadership skills in junior JAs, the JAG Corps can build the next generation of outstanding legal officers and use those skills to reinforce the importance of ethics in the legal community. The Army defines leadership as “the process of influencing people by providing purpose, direction and motivation to accomplish the mission and improve the organization.”⁵ Whether a JA is leading one Soldier or an office of 100 officers, Soldiers, and Civilians, his mission is to deliver principled counsel and mission-focused legal services to the Army and the Nation.⁶ In providing leadership, accomplishing the mission, and improving the organization, JAs must be vigilant in complying with their ethical obligations.

Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, is easy to overlook. It places a specific obligation on JAs to make reasonable efforts to ensure paralegals act in a manner consistent with the JA's obligations under the *Rules of Professional Conduct*.⁷ The duty of a JA to supervise paralegals is similar to the duty to supervise subordinate JAs, both of which duties find their bases in the rules of agency⁸ and in Army doctrine.⁹

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¹ U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP 1 (1 Aug. 2012) (Cl, 10 Sept. 2012) [hereinafter ADP 6-22].

² U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

³ *Id.* app. B (Rule 5.3 stating a lawyer is responsible for the conduct of a nonlawyer assistant where the conduct “would be a violation of these Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer 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”).

⁴ *Id.*

⁵ ADP 6-22, *supra* note 1, at 1.

⁶ Lieutenant General Dana K. Chipman, *One Team: The Judge Advocate General's Corps' Vision, Mission, and Priorities*, vol. 38-1, TJAG SENDS: A MESSAGE FROM THE JUDGE ADVOCATE GENERAL (2010).

⁷ *Id.*

⁸ LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.3-1 (Ronald D. Rotunda & John S. Dzienkowski eds., 2012) [hereinafter LEGAL ETHICS] (citing to RESTATEMENT (SECOND) OF AGENCY § 503 (1958)).

However, the Rule requires a greater degree of supervision over nonlawyer assistants than over lawyers because it presumes they lack extensive legal training and because they are not covered by a professional disciplinary authority.¹⁰ The supervisory obligations imposed by Rule 5.3 acknowledge the different roles lawyers assume within a law practice, providing different duties for those with general managerial authority and those who directly supervise the daily duty performance of paralegals.¹¹

A. The Duty of Senior Supervisory Lawyers

The Rules require all JAs, including senior supervisory lawyers, to conduct adequate oversight of the paralegals they directly supervise.¹² Section B, below, analyzes this obligation. Senior supervisory lawyers have the additional responsibility to implement measures ensuring subordinate JAs adequately supervise the Soldiers in the law office.¹³ These senior lawyers must design procedures to assure themselves that a paralegal's duty performance is compatible with the professional obligations of the JAs the paralegal supports. This obligation is mandatory. Failure to implement reasonable supervisory controls violates Rule 5.3, even if no paralegal in the office has acted improperly.¹⁴ On the other hand, a lawyer who has implemented proper procedures to guide paralegals and has provided appropriate supervision will be held harmless if the paralegals misbehave.¹⁵

⁹ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (26 Jan. 2012) (paragraph 4-23, stating the staff judge advocate (SJA) provides oversight and training of legal personnel, including professional responsibility training to judge advocates under the SJA's supervision; paragraph 4-42, stating the Chief, Trial Defense Service (TDS) exercises supervision, direction and control over the defense counsel and TDS mission; and paragraph 4-12, stating the brigade judge advocate supervises, trains and mentors the trial counsel, augmentees, and the brigade senior paralegal noncommissioned officer, and bears supervisory responsibility for the overall professional development of brigade legal section personnel).

¹⁰ MODEL RULES OF PROF'L CONDUCT R 5.3 cmt. 1 (2004).

¹¹ Compare AR 27-26, *supra* note 2, app. B (Rule 5.3(a) "[T]he senior supervisory lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."), and AR 27-26, *supra* note 2, app. B (Rule 5.3(b) "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

¹² AR 27-26, *supra* note 2, app. B (Rule 5.3(b)).

¹³ *Id.* (Rule 5.3(a)).

¹⁴ *In re Galbasini*, 163 Ariz. 120 (1990).

¹⁵ *People v. Smith*, 74 P.3d 556, 571 (Colo. O.P.D.J 2003) (holding there is no violation of Rule 5.3(a) where lawyer had reasonable measures in place to ensure legal assistant acted in a manner consistent with the lawyer's ethical rules, even if the assistant did not follow them).

Army Regulation 27-26 does not define the term "senior supervisory lawyer," but it does not include all JAs with subordinates. The term "Senior Supervisory Judge Advocate," as defined in AR 27-1,¹⁶ does not appear to comport with the intent of Rule 5.3(a) or the language of the American Bar Association Model Rule on which it is based.¹⁷

The JAG Corps needs a clear definition of "senior supervisory lawyer." A common sense interpretation is that "senior supervisory lawyer," for purposes of Rule 5.3(a), means the supervisory JA with overall leadership responsibility for a law office. This would include staff judge advocates, brigade judge advocates, regional defense counsel, and similar leaders. Leaders at these levels can vigorously implement a supervisory program, while ensuring that the program is not so burdensome as to hinder military operations. These leaders are in a good position to quickly adapt supervisory measures to changes in law office operations.

Regardless of who takes on this task, senior supervisory lawyers should tailor control measures to the nature of the law practice, the skill set of paralegals assigned to the organization, and the duties actually performed by paralegals. Appropriate measures may include training on the JAs' ethical duties—including particularized training on whichever Rules the paralegals will most likely encounter—supervisory controls that prevent paralegals from engaging in the unauthorized practice of law, and identifying and resolving potential client confidence and conflict of interest issues involving the paralegals.¹⁸

While creating a supervisory plan, senior supervisory lawyers should be aware that the required measures can change as the practice of law and technology evolve. For example, due to changes to computer software, JAs are more likely to accidentally disclose confidential client information or attorney work product when disseminating digital copies

¹⁶ U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 7-4 (13 Sept. 2011) (noting "[t]he senior supervisory JA is the MACOM SJA or other JA in an equivalent supervisory position.").

¹⁷ MODEL RULES OF PROF'L CONDUCT R 5.3 (2004) (pointing out that "a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer").

¹⁸ See, e.g., *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So.2d 196 (Fla. Dist. Ct. App. 2000) (A nonlawyer who formerly worked for a firm representing an adverse party was properly counseled to maintain the former clients confidences.); *In re Kellogg*, 4 P.3d 594 (Kan. 2000) (A lawyer's failure to train a nonlawyer assistant is a violation of Rule 5.3.); *In re Wilkinson*, 805 So.2d 142 (La. 2002) (finding a violation of Rule 5.3 where attorney admonished nonlawyer assistant to give no legal advice to client but allowed the assistant to meet privately with the client and took no active role in the representation).

of documents to persons outside the legal staff.¹⁹ Senior supervisory lawyers must now implement procedures to ensure confidential client information is not transmitted in metadata.²⁰ In addition to ethical concerns raised by changing technology, senior leaders should pay attention to ethical issues raised by the expanding role of JAG Corps personnel on the battlefield; including issues raised by the detainee operations, rule of law, and counter-insurgency missions, as well as the asymmetrical nature of current and future operations. Senior leaders should include identifying emerging ethical considerations in periodic and mandatory ethics training requirements.²¹ Part III below suggests control measures that may be effective for complying with other enumerated *Rules of Professional Conduct*.

B. The Duty of Judge Advocates Directly Supervising Paralegals

In general terms, Rule 5.3(b) obligates JAs to oversee the duty performance of paralegals to ensure all activities are consistent with the other *Rules of Professional Conduct* and requires, at a minimum, that JAs provide adequate instruction when assigning projects, monitor the progress of those projects, and review them when complete.²² Ensuring that JAs embrace the supervisory obligations of Rule 5.3(b) provides a continuing opportunity for them to learn and develop their skills as Army officers and leaders.

1. Supervise Each Subordinate

Every JA who assigns tasks to or directs a paralegal in the performance of his duties has an ethical obligation to provide appropriate oversight of all assigned tasks. Rule 5.3(b) requires lawyers having direct supervisory authority over nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional

obligations of the lawyer.”²³ While an individual paralegal may provide legal support to more than one JA, the rules require each JA to adequately supervise completion of the legal tasks he assigns. The nature and extent of supervision can be tailored to the experience and professional competence of the individual Soldier, the volume of work assigned, and the complexity of the tasks being performed.

2. Tailor the Level of Supervision to the Subordinate

To provide effective and efficient supervision, JAs must know their paralegals. “Internal controls and supervisory review are necessary precisely because dishonesty and incompetence are not identifiable in advance.”²⁴ Knowing the rank, length of service, and reputation for professional competence of the paralegals is only the beginning of the analysis. Leaders must also know about them as individuals and what is going on in their lives to craft an efficient supervisory system, particularly for Soldiers just joining the organization. This personal knowledge can prevent the inefficiency associated with overly stringent supervisory controls.

3. Avoid Micromanagement: Delegation

Too much supervision can hurt law office efficiency as much as too little supervision. Providing appropriate supervision to paralegals does not require JAs to be micromanagers. Any JA may eventually lead a team of other JAs, paralegal NCOs, and paralegals, all of whom have different roles and tasks across a spectrum of legal disciplines. It is permissible and appropriate to delegate supervisory responsibility to another person who has the requisite knowledge and ability to provide appropriate oversight and supervision.²⁵ However, if a JA delegates supervisory responsibility to another, he still must maintain oversight to ensure proper supervision of the paralegals and to take remedial action if it is inadequate.²⁶ No matter how he delegates supervisory responsibilities, the JA remains just as responsible for impermissible conduct as if he personally supervised the paralegal who committed it.

4. Use Noncommissioned Officers

Regardless of the JA’s personal responsibility for the conduct of paralegals, implementing internal controls and

¹⁹ Major Brian J. Chapuran, *Should You Scrub? Can You Mine? The Ethics of Metadata in the Army*, ARMY LAW., Sept. 2009, at 1. “Metadata is information contained in an electronic document that is not immediately visible to someone viewing the document For example, Client A visits the legal assistance office to have a separation agreement prepared. The attorney pulls up the last agreement he drafted, saves the new agreement as a new file, and begins work. A few days later, the attorney e-mails Client A, attaching the draft separation agreement. Client A opens the document and, because metadata is present, Client A is able to find the name of Client B, for whom the previous separation agreement was drafted. . . . thus, metadata led to a breach of client confidentiality.” *Id.* at 1.

²⁰ See N.C. Ethics Op. 1 (N.C. St. Bar. 2009) (stating “a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients”).

²¹ Policy Memorandum 06-01, The Judge Advocate Gen. of the Army, subject: Professional Responsibility (10 Jan. 2006).

²² *In re Comish*, 889 So.2d 236 (La. 2004).

²³ AR 27-26, *supra* note 2, app. B (Rule 5.3(b)).

²⁴ *In re Carter*, 887 A.2d 1 (D.C. 2005).

²⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAW § 11, cmt. C (2000).

²⁶ *Id.*

supervisory review should be a team effort. The NCO performs an essential function in all military organizations. In addition to technical competence honed over years of service, they provide leadership to ensure Soldiers complete the mission on time and to standard.²⁷ However, JAs cannot turn over responsibility for the day-to-day operation of legal services, or any part thereof, to a paralegal without continuous oversight.²⁸ While NCO leadership can never totally replace JA oversight under Rule 5.3(b), with appropriate guidance, NCOs can be a valuable resource to ensure timely and consistent duty performance in accordance with the Rules of Professional Conduct.

Even with diligent training and supervision, mistakes happen; so what is the appropriate response when a JA discovers that a paralegal has likely violated an ethical rule? The JA must take timely and reasonable steps to avoid or mitigate the consequences, or he risks running afoul of Rule 5.3.²⁹ In addition, the JA must take corrective action to ensure the paralegal understands the error, provide appropriate remedial training, and increase oversight of the Soldier's duty performance to ensure compliance with the ethical standard in the future.³⁰ Following these simple requirements can increase the quality of the legal services and ensure JAs do not accidentally violate the Rules of Professional Conduct.

III. Selected Rules of Professional Conduct

Paralegals supporting JAs in providing legal services to the force are in a position to violate most, if not all, of the *Rules of Professional Conduct*. The section below identifies the rules paralegals will most likely encounter during their daily duties and discusses the supervisory attorney's obligations.

²⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 3-17 (12 Oct. 2006) [hereinafter FM 6-22] (stating "NCO leaders are responsible for setting and maintaining high-quality standards and discipline.").

²⁸ *People v. Smith*, 74 P.3d 566 (Colo. O.P.D.J. 2003) (noting in spite of having supervisory measures in place as required by Rule 5.3(a), lawyer delegated substantial authority to assistant without overseeing her work, contrary to Rule 5.3(b)).

²⁹ AR 27-26, *supra* note 2, app. B (Rule 5.3(c), stating "a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules of Professional Conduct if engaged in by a lawyer if: [. . .] (2) the lawyer 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").

³⁰ *In re Morin*, 878 P.2d 393 (Or. 1994) (A lawyer is responsible for unauthorized practice of law by a paralegal where, following an initial warning to the paralegal, the lawyer provide the paralegal with so little supervision that the lack of supervision amounted to aiding in the unauthorized practice of law.).

A. Preventing the Unauthorized Practice of Law

Paralegals are likely to have the opportunity to engage in the unauthorized practice of law during their daily duties. In addition to the tasks they perform for JAs, paralegals work closely with and are directly accountable to commanders, command sergeants major, and first sergeants. Because of their rank and duty position, these leaders rightly expect to discuss legal issues with the paralegals assigned to their units, especially when it comes to legal issues facing the command. As the paralegals' technical chain supervisors, JAs must protect their Soldiers from the demands of senior-ranking Soldiers who might require or tempt paralegals to engage in the unauthorized practice of law. Instead, the supervising attorney should empower them to provide the broadest range of support to their units consistent with Army regulations and the *Rules of Professional Conduct*.

The prohibition against the unauthorized practice of law provides a clear benefit to the legal system. It aids in regulating the legal profession and protects the integrity of the judicial system.³¹ Limiting the practice of law to qualified JAs increases the quality of legal representation provided to the Army and individual clients while increasing the efficiency of legal services and the Army as a whole.

The role of the paralegal within the law office is that of technical expert. "Paralegals provide support in all of the core legal disciplines, under the supervision of JAs, civilian attorneys, and paralegal NCOs."³² However, "[t]hey do not provide legal advice, but support the legal services provided by judge advocates and civilian attorneys at all levels within the Army."³³ Because of this relationship, JAs may unwittingly aid in the unauthorized practice of law if they fail to provide proper training and supervision. Rule 5.5 states that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."³⁴ To avoid assisting a person in the unauthorized practice of law, JAs must provide appropriate training and supervision to ensure that paralegals do not give legal advice to clients or others.³⁵

Unfortunately, AR 27-26 does not define "unauthorized practice of law." It simply states that a lawyer may delegate functions to nonlawyers "so long as the lawyer supervises the delegated work and retains responsibility for their

³¹ *Fla. Bar v. Schramek*, 616 So.2d 979 (Fla. 1993).

³² FM 1-04, *supra* note 9, para. 4-32.

³³ *Id.*

³⁴ AR 27-26, *supra* note 2, app. B (Rule 5.5(b)).

³⁵ *In re Farmer*, 950 P.2d 713 (Kan. 1997) (stating attorneys "need to be pro-active" to ensure paralegals are not giving legal advice to clients).

work.”³⁶ State law does define the term,³⁷ but “[a] lawyer’s performance of legal duties pursuant to a military department’s authorization . . . is considered a federal function and not subject to regulation by the states,” which is why a military legal assistance attorney can advise clients on state law without being licensed by that state.³⁸ Still, state courts provide useful guidance on what functions cannot properly be delegated. These courts generally agree that paralegals may not give legal advice, accept cases, appear in court, plan strategy, make legal decisions, or chart the direction of a case.³⁹

The practice of law relates to the rendition of service for others that calls for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body of and philosophy of law to a specified legal problem of a client.⁴⁰

These broad concepts can be useful to individual JAs in deciding what conduct is permissible for paralegals under their supervision.

One effective solution to preventing the unauthorized practice of law is to give specific guidance to the paralegals. Each JA should identify the tasks that paralegals shall not perform under any circumstances; those tasks for which paralegals should attempt to obtain guidance before proceeding or notify the JA as soon as practicable after performance has begun; and those tasks paralegals should report to the JA but that are within the scope of the paralegal’s duties. Providing this specific guidance will make the role of the paralegal clear and empower the Soldier to decline to act when it is contrary to the orders of the supervising JA.

B. The Army as Client

Paralegals must have a clear understanding of which master they serve. An individual can be a client only when the paralegal is supporting the Trial Defense Service or Legal Assistance mission. At all other times, the client is the

Department of the Army acting through its authorized officials.⁴¹

During the normal course of duties, paralegals provide support directly to unit representatives: normally commanders, command sergeants major, and first sergeants. A paralegal almost always works with personnel who are senior in rank to him and who are often in the Soldier’s chain of command. These leaders will have operational requirements and command priorities that are—unbeknownst to the paralegal—driving them to take actions that may not be in the best interests of the Army or consistent with law or Army Regulations. They likely do not have the experience or training in the law and ethics the paralegal might possess. Yet, Army training and culture has taught the paralegal to follow orders and complete the mission. This unique dynamic can cause confusion in the minds of paralegals about how to act.

The supervising attorney can avoid these issues through proper training and supervision. Paralegals should understand that all JAG Corps personnel act in support of the Army as an institution. The JA represents the Army. Paralegals support the JA in that mission. By focusing on the Army as the client, paralegals will better understand that they support the unit mission, not any specific individual in the unit. When a unit leader recommends or pursues a course of action that is not in the best interest of the Army or is illegal, the legal staff must act in a manner reasonably necessary to further the best interest of the Army.⁴² This obligation extends to the paralegal as well as to the JA. The appropriate course of action is a matter of personal preference for the JA and the paralegal. At a minimum, the paralegal must immediately notify the JA of what is going on. This is usually the best way, as the lawyer is normally the appropriate person to counsel senior leadership about what they should or should not, and can or cannot do, in a given circumstance.

C. Confidentiality of Information

A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer.⁴³

³⁶ AR 27-26, *supra* note 2, app. B (Rule 5.5 cmt.)

³⁷ MODEL RULES OF PROF’L CONDUCT R 5.5 cmt. 2; *see also* *Chambers v. Nasco*, 501 U.S. 32 (1991).

³⁸ AR 27-26, *supra* note 2, app. B (Rule 5.5 cmt.)

³⁹ Mary Kay Lieberman, *The Unauthorized Practice of Law (UPL): What It Is and How to Avoid It*, 2 ASS’N OF TRIAL LAWYERS OF AMERICA ANNUAL CONVENTION REFERENCE MATERIALS 2251 (2000).

⁴⁰ LEGAL ETHICS, *supra* note 8, § 5.3-1.

⁴¹ AR 27-26, *supra* note 2, app. B (Rule 1.13(a)).

⁴² *Id.* (Rule 1.13(c)).

⁴³ MODEL RULES OF PROF’L CONDUCT R 1.6 cmt. 2.

1. Individual Clients

Paralegals working in TDS and Legal Assistance offices must act diligently to preserve confidentiality of client information. Rule 1.6 prohibits JAs, and the paralegals supporting them, from revealing information relating to the representation of a client unless the client consents after consultation.⁴⁴

The nature of military culture makes disclosure of confidential information by a paralegal a very real concern. Any disclosure can undermine the credibility of the Army's legal system. Paralegals are often privy to the most private and salacious details of the client's life. Peers and superiors may well be interested in these details. Peer pressure may lead paralegals to reveal confidential information on purpose, or the paralegal may reveal it accidentally because he is unaware of who may be listening during an otherwise appropriate conversation. Each JA must ensure paralegals understand that they must zealously guard confidential client information.⁴⁵

Similarly, JAs must prevent accidental disclosure of client confidences in the workplace. During the normal duty day, paralegals working in the TDS or Legal Assistance offices perform customer service duties for members of the military public in addition to handling confidential information. The senior JA should examine the layout of the law office and the duties assigned to those who have regular contact with the military public to prevent inadvertent disclosure of confidential information. Additionally, they should continually reinforce the obligation to maintain client confidences and be aware of their surroundings when discussing matters related to clients and client representation to ensure confidences are maintained.

2. Army as Client

Paralegals working on behalf of the Army as a client also have access to confidential client information. Rule 1.6 prohibits revealing information relating to representation of a client unless the client consents after consultation in this context as well.⁴⁶ When representing the Army as a client, the number of personnel who can have access to client

information is significantly greater, but the obligation remains the same.

Paralegals must understand the importance of maintaining client confidences. Most duties a paralegal performs in support of the unit lead to action by the commander. Every JA must ensure paralegals are mindful of their role on the commander's personal staff⁴⁷ when performing their duties. In particular, paralegals must understand that confidential command information should not be disclosed to third parties who do not "need to know," even when the information is already known outside command channels.⁴⁸ Those JAs who advise commanders should discuss access to legal actions with them, limiting access to those with a need to know. By identifying which personnel are authorized access to confidential command information, JAs can better protect it from accidental disclosure.

It is vital to remember that "third parties" in this context means "parties outside the Army," because the Army, not the commander, is the client:

When one of the officers, employees, or members of the Army communicates with the Army's lawyer on a matter relating to the lawyer's representation of the organization on the organization's official business, the communication is generally protected from disclosure to *anyone outside the Army* by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the lawyer. It is the Army, and not the officer, employee, or member which benefits from Rule 1.6 confidentiality.⁴⁹

Thus, in a criminal case, the Government may not properly conceal command information from an accused Soldier or his (civilian or military) defense counsel on the basis that it is "confidential." Whether it can be withheld on another basis is probably best left to the attorney rather than the paralegal staff.

⁴⁴ AR 27-26, *supra* note 2, app. B (comments to Rule 1.6(a), stating "[t]he 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").

⁴⁵ U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 4-8 (13 Sept. 2011) ("Those who assist attorneys providing legal assistance will maintain the same strict standards of confidentiality. Attorneys will ensure that those who assist them are fully instructed as to the nature and scope of privileged communications.").

⁴⁶ AR 27-26, *supra* note 2, app. B (Rule 1.6(a)).

⁴⁷ U.S. DEP'T OF ARMY, ARMY TACTICS, TECHNIQUES & PROCEDURES NO. 5-0.1 para. 2-113 (14 Sept. 2011) (paragraph 2-105 stating "[p]ersonal staff officers work under the immediate control of, and have direct access to, the commander").

⁴⁸ Lawyer Disciplinary Bd. v. McGraw, 194 W.Va. 788, 800 (1995) (noting "[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it").

⁴⁹ AR 27-27, *supra* note 2, app. B (Rule 1.13 cmt).

Accidental disclosure of confidential client information can easily occur in the workplace.⁵⁰ To efficiently complete the JAG Corps mission, law office personnel must have easy access to relevant documents and be able to freely discuss pending legal actions. To prevent an inadvertent disclosure of confidential information, JAs should limit access to the law office work areas to personnel identified by the commander and, to the greatest extent possible, include only commanders and senior enlisted advisors. By limiting access to the law office, JAs can limit the opportunities for inadvertent disclosure of client information and ensure documents remain secure.

Similarly, JAs must implement control measures to prevent unauthorized release of confidential information during routine staff functions. Paralegals are taking an increasingly active role on company and battalion staff. Judge advocates should proactively engage commanders regarding the information that is reportable during staff meetings to protect the confidentiality of command information. Once established, JAs should work with the NCOs to train all Soldiers on proper briefing techniques as well as identifying and protecting confidential information during staff meetings. For example, a paralegal should know not to brief the status of specific adverse actions during a Command and Staff briefing, but to instead offer to brief the commander in private immediately following the meeting.

D. Communications with Persons Represented by Counsel

Paralegals must be aware of restrictions on communicating with persons represented by counsel. In representing the Army, a JA and the paralegal staff “shall not communicate about the subject of the representation with a party known to be represented by another lawyer in the matter.”⁵¹ In most instances, if a paralegal is approached about a legal matter within the scope of his duties, the legal action has already commenced and the Soldier knows that legal counsel is available at no cost to the Soldier.

Paralegals must be aware of restrictions on communication with Soldiers represented by counsel. Paralegals usually support their units and are often peers of and know the Soldiers who are the subjects of adverse government action. These Soldiers may be tempted to see them as accessible sources of information. The JA must ensure the paralegals understand they cannot discuss matters related to an adverse action with the subject of the action, who is or should be represented by counsel. They must

⁵⁰ For example, unit personnel conducting official business in the law office can easily learn confidential client information by listening to conversations among the legal staff who are collaborating on a legal action related to a Soldier in another unit.

⁵¹ AR 27-26, *supra* note 2, app. B (Rule 4.2).

further ensure paralegals understand that the Soldier cannot waive this protection, unless the Soldier’s counsel consents.⁵² While Rule 4.2 acknowledges Soldiers have the right to speak with government officials about the matters in controversy,⁵³ paralegals should not view themselves as an appropriate government officials and instead should assume Soldiers have counsel and refer them to TDS or Legal Assistance, as appropriate.

IV. Proposed System of Supervision

Supervisory JAs must implement measures to ensure paralegals conduct their duties consistent with the Rules of Professional Conduct. This paper proposes a system of supervisory and oversight measures that uses existing Army doctrinal concepts and leadership obligations and that are easy to implement. This system combines training, supervision, and counseling to provide ethical oversight in a clear, consistent, and predictable manner. Its purpose is to improve the overall quality of the Army legal system, and empower paralegals to provide the greatest breadth of support services consistent with the *Rules of Professional Conduct*. Incorporating ethical rules oversight and supervision into existing operational concepts and leadership obligations will allow JAs to implement the required oversight with little negative impact on law office operations.

A. Critical Information Flow

Each law office should use Critical Information Requirements (CIRs) to keep abreast of ethical issues that arise during daily operations. A CIR list is a useful tool to prioritize the flow of information within the law office. Commanders use CIRs to focus information collection to the relevant facts they need to make critical decisions throughout the conduct of operations.⁵⁴ Likewise, JAs should use CIRs to identify and prioritize the reporting of new legal issues, outline the format and content of CIRs, and establish timelines for reporting CIR events. Intra-office CIRs are an effective organizational component in the overall supervisory plan that will aid in identifying and

⁵² See *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (holding that a prosecutor’s duty to refrain from speaking directly with represented parties was personal and could not be “vicariously waived” by the represented person himself because “[t]he rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not the *rights* of represented parties”); AR 27-26, *supra* note 2, app. B, Rule 4.2 (“In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. . . .”).

⁵³ AR 27-26, *supra* note 2, app. B (cmt. to Rule 4.2).

⁵⁴ U.S. DEP’T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 12 (17 May 2012).

highlighting ethical issues which may arise in the law office, increasing timely reporting of ethical issues, and mitigating or avoiding ethical missteps that may arise.

B. Consistency and Predictability

Judge advocates should establish an office battle rhythm. A battle rhythm is the sequencing and executing of actions within an organization that is regulated by the flow and sharing of information that supports all decision cycles.⁵⁵ It is a published and set routine cycle of leader and staff activities intended to synchronize current and future operations.⁵⁶ Establishing an office battle rhythm will increase office efficiency, improve personnel accountability, and synchronize office lines of effort, thereby increasing the JA's oversight of legal activities. By establishing daily and periodic action update briefs and Significant Activities (SIGACTS) briefs, JAs can create a regular opportunity to provide guidance, assign tasks, track and review legal actions, and update priorities of work for the entire law office. Regular updates on daily office activities will increase oversight of staff actions, improve the timely identification of ethical issues, and enable JAs to avoid or mitigate any consequences arising from the ethical violation. Additionally, requiring JAs to develop and implement an office battle rhythm will aid their professional development and better prepare them to take an active role as a member of a commander's staff.

C. Delegating and Evaluating

Judge advocates should use Noncommissioned Officer Evaluation Reports (NCOERs), Support Forms, and periodic counseling to establish the NCO's duties within the supervisory system. A JA will counsel and rate most NCOs in the law office. In the role of rater, JAs must ensure that the NCO thoroughly understands the organization, its mission, the NCO's role in support of the mission, and the standards by which individual performance is evaluated.⁵⁷ When acting as a rater, JAs should use DA Form 2166-8-1, Noncommissioned Officer Evaluation Report Support Form, to explain the system of supervision they are using to ensure compliance with the *Rules of Professional Conduct* and the NCO's role in that system of supervision.

⁵⁵ JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS, at IV-16 (30 July 2012).

⁵⁶ *Id.*

⁵⁷ U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-2(d) (5 June 2012).

Noncommissioned Officer Evaluation Report counseling is an ideal opportunity to develop a team approach to supervising paralegals. Addressing the NCO's role in ethics compliance during initial and follow-up NCOER counseling will establish the ethical rules as a leadership priority, motivate the NCOs to take ownership of maintaining compliance with the ethical rules, and provide them with quantifiable performance objectives. Using ethical performance objectives in the rating dialogue will better enable NCOs to develop subordinates, plan to accomplish the mission, modify processes, and set priorities of work for the entire legal staff.⁵⁸

D. Take Advantage of Training Opportunities

Judge advocates should use Sergeant's Training Time to provide a regular opportunity to discuss professional ethics. Commanders emphasize individual Soldier training in support of Mission Essential Task List (METL) training by allocating dedicated training time for NCOs using sergeant's training time.⁵⁹ Ethical issues can arise in any area of the legal practice. By incorporating Rules of Professional Conduct elements into METL training for paralegals, JAs can demonstrate how the Rules of Professional Conduct affect daily duties with concrete examples within general Military Occupational Specialty training topics and thereby raise the awareness of paralegals in a practical and effective manner.

E. Regular Counseling and Feedback

Judge advocates should incorporate legal ethics into the performance counseling of all paralegals in the law office. Performance counseling can be an effective tool to raise awareness and set performance objectives related to compliance with ethical rules. All Soldiers should receive regular and effective performance counseling.⁶⁰ The leader and the subordinate must work together to establish performance objectives and evaluation standards for the next counseling period.⁶¹ Including duty related ethical rules into regular performance counseling can set the standard for duty performance, highlight areas of particular concern within the office, and help to shape the system of supervision to ensure paralegals act in accordance with the *Rules of Professional Conduct*. In addition, reinforcing counseling requirements

⁵⁸ *Id.* para. 3-4(b).

⁵⁹ U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT app. G-24 (4 Aug. 2011).

⁶⁰ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (20 Sept. 2012) [hereinafter AR 600-20] (paragraph 2-3, noting that "[p]roviding regular and effective performance counseling to all Soldiers, not just those whose performance fails to meet unit standards, is a command function").

⁶¹ FM 6-22, *supra* note 27, para. 8-72.

with junior leaders can provide opportunities to hone a skill that becomes increasingly important as JAs progress through their careers.

The supervisory measures listed above, if implemented and maintained, will decrease the likelihood of an accidental violation of the ethical rules and increase the probability that violations will be identified, should they occur. Corrective training—such as extra training, additional instruction, or on-the-spot correction—is among the most effective tools available to leaders to address these issues.⁶² However, in assigning corrective training, JAs must be mindful that the training, instruction, or correction given to a Soldier must be oriented to improving the Soldier's performance in his or her problem area.⁶³ Corrective training—if completed and documented on DA Form 4856—will enable the JA to document appropriate additional training and increased supervision contemplated by Rule 5.3.

This system makes use of existing Army doctrinal concepts and processes. Each JA can easily tailor the timing of training, counseling, and regular oversight to the nature of the practice in the law office. If diligently followed, this system will significantly improve the paralegal's ability to identify ethical issues, report emerging ethical challenges, and seek guidance to avoid ethical violations or mitigate adverse consequences should an ethical violation occur. This plan will also familiarize junior JAs with systems and processes which are increasingly important as they advance in rank and experience.

V. Conclusion

Rule 5.3 requires senior supervisory lawyers to implement a system of control measures they can reasonably expect paralegals to uphold in performing their duties in a manner consistent with the Rules of Professional Conduct. Senior supervisory lawyers should tailor the system to the nature of the organization's legal practice and review it periodically to identify emerging issues and revise the required control measures. If the control measures are stated in terms of existing Army leadership requirements and doctrinal concepts, the system of supervision can aid in the development of junior JAs as officers and familiarize them with concepts and processes which they will encounter in future assignments.

If they are required to implement a battle rhythm and critical information requirements, junior JAs will be familiar with the purpose and use these concepts before moving into staff positions, thereby becoming more effective staff officers. This will also create a structure for the timely flow of important information while minimizing the risk of violating the *Rules of Professional Conduct*. Ensuring JAs execute counseling requirements and METL-specific training requirements to include ethical considerations helps to increase the quality and efficiency of legal service support while limiting confusion about the Soldier's role; further, it empowers them to maintain ethical standards.

Additionally, by incorporating ethics oversight and supervisory systems into noncommissioned officers' duty descriptions, NCOERs, and Support Forms, JAs can effectively reinforce the importance of NCO ethics compliance and take advantage of the NCO's inherent leadership role to aid in monitoring duty performance.

If senior supervisory lawyers establish and enforce these standards, JAs directly supervising paralegals will be forced to consider the nature of their law practice and the role of paralegals within it. Additionally, all JAG Corps personnel will be intimately familiar with the nuances of the ethical rules and how those rules impact their regular duty performance. This will allow JAs to take better advantage of the skills and expertise of their Soldiers while ensuring compliance with their ethical requirements under the Rules of Professional Conduct.

Any system of supervision should begin with a thorough review of AR 27-26 to identify ethical rules that will be of particular concern to the law office. Each senior JA should meet with his NCOIC to establish and publish a workable battle rhythm to ensure appropriate training, supervision, and review of all work; outline a system for reporting critical information requirements; and identify individual leader responsibilities in the system of supervision. Judge advocates should publish the protocol to all members of the legal staff and review it as part of periodic performance counseling. This system can ensure all JAs meet their supervisory obligations under the Rules of Professional Conduct and improve the quality of legal services provided to the Army and its personnel.

⁶² AR 600-20, *supra* note 60, para. 4-6(b) (“One of the most effective administrative corrective measures is extra training or instruction (including on-the-spot correction).”).

⁶³ *Id.* para. 4-6(b)(1).