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# Azimuth Check

## Knowing and Avoiding Professional Responsibility Slips, Trips, and Falls

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*"Learn from the mistakes of others. You can't live long enough to make them all yourself."*<sup>1</sup>

In delivering principled counsel to your client, knowing what not to do becomes as important as knowing what to do. This is an azimuth check to help Judge Advocate General's (JAG) Corps and Judge Advocate Legal Services (JALS) personnel gain awareness of common

errors and missteps that become matters for the Professional Responsibility Branch (PRB), Office of The Judge Advocate General, to review. This information is relevant not only to new attorneys and paralegals but also to supervisors who lead and mentor subordinates.

Most of the allegations that PRB reviews are complaints against captains and majors, but this does not shed much light on the matter. Captains and majors comprise the vast majority of attorneys practicing in the JAG Corps and JALS,<sup>2</sup> and they work under the supervision of lieutenant colonels and colonels. Captains and majors are not only (relatively) less experienced in military law, but they are also the attorneys who most frequently interact with individual clients, alleged victims, accused persons, respondents, and witnesses—in other words, those individuals interacting with the legal system who are most likely to file a complaint.

The most obvious errors judge advocates (JAs) commit are personal misconduct and its close friend, committing misconduct and not telling anyone about it. Attorney misconduct generates the largest number of professional responsibility (PR) cases. Nearly all misconduct cases are presented to PRB not as an allegation but as a report.<sup>3</sup> The report is routinely followed by a command or law enforcement investigation. Once the investigation is complete, PRB reviews the investigation to assess whether Rule 8.4 (Misconduct) of the *Rules of Professional Conduct for Lawyers* applies to the facts.<sup>4</sup> Rule 8.4 covers conduct regardless of whether the lawyer was acting as a lawyer or not and pertains to a broad (but not all-encompassing) range of misconduct or illegal conduct.<sup>5</sup>

To highlight the point: an attorney who solely commits a driving under the influence (DUI) offense likely does not implicate Rule 8.4, but an attorney who commits a DUI offense and then actively takes steps to deceive or misrepresent the fact of the DUI implicates Rule 8.4. An attorney does not have to be convicted of or even charged with a crime to violate this rule.<sup>6</sup> Any credible information of a violent crime reflects adversely on the lawyer's fitness to practice law and is therefore examined under this rule.<sup>7</sup> A quick review of the comments to Rule 8.4 provides a thorough examination of all aspects of misconduct the rule covers.

Misconduct's close friend, failure to report misconduct, violates an attorney's duty to report through their legal tech chain to PRB if the attorney is being investigated by their licensing authorities.<sup>8</sup> This

requirement is extended to “an allegation of misconduct, impropriety, or unfitness . . . in connection with their practice of law or in connection with any proceeding.”<sup>9</sup> It also extends to any JALS lawyer charged with a criminal offense.<sup>10</sup> Failure to report cases most frequently arise in off-duty offenses that are discovered later in time during security reviews and other Department of the Army level screening activities.

Aside from misconduct cases, attorneys are reviewed most frequently for “The Four C’s”: competency (Rule 1.1),<sup>11</sup> communication (Rules 1.2 and 1.4),<sup>12</sup> confidentiality (Rule 1.6),<sup>13</sup> and conflicts (Rules 1.7, 1.8, and 1.9).<sup>14</sup> PR competency reviews frequently include a thorough examination of the legal tech chain, too; a lack of competency allegation against an attorney immediately begs the question of whether the attorney was being properly supervised, managed, trained, and mentored prior to engaging in the alleged substandard conduct.<sup>15</sup> Supervisors have an obligation to provide subordinate attorneys with engaged leadership, and subordinate attorneys have an obligation to use the legal tech chain and collaborate.

In allegations involving ineffective communication, oftentimes, it is not *what* is communicated but *how* it is communicated. JAs must ensure that their clients, both individuals and the command/Army, unambiguously understand and effectively receive their legal advice. In cases involving alleged victims, no matter the outcome of the action, JAs should conduct a thorough and compassionate closeout with the victim in every single case. Sympathetic communication prevents many issues.

Confidentiality problems can pop up in a variety of ways. They can arise from an ineffective downrange workspace that lacks proper privacy, such that attorneys are discussing command or individual client matters within earshot of those who do not have a need-to-know status (individuals can resolve this by fixing the workspace or relaying information in a more private setting). It can also originate from attorneys and paralegals with an “information is power” dynamic who want to impress peers or others with their knowledge of ongoing sensitive issues in the command (individuals can resolve this with training, awareness, and enforcement of standards). It can be a nuanced request,

such as an inspector general (IG) asking for a legal opinion during an IG investigation (individuals can resolve this by reporting the request through the legal tech chain to PRB). Alternatively, it can be very inane—someone shares something funny that happened at work about a case with a spouse, a group of friends, or in some other social setting because it is just a funny story (individuals can resolve by keeping the jokes within the circle of those who are working the case).

“The road to hell is paved with good intentions.”<sup>16</sup> PRB utters this phrase in nearly every presentation and frequently in communications with JAG Corps leaders due to the regular occurrence of Rule 1.7, conflict of interest, incidents. In an effort to ingratiate themselves with the command and to be helpful, legal advisors (and paralegals) inadvertently develop attorney-client relationships with individual members of the command. Conflict of interest cases also arise when off-duty friends seek assistance, and the attorney inadvertently develops an attorney-client relationship with another member of the military community. Command legal advisors must remember that they represent the Army,<sup>17</sup> not individuals; paralegals must also be mindful of Rule 5.5 (Unauthorized Practice of Law).<sup>18</sup> Legal advisors and paralegals can help those seeking advice by referring them to the appropriate legal assistance, trial defense, or special victims counsel for assistance.

Lastly, remember, as professionals, we all have obligations to maintain the high standard of the legal profession.<sup>19</sup> If you are faced with a PR dilemma or think you have observed a PR violation, consult with your legal tech chain.<sup>20</sup> Have faith and trust that the matter will be reviewed fairly and in accordance with Army Regulations 27-1, *Judge Advocate Legal Services*,<sup>21</sup> and 27-26, *Rules of Professional Conduct for Lawyers*.<sup>22</sup> **TAL**

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## Notes

1. This quote is attributed to a range of people. *See You Must Learn from the Mistakes of Others. You Will Never Live Long Enough to Make Them All Yourself*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2018/09/18/live-long/> (last visited Oct. 23, 2024) (outlining the history and evolution of this quote from 1837 to present day).
2. For example, in the most recent consolidated date of rank roster of active component judge advocates published by the Plans, Programs, and Policies (P3) Office on 14 August 2024, there are 543 majors, 790 captains, and 81 first lieutenants in the JAG Corps, compared to about 130 colonels, about 260 lieutenant colonels, and 672 civilian attorneys. *See PLANS, PROGRAMS AND POLICIES (P3), JUDGE ADVOC. GEN.'S CORPS, CONSOLIDATED DATE OF RANK ROSTER OF ACTIVE COMPONENT JUDGE ADVOCATES* (14. Aug. 2024).
3. When discussing misconduct, the most common type of misconduct is criminal in nature. A report is generated by a law enforcement entity. That report then serves as the basis of a PR allegation.
4. *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 8.4 (28 June 2018) [hereinafter AR 27-26] (Misconduct). In these cases, PRB reviews the investigation for potential violations of Rule 8.4(b-d).
5. *See id.*
6. *Id.* app. B, r. 8.4, cmt. (3).
7. *Id.*
8. *See id.* para. 7(i).
9. *See* Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-01 – Professional Responsibility, para. 2(e) (1 Mar. 2022) [hereinafter TJAG Policy Memorandum 22-01].
10. *Id.* para. 2(c).
11. AR 27-26, *supra* note 4, app. B, r. 1.1.
12. *Id.* app. B, r. 1.2, 1.4.
13. *Id.* app. B, r. 1.6.
14. *Id.* app. B, r. 1.7, 1.8, 1.9.
15. Supervisory lawyer responsibilities are addressed in Rule 5.1 (Responsibilities of Senior Counsel and Supervisory Lawyers), *id.* app. B, r. 5.1, and in Army Regulation 27-1, Chapter 12 (Mismanagement Inquiries). U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 12 (24 Jan. 2017) [hereinafter AR 27-1].
16. This proverbial idiom likely derives from St. Bernard of Clairvaux's writings in approximately 1150. CHRISTINE AMMER, *THE AMERICAN HERITAGE DICTIONARY OF IDIOMS* 378 (2d ed. 2013) (defining “road to hell is paved with good intentions”).
17. *See* AR 27-26, *supra* note 4, app. B, r. 1.13 (Department of the Army as Client).
18. *Id.* app. B, r. 5.5.
19. *See id.* app. B, r. 8.3 (Reporting Professional Misconduct); TJAG Policy Memorandum 22-01, *supra* note 9.
20. *See* TJAG Policy Memorandum 22-01, *supra* note 9, para. 2(c) (directing reporting through technical channels).
21. AR 27-1, *supra* note 15.
22. AR 27-26, *supra* note 4.