

Professional Responsibility Notes

Office of The Judge Advocate General

Department of the Army Standards of Conduct Office

The Standards of Conduct Office (SOCO) normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. Those inquiries—which involve isolated instances of professional impropriety, poor communication, lapses in judgment, and similar minor failings—typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General's Professional Responsibility Committee (Committee).

The following two Committee opinions, which apply the Army's Rules of Professional Conduct for Lawyers (Army Rules)¹ and other regulatory standards² to cases involving allegations of attorney personal and professional misconduct, are intended to promote an enhanced awareness of personal and professional responsibility and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, the SOCO edited the Committee opinions.³ Mr. Eveland.

Professional Responsibility Opinion 96-1

The Judge Advocate General's Professional Responsibility Committee

Army Rule 1.6
(*Confidentiality*)

Army Rule 8.4
(*Misconduct*)

No ethics violation proven against attorney who invoked privilege, where criminal investigators sought attorney's statement concerning his sexual involvement with client, a physically abused wife of an enlisted soldier.

Army Rule 8.4
(*Criminal Acts, Conduct Involving Dishonesty, and Conduct
Prejudicial to the Administration of Justice*)

Attorney obstructed justice when he asked witness to withdraw her statement detailing attorney's admissions of adultery with physically abused wife of an enlisted soldier.

1. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

2. See U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE (3 Feb. 1995) (The 15 September 1989 edition of AR 27-1 was in effect at the time of the events.); U.S. DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (10 Sept. 1995) [hereinafter AR 27-3] (The 30 September 1992 edition of AR 27-3 was in effect at the time of the events.).

3. Sequentially numbered footnotes have been added to both Committee opinions.

Facts

Captain *W* was a member of the Judge Advocate General's Corps serving as an administrative law attorney. Although a married man, Captain *W* frequented NCO clubs by himself, where he met a married woman, Mrs. *Z*, the victim of physical abuse by her spouse, Specialist *Z*. As the evening progressed, Captain *W* and Mrs. *Z* engaged in small talk, and Captain *W* revealed to Mrs. *Z* that he was a lawyer. When that club closed, they went to another club. After the second club closed, the two drove to the SJA office, where they engaged in further conversation for approximately twenty minutes before engaging in sexual intercourse and sodomy. A few weeks later, Captain *W* and Mrs. *Z* again met at a military club. When it was time to go home, Mrs. *Z* asked Captain *W* for a ride. He took her instead to the Legal Assistance Office, where they engaged in sexual intercourse.

Over the next two months Captain *W* and Mrs. *Z* talked from time to time, both in person and on the phone. The exact content of those conversations is unknown. However, Captain *W* told one witness, while watching the Superbowl at a bar, that he was giving Mrs. *Z* "legal advice for marital problems."

Specialist *Z* assaulted his wife four times after she began her relationship with Captain *W*. As a result of his assaults, court-martial charges were preferred against Specialist *Z*. During the course of the criminal investigation against Specialist *Z*, Mrs. *Z* told U.S. Army Criminal Investigation Command (CID) investigators that she and Captain *W* had engaged in sexual intercourse and sodomy. As a result of Mrs. *Z*'s statements, Captain *W* was apprehended by the CID, advised of his article 31, Uniform Code of Military Justice (UCMJ) rights, and given an opportunity to make a statement. Captain *W* invoked his rights and refused to answer the investigators' questions because of "attorney-client privilege." Captain *W* also wrote on the rights advisement form, "I have advised Mrs. *Z* on legal matters I believe gave rise to the complaint."

Mrs. *Z* was reinterviewed, and denied having an attorney-client relationship with Captain *W*. However, she did disclose that at some point during her affair with Captain *W*, she had asked for his advice, to "get another person's point of view,"

because she wasn't getting along with her husband. Specifically, Mrs. Z said she asked Captain W, "If you were in my situation would you leave your husband?"

Ms. Wit, an acquaintance of Mrs. Z and Captain W, told the CID that both, on separate occasions, had admitted their sexual relationship to her. Captain W found out about this statement. According to Ms. Wit, she went to the bowling alley parking lot when told that Captain W wanted to see her. Although Captain W knew he was under investigation by the CID and that Ms. Wit was a key witness against him, he joined her in the parking lot to talk with her. Captain W asked if she told the CID that he had slept with Mrs. Z. When Ms. Wit admitted that she had told the CID about his sexual relationship with Mrs. Z, Captain W told her that she would have to change her statement because he was going to get in trouble. Captain W told Ms. Wit to call the CID, tell them her prior statement was a lie, and tell them that Mrs. Z had asked her to lie to get her husband out of trouble. Ms. Wit advised Captain W that she could not do what he asked because she did not want to start lying. Captain W told her that she could not get into trouble for lying because she was a civilian. Ms. Wit told her friend, Ms. Second, that Captain W had asked her to change her statement to the CID, and Ms. Wit reported the conversation with Captain W to the CID.

Court-martial charges were preferred against Captain W for the offenses of sodomy, housebreaking, and conduct unbecoming an officer and a gentleman (adultery, false official statement, and obstruction of justice). Captain W submitted a request for resignation for the good of the service. That request was approved.

The Chief of the Standards of Conduct Office advised Captain W of the allegations of professional impropriety that had been referred to that office for action under *Army Regulation (AR) 27-1*.

In his rebuttal to assertions of professional misconduct, Captain W asserts that on numerous occasions Mrs. Z sought his advice as an attorney regarding domestic violence issues. He also asserts that at the time he refused to answer the CID investigator's questions, he considered these consultations to be privileged and confidential. Finally, Captain W asserts that he did not ask to talk with Ms. Wit, but that a friend, without his knowledge, had her come and talk to him. He asserts that Ms. Wit told him that she was coerced by Mrs. Z to tell the CID that he and Mrs. Z had engaged in a sexual relationship. He also asserts that Ms. Wit told him that she only made the allegation after she had previously denied it and the CID had threatened

her with deportation. Captain W asserts that he did not ask Ms. Wit to change her original statement. However, in a memorandum written in support of his request to resign for the good of the service, Captain W admitted that he never should have spoken to Ms. Wit.

Rules of Professional Conduct for Lawyers

The Army's Rules of Professional Conduct for Lawyers (Army Rules), are applicable to this case.⁴

Army Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

...

(e) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on the behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.⁵

Army Rule 8.4 states:

It is professional misconduct for a lawyer to:

...

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

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

4. In the preamble to the *Army Rules*, their scope is stated as being applicable to all lawyers as defined in the rules. Lawyer is defined as:

[A] person who is a member of the bar of a Federal court, or the highest Court of a State or Territory, or occupies a comparable position before the courts of a foreign jurisdiction and who practices law under the disciplinary jurisdiction of the Army. This includes all Army lawyers and civilian lawyers practicing before tribunals conducted pursuant to the Uniform Code of Military Justice and the Manual for Courts-Martial.

AR 27-26, *supra* note 1, at 35.

5. *Id.* Rule 1.6.

(d) engage in conduct that is prejudicial to the administration of justice.⁶

Discussion

The record supports a finding that Captain *W* and Mrs. *Z* did have a colorable attorney-client relationship, although the relationship existed for a limited time and purpose.⁷ Both parties agree that Mrs. *Z* approached Captain *W* at a time when she knew that he was a lawyer. They both agree that she sought his advice regarding domestic violence in the *Z* home. As a military family member, Mrs. *Z* was eligible for such legal assistance, and Captain *W* was authorized by regulation to provide it. The record also establishes that Captain *W* did provide family law advice to Mrs. *Z* during their illicit relationship.⁸

When Captain *W* was questioned as a suspect, he had no official duty to answer the investigator's questions. In fact, he had an absolute right to remain silent under Article 31, UCMJ,⁹ and the Fifth Amendment.¹⁰ He also had an obligation to protect the confidences of his client under the legal assistance regulation¹¹ and Army Rule 1.6(a).¹²

In this case, the charge that Captain *W*'s statements regarding attorney-client privilege were false appears to be based upon the opinion of Mrs. *Z* that an attorney-client relationship did not exist between her and Captain *W*. In the Committee's opinion, Mrs. *Z*'s subjective belief is not controlling as to whether Captain *W*'s assertion of the attorney-client privilege was justified. Also, the Committee was not persuaded that Captain *W*'s assertion of the attorney-client privilege was intended to, or had the effect of, deceiving or impeding the criminal investigation.¹³

The Committee also determined that, with respect to the allegation of obstruction of justice, a preponderance of the evidences establishes that Captain *W* did in fact attempt to obstruct the CID investigation by attempting to have Ms. Wit change her statement to the CID. Ms. Wit's account of this incident was found to be more credible than Captain *W*'s for several reasons. First, Mrs. *Z* advised the CID that Captain *W* had revealed his sexual relationship with her to Ms. Wit. Next, according to a statement made by Ms. Second to the CID, Captain *W* alluded to his sexual relationship with Mrs. *Z*. Finally, Ms. Wit promptly reported Captain *W*'s request that she change her statement only one day after it occurred. All of these facts lend credibility to Ms. Wit's allegation that Captain *W* attempted to obstruct justice by having her change her previous testimony.¹⁴

6. *Id.* Rule 8.4.

7. "Any authorized contact with a service soldier seeking his or her services as . . . an attorney for himself or herself results in at least a colorable attorney-client relationship, although the relationship may be for a limited time or purpose." U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, app. C, para. C-1b(1) (8 Aug. 1994). The Committee finds this statement of the law persuasive and equally applicable to eligible persons seeking legal assistance from Army judge advocates.

8. As a judge advocate on active duty, Captain *W* was authorized to provide family law advice to Mrs. *Z*. AR 27-3, *supra* note 2, paras. 2-2a, 2-2a(1), 2-5a(1), 3-6a. Indeed, unless providing this assistance was inconsistent with superior orders or his other duties and responsibilities, Captain *W* had a duty to provide Mrs. *Z* such assistance. *Id.* para. 2-3a. Such assistance can be provided at any time. *Id.* para. 2-3b. In this regard, the Committee notes that the record contains no evidence that Captain *W*'s superiors prohibited him from providing such assistance.

9. UCMJ art. 31 (1988).

10. U.S. CONST. amend. V.

11. Once a colorable attorney-client relationship forms, an Army attorney is required to protect the confidentiality of all privileged communications with the client. AR 27-3, *supra* note 2, para. 4-8a (The 10 March 1989 version of AR 27-3, which was in effect at the time of events, was reissued 30 Sept. 1992 and 10 Sept. 1995.).

12. AR 27-26, *supra* note 1, Rule 1.6(a).

13. Making a false official statement—under circumstances that dishonor or disgrace the person making the statement as an officer, or seriously compromise the officer's character as a gentleman—is a violation of Article 133 of the Uniform Code of Military Justice. UCMJ art. 133 (1988); MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶¶ 59c(2), 59c(3) (1995). In particular, the Army Court of Military Review has held that:

[I]ntentional deception of a criminal investigator on the subject matters of an official inquiry amounted to conduct unbecoming an officer. Lying to the military official on a matter of official concern completely compromised appellant's status as an officer and gentleman. Even though making a false statement to a criminal investigator generally is no offense, absent an independent duty to account, . . . the special status of an officer and the position of trust he occupies makes the intentional deceit a crime under Article 133.

United States v. Lindsay, 11 M.J. 550, 552 (A.C.M.R. 1981).

14. The elements of obstructing justice are that: (1) the accused wrongfully did a certain act; (2) the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending; (3) the act was done with the intent to influence, to impede, or otherwise to obstruct the due administration of justice; and (4) the conduct of the accused was prejudicial to good order and discipline. UCMJ art. 134 (West. Supp. 1996). This offense may be based on conduct that occurs before prefferal of charges. Captain *W*'s conduct satisfies the elements of this offense because he approached a witness in a criminal investigation against him and tried to get her to change her prior statement concerning his misconduct with Mrs. *Z*.

Captain *W*'s assertions, on the other hand, are not credible. By his own admission, he was an experienced trial counsel, and knew that it was inadvisable for him to talk to a key witness in a criminal investigation in which he was the subject. His assertions that he played no role in the procuring of Ms. Wit, that she voluntarily admitted to him that she had lied to the CID, and that she was eager to change her statement once she realized the trouble he was in, ring hollow in light of the corroborative evidence in support of Ms. Wit's allegations concerning this offense.

Captain *W*'s criminal conduct violated Article 134, UCMJ, and was committed while he was a member of the Judge Advocate General's Corps. Accordingly, his attempt to obstruct justice clearly reflected adversely on his honesty and fitness as a lawyer, was deceitful, and was prejudicial to the administration of justice.

Findings

The Committee finds that:

- a. Captain *W* did not violate Army Rule 8.4¹⁵ by asserting the attorney-client privilege during custodial interrogation.
- b. Captain *W* did violate paragraphs (b), (c), and (d) of Army Rule 8.4¹⁶ by attempting to obstruct justice.

Recommendations

In light of the above findings, the Committee recommends that The Judge Advocate General:

- a. Notify Captain *W*'s State bar of this professional misconduct so that the bar may take such proceedings as the bar deems appropriate.
- b. Revoke Captain *W*'s certification as counsel under Article 27(b), UCMJ,¹⁷ and suspend him from practice before Army Courts-Martial and the U.S. Army Court of Criminal Appeals.

Professional Responsibility Opinion 96-2 The Judge Advocate General's Professional Responsibility Committee

Army Rule 1.1 (Competence)

Attorney's improper relationship with criminal defense client did not result in a lack of thoroughness or preparation.

Army Rule 1.15 (Safekeeping Property)

Attorney not ethically required to safeguard drivers license of former client where attorney acquired drivers license in the course of a personal relationship not connected with legal representation.

Army Rule 1.7(b) (Conflict of Interest: Lawyer's Own Interests)

Army Rule 2.1 (Exercising Independent Professional Judgment)

Army Rule 8.4(b) (Committing a Criminal Act that Reflects Adversely on the Lawyer's Honesty, Trustworthiness, or Fitness as a Lawyer)

Lawyer's cocaine use with client—triggering client's parole revocation—breached ethical obligations to exercise independent professional judgment, to avoid conflicts of interest, and to avoid criminal activity.

Army Rule 8.4(b) and (d) (Criminal Acts and Conduct Prejudicial to the Administration of Justice)

Interstate transportation of revolver with obliterated serial number reflected adversely on fitness of Army Reserve attorney.

Facts

Captain *B*, a lawyer assigned to the U.S. Army Trial Defense Service (TDS), represented Private *Y* at the latter's court-martial on charges that included wrongful possession and distribution of cocaine. *Y* was sentenced, inter alia, to be confined for four years. While *Y* was incarcerated in the U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, Captain *B* visited him at least twenty-five times. A year after *Y*'s incarceration, Captain *B* listed *Y* as a beneficiary on Captain *B*'s Serviceman's Group Life Insurance. From January through April of the second year of *Y*'s imprisonment, Captain *B* visited *Y* seventeen times, listing himself on the visitor record as a friend.

15. AR 27-26, *supra* note 1, Rule 8.4.

16. *Id.* Rule 8.4, paras. (b), (c), (d).

17. UCMJ art. 27(b) (West Supp. 1996).

On November 14, over two years after the court-martial, *Y* was released on parole and returned home. On the day he returned home, *Y* was visited by Captain *B*. Within two weeks of his return, *Y* states that he used cocaine with Captain *B*. *Y* stated that he and Captain *B* used cocaine together on at least four or five occasions while *Y* was out on parole. Captain *B* provided the money and *Y* made the purchases.

As a condition of his parole, *Y* was required to submit urine specimens for drug testing. His specimen given on December 6, three weeks after release, tested positive for cocaine. After initially denying using cocaine, *Y* admitted using cocaine to his U.S. Probation Officer. *Y*'s parole was suspended on January 8, about seven weeks after it began. As requested by the U.S. Army Clemency and Parole Board, *Y* was given a preliminary interview by his U.S. Probation Officer. Captain *B* contacted the U.S. Probation Officer and offered to have *Y* reside with him if parole would not be revoked. On February 3, the U.S. Army Clemency and Parole Board ordered *Y*, as a further condition of his parole, to reside in a halfway house and to participate in a drug abuse therapy program.

Captain *B* called parole authorities at Fort Leavenworth to complain about the handling of *Y*'s parole. Captain *B* also spoke on "a couple of occasions" to *Y*'s probation officer, at times representing himself as *Y*'s lawyer and at other times as a friend.

On two occasions while *Y* was living at the halfway house, Captain *B* picked him up from the house, and they used cocaine together. According to Ms. *G*, a female acquaintance of *Y*, Captain *B* provided her cocaine and used it with her while *Y* was in the halfway house. While *Y* was at the halfway house, Captain *B* also listed *Y* on his auto insurance policy and authorized *Y* to use his late model automobile.

On February 12, 22, and 25, *Y* submitted specimens that all tested positive for cocaine. On February 28, *Y* was apprehended and placed in the local county jail, and Captain *B* visited him on that date. Captain *B* advised *Y* of his legal rights, typed a letter for *Y* to send to the U.S. Army Clemency and Parole Board seeking to have the revocation hearing held at the local military installation, and contacted the U.S. Marshal Service and parole authorities seeking to get *Y* released. In a letter addressed to the U.S. Army Clemency and Parole Board dated March 1, on TDS stationery, *Y* requested legal representation and stated that he had already consulted with a local TDS attorney, Captain *B*. Captain *B* requested permission from his Regional Defense Counsel (RDC) to represent *Y* in the parole

revocation matter. Although such representation was an extra duty and it was an unusual request, the RDC approved. *Y* was transferred to the installation detention facility on March 3, where Captain *B* visited him three times the next day, listing his relationship to the prisoner as "attorney." *Y* was returned to Fort Leavenworth on March 5.

On April 6, *Y* had a parole revocation hearing. Captain *B*, who visited *Y* on April 4, 5, and 6, testified at the parole revocation hearing as a personal friend on *Y*'s behalf and offered financial assistance to *Y* if parole would not be revoked. Captain *B* testified that he would ensure that *Y* received paralegal training, as he intended to hire *Y* as a paralegal in a private law practice that he intended to set up. *Y*'s parole was revoked. While *Y* was back in prison, Captain *B* retained some of *Y*'s personal property, including his car, cellular telephone, beeper, compact disks, clothing, waterbed, microwave oven, diamond earring, billfold, credit card, drivers license, and television. Captain *B* paid the storage fees on other property owned by *Y*.

On June 26, the Assistant Judge Advocate General for Civil Law and Litigation issued a letter of reprimand to Captain *B* for exercising poor judgment in his personal relationship with *Y*. On June 30, Captain *B* was released from active duty. On July 10, the local office of the U.S. Army Criminal Investigation Command (CID) completed a report of investigation that titled Captain *B* for wrongful possession, distribution, and use of cocaine with *Y*, Ms. *G*, and Ms. *H* (who also provided a statement that she had used cocaine with Captain *B*). He was also titled for selling cocaine to Ms. *G*.

Nearly eighteen months later, on December 10, while still a commissioned officer in the Individual Ready Reserve, U.S. Army Reserve, but not performing military duties, Captain *B* was stopped by the police in a town in New York for operating a vehicle that appeared to have overly-tinted windows. A check of the vehicle's registration indicated that the registration was suspended.¹⁸

The vehicle was impounded, and an inventory of the vehicle was conducted. *Y*'s drivers license and a loaded .22 caliber revolver with the serial numbers removed were discovered in the middle console of the car. Captain *B* stated, through counsel, that he had purchased the weapon several years earlier in another state when he was doing much traveling and felt a need for personal protection. At the time of his traffic stop, he had forgotten that the weapon was in his vehicle.

All five counts of a county grand jury indictment were dismissed at trial. The dismissal included three traffic and two

18. A five-count grand jury indictment also charged Captain *B* with one count of "Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree." New York Vehicle and Traffic Law section 511(1)(a) makes the operation of a motor vehicle when the operator knows or has reason to know that the license or privilege of operating the vehicle has been suspended, revoked, or otherwise withdrawn, the crime of aggravated unlicensed operation of a motor vehicle in the third degree. N.Y. VEH. & TRAF. LAW § 511(1)(a) (Consol. 1994). This misdemeanor is punishable by a fine of not less than \$200 nor more than \$500, imprisonment of not more than 30 days, or both. *Id.* Section 512 of the New York statute makes the operation of a motor vehicle while the certificate of registration of such vehicle or privilege of operation is suspended or revoked punishable by a fine of not less than \$50 nor more than \$100 or by imprisonment for not more than 30 days or both, for a first offense. N.Y. VEH. & TRAF. LAW § 512 (Consol. 1994).

firearms charges. The two firearms charges were that Captain *B* engaged in criminal possession of a weapon in the third degree in violation of the Penal Laws of the State of New York, sections 265.02(4) (having a loaded firearm in his possession at a place other than his home or place of business) and 265.02(3) (knowingly possessing a firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such weapon).

Rules of Professional Conduct for Lawyers

Army Rule 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."¹⁹

Army Rule 1.7(b) states, "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: . . . the client consents after consultation."²⁰

Army Rule 1.15(a) states, "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property . . ."²¹

Army Rule 2.1 states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice . . ."²²

Army Rule 8.4 states, "It is professional misconduct for a lawyer to . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; . . . (d) engage in conduct that is prejudicial to the administration of justice; . . ."²³

Discussion

The Committee reviewed the allegations enumerated in the notice from the Army Standards of Conduct Office to Captain *B* and evaluated them in the following discussion.

Violations of Army Rule 8.4 Arising from Captain B's New York Traffic Arrest

The Committee is convinced that Captain *B* knowingly transported a weapon in interstate commerce with the serial number removed, obliterated, or altered in violation of federal law.²⁴

At the time of the traffic stop, Captain *B* was the owner, operator, and sole occupant of the vehicle in which a loaded firearm with the serial number removed was discovered. Through his attorney, Captain *B* admits that a handgun was found and avers that he purchased the firearm in another "jurisdiction" at a time when he engaged in considerable travel. While Captain *B* claims that there was no evidence that the weapon had been "defaced for the purpose of concealing a crime," he does not deny that the serial number was defaced as alleged in the police report, which the Committee credits for the purpose of this inquiry. The Committee concludes that, contrary to Captain *B*'s assertion through counsel that he had simply "forgotten" that the weapon was in the vehicle, it is more likely than not that Captain *B* knew that he possessed the firearm and knew that the serial number had been removed.

The Committee cannot conclude that New York law was violated because there is insufficient evidence in the file to indicate that the serial number was defaced for either the *purpose* of concealment or prevention of the detection of a crime or the *purpose* of misrepresenting its identity. New York, unlike other states, requires *knowledge* that defacing was for the *purpose* of concealment.²⁵ Because Captain *B* admits not only that the weapon was purchased in another jurisdiction, but also that he had the weapon "[w]hen he returned to the state of New York," the Committee concludes that the weapon had to have been

19. AR 27-26, *supra* note 1, Rule 1.1.

20. *Id.* Rule 1.7(b).

21. *Id.* Rule 1.15(a).

22. *Id.* Rule 2.1.

23. *Id.* Rule 8.4.

24. 18 U.S.C. § 922(k) (1994).

It shall be unlawful for any person knowingly to transport, [to] ship, or [to] receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered, or to possess or [to] receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

Id.

25. *People v. Burgos*, 468 N.Y.S.2d 712 (N.Y. App. Div. 1983). New York statute makes the knowing possession of a firearm which has been defaced for the purpose of concealment or prevention of the detection of a crime, or misrepresenting the identity of such firearm, the crime of criminal possession of a weapon in the third degree, a class D felony. N.Y. PENAL LAW § 265.02(3) (Consol. 1994).

transported in interstate commerce, thereby violating federal law.²⁶

Lacking the additional element found in the New York statute, the federal statute at most requires *simple knowledge* that the serial number was defaced.²⁷ The Committee concludes that Captain *B* could not possess a single weapon for a sustained period of time without such knowledge.

The Committee concludes that paragraphs (b) and (d) of Army Rule 8.4²⁸ are violated by unlawful possession of a firearm, at least where the serial number is defaced. Defacing a serial number conceals the origin of a weapon and thereby frustrates the administration of justice should the weapon be used in a crime. Captain *B* either defaced the serial number himself, thereby engaging in deceptive conduct potentially injurious to the administration of justice, or obtained it from another who earlier defaced it. In the latter circumstance, the Committee has concluded that the defacement would have been obvious and considers that (for the purposes of Army Rule 8.4²⁹) knowing purchase would amount to culpable indifference to the obvious potential harm to the administration of justice. Accordingly, his conduct is inimical to that expected of an attorney.

Crediting the evidence in Captain *B*'s affidavit and provided by his attorney, the Committee is not convinced that Captain *B* operated a motor vehicle while his drivers license was suspended, revoked, or withdrawn or while the vehicle registration was suspended.

Violation of Army Rule 1.15(a) Arising from Captain B's Possession of Y's License

The Committee concludes that there is insufficient evidence to find a violation of Army Rule 1.15(a). No facts connect Captain *B*'s possession of *Y*'s property with the representation. Captain *B* and *Y* established a personal relationship that arose out of, but became separate at some point from, the representation. However inappropriate that relationship may have been, the Committee cannot conclude that Captain *B* became obliged

to act with the care of a fiduciary for property he may have acquired in the course of that personal relationship which has no apparent connection with the subject matter of the representation.

Violation of Army Rule 8.4 Arising from Captain B's Purchase and Use of Cocaine

The Committee concludes that Captain *B* purchased and used cocaine on several occasions. That conduct constituted criminal activity under the UCMJ,³⁰ not to mention other federal and state laws.

While Army Rule 8.4 suggests that "a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice,"³¹ illicit drug use has been found to be a violation without additional aggravating factors. Possession of illegal drugs "indicates an inevitable contact with the chain of distribution and trafficking of illegal drugs . . . the impact [of which] is of such severity that it affects adversely the public's perception of Respondent's fitness to be an officer of the Court."³²

Captain *B*'s cocaine involvement with *Y*—while the latter was still on parole from the cocaine conviction which occurred during the earlier representation—provides an additional aggravating element reflecting adversely upon Captain *B*'s fitness as a lawyer. Captain *B*'s conduct was also arguably prejudicial to the administration of justice under the peculiar facts of this case because it contributed to *Y*'s parole revocation. The attorney-client relationship does not continue indefinitely, but however uncertain its duration may be, the Committee concludes that an attorney has a continuing duty to his client—at least with respect to the subject matter of the representation. Hence, having represented *Y* at trial, Captain *B* was obliged to do nothing that would compromise *Y*'s parole. By committing acts similar to those for which *Y* was convicted and which could and did result in parole revocation, Captain *B* breached a continuing duty, providing the nexus necessary to establish a violation of Army Rule 8.4³³ (even if one were to assume, *arguendo*,

26. The Committee notes that all that is necessary for "interstate" transportation is that the firearm was manufactured outside the state in which it is possessed. See *United States v. Coleman*, 22 F.3d 126 (7th Cir. 1994).

27. *United States v. Hooker*, 997 F.2d 67 (5th Cir. 1993).

28. AR 27-26, *supra* note 1, Rule 8.4, paras. (b), (d).

29. *Id.* Rule 8.4.

30. UCMJ, art. 112a (1994) (making it a crime for any person subject to the UCMJ wrongfully to use, to possess, or to distribute cocaine).

31. AR 27-26, *supra* note 1, Rule 8.4.

32. *In re Wright*, 648 N.E.2d 1148, 1149 n. 3 (Ind. 1995); *In re Jones*, 515 N.E.2d 855, 856 (Ind. 1987). Of separate concern is illicit drug use associated with dependency. As the court noted in *Wright*: "an attorney who suffers a chemical dependency may be unfit to represent clients, because such an attorney may be incapable of keeping his client's secrets, giving effective legal advice, fulfilling his obligation to the courts, and so on." *Wright*, 648 N.E.2d at 1150, quoting *In re Stults*, 644 N.E.2d 1239 (Ind. 1994). See also *In re Schaffer* 140 N.J. 148, 657 A.2d 871 (1995); *In re Smith*, No. SB-95-0074-D, 1996 LEXIS 15 (Ariz. 1996).

that mere cocaine purchase and use in another case might not constitute violations).

Moreover, as discussed below, the Committee concludes that Captain *B* undertook to represent Captain *Y* at some point during the latter's parole. The offenses committed by Captain *B* were close in time and appear to have overlapped this representation, providing additional cause to find them to be violations of the rule. Last, Army Rule 8.4's comment that judge advocates assume legal responsibilities going beyond those of other citizens suggests that the offenses should constitute a violation.³⁴

Violations of Army Rules 1.1, 1.7(b), and 2.1 Arising from Captain B's Relationship with Y

The Committee concludes that Captain *B* undertook to represent *Y* at some point during *Y*'s parole. He communicated with parole authorities several times concerning *Y*, intermittently represented himself as *Y*'s lawyer, apparently obtained a statement from *Y*'s drug counselor, advised *Y* of his legal rights when he was apprehended, typed a letter for *Y* to have the revocation hearing held at the local Army installation, requested and received permission from his RDC to represent *Y* in the parole revocation, and listed his relationship to *Y* as "attorney" when he visited him in confinement several times. Moreover, *Y* said in his letter to the Parole Board seeking representation, typed on TDS stationery, that he had already consulted with Captain *B*. The evidence leads to the conclusion that even if representation ceased during *Y*'s initial incarceration, it resumed again once *Y* returned to military custody and, more likely than not, extended to most of the period of *Y*'s parole.

Captain *B*'s personal relationship with *Y* violated Army Rule 1.7(b)³⁵ because his own interests regarding his own criminal conduct materially limited his representation concerning *Y*'s parole. Captain *B*'s criminal acts—purchasing cocaine for *Y* and using it with him on several occasions—created interests manifestly adverse to *Y*'s. Like any criminal suspect facing the potential threat of apprehension or prosecution for acts committed with or on behalf of another suspect, Captain *B*'s personal interest in avoiding detection and prosecution by concealing or distorting facts unfavorable to him would necessarily limit his

ability to represent *Y*. His loyalty to *Y* was impaired, and he could not fully and freely represent *Y*'s interests, given his own. In this regard, we note the comment to Army Rule 1.7 that "[i]f the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."³⁶ Captain *B* could not reasonably believe the representation would not be adversely affected, and there is no evidence that *Y* consented after consultation, although the facts were obviously known to him.

The Committee also concludes that Captain *B*'s inappropriate relationship led to a violation of Army Rule 2.1, which requires the exercise of judgment independent from the client.³⁷ While independent judgment refers in the narrow sense to the advice given the client, the Committee concludes that it refers as well to the exercise of independent judgment in all aspects of the representation. Captain *B* impermissibly and repeatedly blurred his personal and official relationships, representing himself at one time as a friend and another time as *Y*'s lawyer. Captain *B* and *Y* themselves were likely unsure from one time to another what role Captain *B* was playing. Captain *B*'s independence was inevitably compromised, resulting in harm to *Y*'s interests.

The Committee does not find a violation of Army Rule 1.1,³⁸ which requires an attorney to provide competent representation. The Committee concludes that Army Rule 1.1 intends competence to be read in the narrow sense as expertise and skill. Absent additional evidence that Captain *B* lacked the requisite expertise and skill, or that his representation in fact suffered from lack of thoroughness or preparation, the Committee finds no violation.

Findings

Recognizing that dismissal of charges in a criminal prosecution or failure to prosecute should not vel non bar disciplinary action against an attorney,³⁹ the Committee finds that:

- a. Captain *B* violated paragraphs (b) and (d) of Army Rule 8.4⁴⁰ by knowingly transporting a weapon in interstate commerce with the serial number removed, obliterated, or altered, in violation of federal law.

33. AR 27-26, *supra* note 1, Rule 8.4.

34. *Id.* Rule 8.4 comment.

35. *Id.* Rule 1.7(b).

36. *Id.* Rule 1.7(b) comment.

37. The comment to *Army Rule* 2.1 observes, "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." *Id.* Rule 2.1.

38. *Id.* Rule 1.1.

39. See Robert A. Brazener, Annotation, *Effect of Acquittal or Dismissal in Criminal Prosecution as Barring Disciplinary Action Against Attorney*, 76 A.L.R.3d 1028 (1995).

b. Captain *B* violated Army Rule 8.4(b)⁴¹ by purchasing and using cocaine for and with a former client while that client was still on parole in connection with a cocaine conviction that was the subject of the representation.

The Committee further concludes that:

a. Captain *B* violated Army Rule 1.7(b)⁴² because his own interests regarding the criminal conduct he committed materially limited his representation of *Y* in the parole matter.

b. Captain *B* violated Army Rule 2.1⁴³ because he did not exercise independent judgment during the period of *Y*'s parole.

Recommendations

In light of the Committee's findings, the Committee recommends that The Judge Advocate General withdraw Captain *B*'s certification as counsel under Article 27(b); suspend him from practice before Army courts-martial and the Army Court of Criminal Appeals; and notify Captain *B*'s state bar of this professional misconduct for such proceedings as it deems appropriate.

40. AR 27-26, *supra* note 1, Rules 8.4(b), 8.4(d).

41. *Id.* Rule 8.4(b).

42. *Id.* Rule 1.7(b).

43. *Id.* Rule 2.1.