

## Army Standards For Lawyer Discipline: Not All We Can Be

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(7415 words)

### Abstract

Professions require rules for the conduct of its members, and a system to enforce those rules through discipline if necessary. The Army's Judge Advocate General's (JAG) Corps, which governs the profession of law within the Army and the Army's courts, is no exception. Although the Army JAG Corps has both rules that govern the ethical conduct of lawyers and a system to investigate and discipline lawyers that violate those rules, an analysis of the studies done at the national level with regard to lawyer discipline demonstrates that the Army has room to improve its system of lawyer discipline. This paper proposes that the Army should designate a specific duty position for the role of disciplinary investigator and then train lawyers in that duty position in the specialized area of the law governing lawyer discipline. Additionally this paper proposes that the Army should change the standard of proof in lawyer disciplinary investigations to that of clear and convincing evidence. These changes will bring the Army system into greater compliance with the national standards for lawyer discipline established by the American Bar Association, and will afford greater consistency and fairness in the Army's disciplinary system for lawyers.

## **Army Standards For Lawyer Discipline: Not All We Can Be**

The United States Army Judge Advocate General's (JAG) Corps should review and revise its procedures for disciplining lawyers for violations of ethical rules that govern lawyer conduct. The current system does not provide adequate professional training for disciplinary investigators and is based on an inappropriate burden of proof. These fundamental flaws lead to inconsistency in the findings and recommendations of disciplinary investigators and in the lawyer discipline that results from the subsequent use of their investigations. Inconsistent investigations and an improper standard of proof can unfairly substantiate allegations of misconduct against lawyers. Improperly trained investigators can also tarnish the public's perception of the profession of law.

The American Bar Association (ABA) assumes the "premier role in developing and shaping professional regulatory policies and procedures in the United States, which has the effect not only of enhancing public protection, but also of maintaining an independent judiciary."<sup>1</sup> The ABA fulfills its role by drafting model rules that can bring consistency to the myriad legal jurisdictions in the United States through thoroughly studied and well-reasoned reports and documents. The ABA established a model system for rules governing the ethical conduct of all lawyers, and the Army conscientiously adopted a modified version of those rules. The ABA also set forth a model system for determining how to investigate, prosecute, and punish lawyers that violated the ethical rules of conduct. The Army has not adopted a modified version of the model system for investigation, prosecution, and punishment. If the Army is to be all that it can with regard to how it disciplines lawyers that fail to live up to their ethical obligations, the Army must make changes that conscientiously look at what aspects of the ABA model system should be adopted.

The basic premise behind the ABA Model Rules of Lawyer Disciplinary Enforcement is the belief that discipline should be handled by a professional cadre of lawyers trained in the specialized area of lawyer professional conduct, and consistency in discipline must be achieved. Although the Army does not need to adopt all the recommendations by the various ABA commissions that have studied the state of lawyer discipline, the Army should alter its procedures for lawyer discipline to better achieve consistent and fair discipline. To achieve this goal of consistency and fairness, the Army should invest in training a professional cadre of lawyers well versed in the specialized area of lawyer discipline and raise the burden of proof in professional conduct investigations to the standard of clear and convincing evidence.

To best understand the state of lawyer discipline in the Army, one must first understand that lawyers in the Army are members of a specific profession that requires rules and stewardship to maintain and earn the trust of its clients. Rules and stewardship portend that the Army will have rules of ethical conduct and a system to discipline those who violate the ethical rules. To help the reader understand this progression, we will review a history of the rules that govern lawyer conduct and how and why the Army adopted those rules. Next, we must consider the national studies and rules regarding discipline of lawyers for violating the ethical rules and what the current Army system looks like. Finally, the paper will make recommendations with regard to how the Army can use general lessons from the national studies on lawyer discipline to improve its system for lawyer discipline.

### Professions Need Rules

The Army JAG Corps is a profession within a profession. It is commonly understood that lawyers are members of the legal profession. For at least the period

since World War II it has also been widely accepted that officers in the Army are also members of a profession.<sup>2</sup> Professions require rules for the conduct of its members and a mechanism to enforce those rules.

A basic belief about professions is that those served by a specific profession must trust those that serve in the profession. For example, patients must trust doctors, the public must trust Soldiers to ethically execute violence on behalf of the nation, and clients must trust lawyers. Standard definitions of a profession point to a need for a set of ethics that underpins this trust.<sup>3</sup>

Trust cannot be maintained by only setting rules of conduct (ethics) for the profession. To maintain trust, the profession must also enforce the rules of conduct. It must have leaders that steward the profession. This concept of an ethic, and stewardship to enforce that ethic in an effort to maintain trust with those served by the profession can be summarized as:

only those capable of competent and ethical practice are permitted to enter the labor market, and that the profession supports institutional procedures that discourage the abuse of public trust among its members and that undertake to exercise effective disciplinary action against those who do so. Formal codes of ethics are often promulgated both to demonstrate concern with the possible abuse of privilege and to provide guidelines for evaluating and taking action against it.<sup>4</sup>

In an effort to regulate the profession of law, each state that licenses lawyers has promulgated rules for lawyer conduct. These rules cover attorney-client confidence, competence of the attorney, diligence of the attorney, advertising, solicitation of business, candor to the court, honesty, and various other requirements. Those same states have each outlined procedures for investigating and disciplining lawyers who have been accused of violating a rule of professional responsibility. The punishments can range from counseling an attorney for minor misconduct to disbarring the attorney;

in essence removing the attorney's license to practice law and excluding him from the profession.

## Ethical Conduct Rules for Lawyers

### History of the Rules Governing Lawyers

The first formal rules regulating the professional conduct of lawyers in the United States were set forth in Alabama in 1887.<sup>5</sup> In 1908, the ABA proposed the first set of model rules to regulate attorney conduct across the nation, the Canons of Professional Ethics (hereinafter Canons).<sup>6</sup> The Canons were amended many times, but were not replaced by the Model Code of Professional Responsibility (hereinafter Code) until 1969.<sup>7</sup> The Code quickly proved to be lacking in its ability to regulate professional conduct.

A developing consensus of the bar was that the substantive rules of the Code envisioned law practice in a simplistic litigative setting not related to modern legal reality. Moreover, many provisions of the Code were rendered obsolete by Supreme Court cases and other developments. Finally, the division of the Code into three statements was largely a failure.<sup>8</sup>

The ABA set up a commission in 1977 to reexamine the Code.<sup>9</sup> After a six-year process, the ABA adopted the Model Rules of Professional Conduct in 1983.<sup>10</sup>

### Lawyer Ethics in the Army

#### The Army before the Uniform Code of Military Justice

Prior to the effective date of the Uniform Code of Military Justice in 1951, there was no requirement for a prosecutor, defense counsel, or judge at military courts-martial to be a lawyer.<sup>11</sup> With no requirement for lawyers at courts-martial, there was no practical requirement for the Army to set forth rules for the conduct of lawyers in military courts.

From the time of the very first Articles of war in 1775 through the end of World War II a system without a requirement for lawyers endured with little change. The magnitude of World War II and the volume of courts-martial conducted without lawyers drove a change to the system.

“At the peak of the World War II mobilization, when some 12,300,000 persons were subject to military law - almost as many as the entire population of the country in 1830 - the armed forces handled one third of all criminal cases tried in the nation.”<sup>12</sup>

More American servicemen than ever before had experienced military justice first hand, and it was clear that they did not like it. There had been over 1,700,000 courts-martial during the war, most of them resulting in convictions. There had been 100 capital executions, and 45,000 servicemen were still imprisoned when the war ended. Some 80 percent of the courts-martial were for acts which would not have been crimes in civilian life, with absence without leave and desertion the most frequent charges. In the Army alone, 20,392 men were convicted of desertion, one of the most serious crimes under the Articles, for an average conviction rate of 3.7 per 1,000 per year.<sup>13</sup>

With this significant interaction between a large population of the United States and the military disciplinary process, a post World War II commission was established to draft a system that would be uniform across all military services, and would provide individual protections to service members while maintaining proper military discipline.<sup>14</sup> The most significant issue to be addressed by the new Uniform Code of Military Justice was the desire to eliminate command influence on the military justice system.<sup>15</sup> One of the provisions of the Uniform Code of Military Justice intended to eliminate command influence was “a mandatory provision for a competent, legally trained counsel at the trial for both the prosecution and the defense.”<sup>16</sup>

The inclusion of competent lawyer meant that the lawyer was subject to the rules of ethical conduct for the state in which the lawyer was licensed to practice. Having

lawyers subject to rules that varied among the states in which the lawyer was licensed led to questions of consistency within the Army. This led to questions about how to institute consistent rules for the Army lawyer, and the role of The Judge Advocate General (TJAG).

#### The Role of TJAG is Much Like a Court

Lawyers are universally accepted as officers of the court, and it is the court that grants admission to practice.<sup>17</sup> “The court having power to admit a person to the practice of law should also be the agency having jurisdiction to fix the standards of conduct required of him and to remove his license to practice for cause.”<sup>18</sup>

Generally the highest court of a given state admits lawyers to practice within the state. Once admitted to practice in a state, many lawyers will then seek admission to practice in specific federal courts. This process results in lawyers being bound by varying sets of rules that regulate their professional conduct. Most states have adopted the ABA Model Rules of Professional Conduct.<sup>19</sup> However, because federal courts have a different jurisdiction than do state courts, federal courts are not bound by the rules adopted by the states in which they sit. Because the federal court system has not adopted one set of rules for professional conduct to regulate lawyers, some courts enforce the rules of the state in which they sit, although using the federal courts own enforcement standards, and others adopt either the ABA Model Rules or the older ABA Model Code.<sup>20</sup>

Courts-martial and the criminal appeals court in each of the armed services of the United States make up yet more jurisdictions. These do not fall within the jurisdiction of the states or that of the standard federal court. Analogous to admission to appear in state or federal court, The Judge Advocate General of each armed service is required

by federal law to certify the competency of any attorney, prosecution or defense, that will appear in a general court-martial or as an appellate counsel before the service's court of criminal appeals.<sup>21</sup> Each TJAG is also responsible for the professional supervision and discipline of the conduct of "lawyers who practice in proceedings governed by [the Uniform Code of Military Justice] and the [Manual for Courts-Martial]."<sup>22</sup> "To discharge this responsibility each [TJAG] may prescribe rules of professional conduct ...."<sup>23</sup> "Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Criminal Appeals."<sup>24</sup>

Outside the jurisdiction of the military courts, each of the armed services' TJAGs is also charged under federal law with the responsibility to establish and supervise legal assistance programs,<sup>25</sup> and to certify as competent those attorneys designated as Special Victims' Counsel.<sup>26</sup> Ultimately each of the TJAGs is required to "direct the members of the Judge Advocate General's Corps in the performance of their duties."<sup>27</sup>

The requirements to direct members of the Judge Advocate General's Corps, to certify the competence of any attorney appearing in a military court or as a Special Victims' Counsel, and to supervise the legal assistance program gives each of the armed services' TJAGs responsibilities in the military services that are very much like those of a state court; basically the admission of lawyers to practice in the jurisdiction of the TJAG. This means that the TJAGs must then have the power to fix the standard of conduct for lawyers practicing in their jurisdiction, and ultimately to discipline those lawyers that fail to meet those standards of conduct.

## The Army Adopts its Ethical Rules of Conduct for Lawyers

As noted supra, the Army did not initially establish rules for the ethical conduct of lawyers. Rather, it relied on the idea that each attorney was bound by the rules of conduct in the state in which the lawyer was licensed. Given the requirement for TJAG to certify lawyers for courts-martial and direct them in the performance of their duties, it became necessary for TJAG to devise rules for application to lawyers practicing in the Army and the Army's courts.

The Army first attempted to gain uniformity by directing all attorneys subject to army regulation to follow the ABA Model Code of Professional Responsibility.<sup>28</sup> Even with this direction, however, uniformity of practice was not attained. Lawyers still looked to their state licensing authority for interpretation of ethical standards.<sup>29</sup> The problem of uniformity became worse with publication of the ABA Model Rules of Professional Conduct. "Army lawyers licensed in [states that adopted the Model Rules of Professional Conduct] were required to comply with two different, and in some cases inconsistent, sets of ethical rules. In cases of direct conflict, there was no guidance as to which standard should supersede."<sup>30</sup>

To remedy these inconsistencies the armed services' TJAGs assembled a joint committee to determine an appropriate standard for the services to use. The joint committee modified the ABA Model Rules of Professional Conduct to "accommodate peculiarities of military practice."<sup>31</sup> The result for the Army is Army Regulation (AR) 27-26, Rules of Professional Conduct for Lawyers.

## Discipline for Violations of Ethical Conduct Rules

### History of the ABA Rules Governing Lawyer Discipline

In 1967, the American Bar Association created the Special Committee on Evaluation of Disciplinary Enforcement. The purpose of the Committee was:

To assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures and practices and to make such recommendations as the Committee may deem necessary and appropriate to achieve the highest possible standards of professional conduct and responsibility ...<sup>32</sup>

The Committee studied the process of professional discipline of lawyers throughout the United States for three years. In 1970, the Committee produced its report “Problems and Recommendations in Disciplinary Enforcement,” which became commonly known as the Clark Report.

In the Clark Report, the Committee noted that the state of attorney discipline throughout the United States was “scandalous.” The Clark Report discussed the problems with the disciplinary system as it existed in 1970, made conclusions about the “ideal” system, and provided 36 recommendations to improve the disciplinary system of lawyers throughout the United States.

In 1980, the Chief Justice of the United States Supreme Court noted, “the Report of the Clark Committee may have had even greater impact on upgrading ethical procedures than the newly restated ethical standards.”<sup>33</sup> This greater impact may be due to one of the criticisms of the ABA Model Rules of Professional Conduct; that the Rules did not establish a disciplinary mechanism or penalties.<sup>34</sup> The Clark Committee evaluated the various disciplinary mechanisms and recommended a better way forward.

In 1989, the American Bar Association created another commission, The McKay Commission, to further investigate the process of lawyer discipline throughout the

country and recommend a model for discipline going into the 21<sup>st</sup> century.<sup>35</sup> The McKay Commission determined that most states “resolved many of the problems identified by the Clark Committee.”<sup>36</sup> Even so, the McKay Commission made 21 recommendations to improve lawyer discipline. At about the same time as the McKay Commission study of lawyer discipline, in 1989, the ABA also adopted the Model Rules for Lawyer Disciplinary Enforcement, which has become the most common standard for imposing sanctions for lawyer misconduct.<sup>37</sup>

#### The Army Did Not Adopt the ABA Model Rules for Discipline

Unlike the armed services’ attempts to determine model rules for ethical conduct through a joint commission, no joint commission was established to modify the ABA Model Rules for Lawyer Disciplinary Enforcement. The Army has not adopted the Model Rules for Lawyer Disciplinary Enforcement, nor has the Army resolved some of the main problems identified by the Clark Committee. Although some of the specific recommendations of the Clark and McKay Reports may not be applicable due to military peculiarities or structure, lessons can be learned from these reports and the ABA Model Rules of Disciplinary Enforcement to improve lawyer discipline in the Army.

#### The Current Army Disciplinary Process and Standard

Army Regulation 27-26, Rules of Professional Conduct for Lawyers, “provides comprehensive rules governing the ethical conduct of Army lawyers, military and civilian, and, pursuant to RCM 109, Manual for Courts–Martial, of non–government lawyers appearing before Army tribunals.”<sup>38</sup> Failure to comply with the rules set forth in AR 27-26 is grounds to place the lawyer into the disciplinary process.<sup>39</sup> Rule 10.1 of AR 27-26 provides that TJAG will establish the disciplinary process to investigate and take

appropriate action on alleged violations of the Rules of Professional Conduct for Lawyers.<sup>40</sup>

Army Regulation 27-1, Judge Advocate Legal Services, chapter seven, Professional Misconduct Inquiries, is the execution of TJAG's responsibility under Rule 10.1 to establish the disciplinary process. Chapter seven establishes how investigations and discipline should be accomplished for lawyers alleged to have violated the Rules of Professional Conduct found in AR 27-26.<sup>41</sup>

Once an allegation of lawyer misconduct is made, the supervisory judge advocate of the lawyer alleged to have violated the rules is responsible for determining if the allegation is credible. Any investigation into the credibility of the allegation is commonly referred to as a 'credibility determination.' If the supervisory attorney determines the allegation to be credible, he must notify the Professional Responsibility Branch<sup>42</sup> (PRB) of the Office of the Judge Advocate General (OTJAG).<sup>43</sup>

Credible alleged violations of the Rules of Professional Conduct for Lawyers are then informally investigated through a Preliminary Screening Inquiry (PSI).<sup>44</sup> Senior Supervisory Judge Advocates (SSJA) are tasked by PRB to appoint an officer to conduct a PSI. A SSJA is the Staff Judge Advocate of a major command or a judge advocate in a similar position.<sup>45</sup> For purpose of the Army today a SSJA would be the Staff Judge Advocate of Training and Doctrine Command, Forces Command, U.S. Army Europe, U.S Army Pacific, U.S. Army Special Operations Command, and any other equivalent positions that do not fall under one of these commands.

PSI officers conduct the investigation under the procedures set forth in chapter seven, and where chapter seven is silent, the PSI officer is to follow the informal

procedures set forth in AR 15-6.<sup>46</sup> “The PSI officer will determine the facts and circumstances of the alleged or suspected violation.”<sup>47</sup> After investigating, the PSI officer will draft a written report to the SSJA, “which will summarize the facts, provide conclusions as to whether a violation occurred, and, as appropriate, recommend corrective or disciplinary action.”<sup>48</sup> The standard of proof the PSI officer is to use in determining whether a violation of the Rules of Professional Conduct for Lawyers occurred is a preponderance of the evidence.<sup>49</sup>

Once the SSJA is satisfied with the PSI officer’s written report, the SSJA will take one of three actions: 1) if the SSJA determines no violation has occurred, he will coordinate with PRB to close the matter; 2) if the SSJA determines that a minor violation has occurred he will coordinate with PRB to permit him to counsel the lawyer who committed the minor violation, but only after the subject lawyer has had an opportunity to respond to the PSI report; or 3) if the SSJA determines that something more than a minor violation occurred, he will forward the file to PRB for further action.<sup>50</sup>

If PRB determines that action should be taken against a lawyer based on a PSI report, PRB will provide the file to the subject lawyer for comment.<sup>51</sup> After a reasonable period of time for the subject lawyer to respond has passed, PRB can present the file to the Deputy Judge Advocate General or TJAG for action. Action by the TJAG is final and not subject to appeal.<sup>52</sup>

### Lessons From the ABA Disciplinary Process

As previously noted, the two main reports from the ABA with regard to the lawyer disciplinary process are the Clark Report and the McKay Report. Together they make 57 recommendations to improve the lawyer disciplinary process. Additionally, the ABA established Model Rules for Lawyer Disciplinary Enforcement<sup>53</sup> and Standards for

Imposing Lawyer Sanctions.<sup>54</sup> Just as not all the provisions of the ABA Model Rules of Professional Conduct are applicable to the peculiarities of military legal practice, not all the ABA recommendations and standards for lawyer discipline and sanction are applicable to the peculiarities of military legal practice. Moreover, the Army disciplinary system already complies with many of the recommendations of the ABA. The general principles set forth in the Clark and McKay Reports are helpful in determining how the Army should attempt to improve its disciplinary process.

The first generalized recommendation of the Clark report was to “[vest] exclusive disciplinary jurisdiction in the state’s highest court under a procedure promulgated and supervised by the court in the exercise of its inherent power to supervise the bar.”<sup>55</sup> In the Army, TJAG acts analogously to the highest court in that TJAG has the power to supervise the “bar” for practice in the Army and the Army’s courts. As TJAG has exclusive authority over the discipline of lawyers practicing in the Army or in front of Army courts and hearings, the Army complies with this specific general recommendation of the Clark Report.

The Clark Reports next generalized recommendation was that a professional staff conducts all investigations of allegations of lawyer misconduct, and that if the allegations could not be dismissed after investigation an inquiry committee would afford the lawyer a hearing.<sup>56</sup> Twenty years after the Clark Committee and Report, the ABA established the McKay Commission to examine the implementation of the Clark Report and make further study and recommendations regarding lawyer discipline. The McKay Report found that most states had resolved the problems identified in the Clark Report.<sup>57</sup> The Commission also found that almost all states had professional disciplinary

staffs and over half the states were holding disciplinary hearings publicly.<sup>58</sup>The ABA Standing Committee on Professional Discipline had evaluated thirty disciplinary agencies at the request of the states and made recommendations for improvement.<sup>59</sup>

The Army does not have a professional disciplinary staff, does not conduct hearings publicly, and has not had its disciplinary systems evaluated by the ABA Standing Committee on Professional Discipline. These are areas in which the Army can improve.

Another lesson learned through the McKay report that may be applicable to the Army is use of the applicable sections of the ABA Model Rules for Lawyer Disciplinary Enforcement. One of the McKay Reports criticisms of lawyer discipline was that some jurisdictions failed to adopt the ABA Model Rules for Lawyer Disciplinary Enforcement, which were devised to implement much of the revisions proposed in the Clark Report.<sup>60</sup>

After the Clark Report was published, the ABA, in the 1970s, developed Suggested Guidelines for Rules of Disciplinary Enforcement.<sup>61</sup> These guidelines became Standards for Lawyer Discipline and Disability Proceedings in 1979.<sup>62</sup> Ultimately, these guidelines and standards were incorporated into the Model Rules For Lawyer Disciplinary Enforcement, which are currently used by the ABA.<sup>63</sup> Even with Model Rules for Lawyer Discipline, it was observed that sanctions resulting from discipline were inconsistent. To provide guidance in an effort for consistency and fairness in sanctions, the ABA established Standards for Imposing Lawyer Sanctions.<sup>64</sup> The purpose of these model rules and standards was to provide consistency of disciplinary standards and sanctions. Training Credibility Determination and PSI officers to use the applicable sections of the Model Rules for Lawyer Discipline and the

Standards for Imposing Lawyer Sanctions can improve consistency in Army disciplinary standards.

### Minimum Improvements for the Army Lawyer Disciplinary Process

#### Professional Training

The main deficiency in the Army disciplinary process is a lack of professional training for individuals tasked with conducting Credibility Determinations and PSIs. In other words, lawyers in the Army tasked with the conduct of discipline should be trained in the specialized area of lawyer discipline. For example, they should understand what legally constitutes a violation of a lawyer's rules of conduct, not just what they feel constitutes a violation, and they should understand what punishment is considered applicable under standards for imposing sanctions.

Army Regulation 27-1 provides that supervisory lawyers at all levels are responsible for reviewing all allegations of lawyer misconduct under the professional responsibility rules, and that they report any credible alleged or suspected violations to PRB.<sup>65</sup> Supervisory lawyers typically manage this review process by appointing a subordinate lawyer to conduct an investigation into the credibility of the alleged wrongdoing and submit a report of findings to the supervisory lawyer. The Army trains neither the supervisory lawyer nor the investigating lawyer with regard to the specialized area of the law governing lawyer discipline.

Once a supervisory lawyer passes credible information of lawyer misconduct to PRB, a SSJA is tasked with conducting a PSI.<sup>66</sup> The SSJA will appoint a subordinate lawyer to conduct the PSI, and the SSJA will review the PSI report.<sup>67</sup> As with the supervisory lawyer and lawyer conducting the credibility determination, the Army trains

neither the SSJA nor the lawyer conducting the PSI with regard to the specialized area of the law governing lawyer discipline.

When the Clark Committee conducted its examination of lawyer discipline in the late 1960s it found that many states did not have a professional staff trained in the specialized area of the law governing lawyer discipline. At that time, many states relied heavily on volunteers to facilitate the investigations and hearings on lawyer discipline. Although Army lawyers conducting credibility determinations and PSIs are tasked or ordered to fulfill these duties, their experience level and duties correlate very closely to the volunteers used by states more than forty years ago.

“The major thrust of the Clark Report was its recognition of the need to professionalize lawyer disciplinary agencies.”<sup>68</sup> The Clark Committee determined that the use of volunteers could cause several applicable problems: “nonuniform standards of enforcement,” “increased delay in disposition,” and “lack of expertise.”<sup>69</sup> Each of these problems is grounded in the idea that the individual conducting the investigations and hearings lacks adequate training.

Regarding nonuniform standards of enforcement, the Clark Report stated:

Without adequate opportunity for training and in the absence of a professional staff, each member of the disciplinary agency must apply his own standards and technique to the investigation of complaints assigned to him. Disposition of a particular complaint, therefore, may depend largely on the member of the agency to whom it is assigned rather than on its substantive merit.<sup>70</sup>

A lack of standard due to lack of training is present in the Army. I personally experienced inconsistency when I was Deputy Staff Judge Advocate to a SSJA. I conducted five ethics investigations into potential violations of the Rules of Professional Conduct for Lawyers. I started several of my assigned PSIs from credibility

determinations done by subordinate legal offices. Subsequently I was also detailed to defend an officer that was subject to an adverse determination made in a PSI. The standards used by the subordinate credibility determination officers varied. As a lawyer defending a fellow lawyer subject to a PSI, I saw yet another standard.

The Clark Committee understood that specific areas of the law require specific expertise. The need for special expertise is why many lawyers specialize in their practice. Specialization helps to ensure that the lawyer is competent in his practice.

With regard to lawyer discipline, the Clark Report stated:

[T]he field of disciplinary enforcement is a specialty of significant proportions. Without training, the attorney retained as counsel to a disciplinary agency will find himself confronted with countless problems with which he will be unable to cope. Unless he has some source to turn to for assistance, he will have no alternative but to do the best he can by trial and error. The skill and knowledge he will ultimately acquire will have been obtained at the expense of waste, inefficiency and ineffectiveness. In the meantime, he may lower the prestige of the profession in the eyes of nonlawyers with whom he will have come into contact and to whom he represents the organized bar.<sup>71</sup>

From a practical and budgetary standpoint, the Army cannot fix this problem in the manner proposed by the Clark Report and adopted by almost every state; a professional staff dedicated to lawyer discipline. With the downsizing of the Army and a constant effort to move personnel from support to combat roles, the idea of adding several positions to PRB as dedicated investigators and hearing officers will not succeed.

The Army can, however, address the problem by codifying a standard practice in the field and then providing adequate training to enforce and maintain that standard. In general, when a supervisory lawyer needs to conduct a credibility determination or a SSJA needs to conduct a PSI, they task their deputy staff judge advocate to conduct the

investigation. This makes sense in that the deputy usually is senior in rank to anyone who may be subject to investigation; generally has the maturity, temperament, and experience to conduct standard investigations; and is more readily available than the chiefs of administrative law or military justice. The Army should standardize the practice of designating the deputy staff judge advocate as the lawyer disciplinary investigator.

Once designated, the deputy staff judge advocate still lacks training and expertise. When I did my investigations, I initially asked for guidance from PRB. They were helpful in answering questions, but there was no standard packet of reference material to review or Army interpretations of what 'diligence' or 'competence' meant within AR 27-26. I was lucky to have a sage SSJA to guide me through practical aspects based on his experience.<sup>72</sup> Yet, I had to discover the volumes of material and casebooks written about lawyer discipline myself, and I had to invest additional time to discover the helpful sections of the Model Rules for Lawyer Disciplinary Enforcement and the Standards for Employing Lawyer Sanctions on my own. As I reviewed credibility determinations and defended a lawyer subject to a PSI, it became obvious that not all lawyers tasked to conduct lawyer discipline investigations had discovered these books, codes, and standards. At the very least, it appeared as if they had not used them. The tragic part of this failure is that inexperienced lawyers conducting investigations without the proper references and standards can erroneously substantiate an allegation against a lawyer whose conduct does not rise to a commonly accepted level for substantiation of a breach of obligation. In other words, lack of training can end with an innocent lawyer tainted with the specter of a rules violation.

I do not wish to denigrate the hard work of some very capable Army lawyers who conduct investigations. The problem lies not in the lack of effort or intellect in any Army lawyer; it lies in the lack of training, which is an issue that can be remedied. The Clark Report noted:

The enforcement of professional ethical standards requires familiarity with a specialized subject of increasing substantive dimensions. The newly appointed disciplinary agency member often has had no occasion to concern himself with the ethical standards of the profession beyond passing references in the course of his legal education (which may have been some years removed at the time of his appointment) and instances of his own practice when he has faced an ethical problem.<sup>73</sup>

If the Army designates deputy staff judge advocates as investigators and hearing officers for lawyer discipline, then the Army can provide this group training to improve the consistency and fairness of Army discipline. The Army can establish a course at the Judge Advocate General's School to train these officers. The PRB and the ethics instructor at the JAG School can put the curriculum together. One that links issues the PRB sees in completed PSIs with tools that help investigators understand the specialized area of lawyer discipline. The course can be a stand alone, or it could be linked to the Staff Judge Advocate Course. Every Army lawyer to assume the duties of deputy staff judge advocate is required to attend the weeklong Staff Judge Advocate course at the JAG school. This course could be modified to include blocks of instruction for every deputy staff judge advocate with regard to lawyer discipline in the Army.

Designating specific officers to conduct credibility determinations and PSIs, and then providing them detailed training on this specialized area of the law will vastly improve the Army lawyer disciplinary process.<sup>74</sup>

## Standard of Proof

Currently the Army uses a preponderance of the evidence standard of proof for lawyer discipline. The ABA Model Rules for Lawyer Disciplinary Enforcement use the clear and convincing standard of proof.<sup>75</sup> Most states use the clear and convincing standard of proof.<sup>76</sup> The Navy,<sup>77</sup> Air Force,<sup>78</sup> Internal Revenue Service,<sup>79</sup> Patent and Trademark Office,<sup>80</sup> and Immigration and Naturalization Service<sup>81</sup> all use the clear and convincing standard of proof.

"[A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.."<sup>82</sup> There are three basic levels of proof: preponderance of the evidence, clear and convincing, and beyond a reasonable doubt. The preponderance of evidence is the lowest standard. It is commonly used in civil law suits where something significantly less than a liberty interest is at stake. The highest standard is that of beyond a reasonable doubt and it is used primarily in criminal cases. The intermediate standard is that of clear and convincing, which

is less commonly used, but nonetheless "is no stranger to the civil law." One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases<sup>83</sup>

A Soldier has no property interest in continued service in the Army.<sup>84</sup> The relationship between a Soldier and the Army is somewhat analogous to an employee-employer relationship, and a preponderance of the evidence standard is typically

appropriate for administrative investigations conducted by the Army and administrative actions taken by the Army.

Lawyers, on the other hand, do have a property interest in their ability to practice law.<sup>85</sup> The proceedings to disbar a lawyer are considered adversarial and of a quasi-criminal nature.<sup>86</sup> Given the quasi-criminal nature of lawyer discipline, the property interest in the ability to practice law in front of a given court, and the propensity to tarnish the reputation of a lawyer when disciplined, the appropriate standard of proof in lawyer discipline is clear and convincing. Moreover, any argument that the Army is acting as employer when it disciplines lawyers is specious, because the rules clearly permit, and history demonstrates, that TJAGs have decertified civilian defense counsel.<sup>87</sup>

The Army should follow the ABA suggestion in the Model Rules for Lawyer Disciplinary Enforcement, and the Army should join its sister services and other government agencies by adopting the clear and convincing standard of proof for lawyer disciplinary actions.

### Conclusion

The Army has done a commendable job in adopting a nationally accepted standard of ethics for lawyer conduct. But, the Army has room to improve on its system for the enforcement of those rules. The Army should request an assessment by the ABA Standing Committee on Professional Discipline to determine the full extent of improvements that can be made. Unless and until that assessment is made, the Army, should, at a minimum, provide adequate training to lawyers designated to conduct credibility determinations and PSIs, and adopt the clear and convincing standard of proof in lawyer disciplinary actions.

An argument can certainly be made that even without the proposed changes the Army disciplinary process may meet the minimum requirements of due process. When it comes to stewardship of the profession and public trust of the ethical conduct of lawyers who practice in the Army or in front of Army courts and hearings, the minimum should not be considered sufficient. The Army should always seek to improve its stewardship, its process, and its outcomes in order to ensure that the process is fair, consistent, and just. In the case of lawyer discipline, there is room and also a need for improvement if we are to continually strive to be all we can be.

## Endnotes

<sup>1</sup> Myles V. Lynk and Ellyn S. Rosen, "The ABA Model Rules For Lawyer Disciplinary Enforcement: A Look Back And Plans For The Future," [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/38th\\_conf\\_session15\\_history\\_of\\_mrlde.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session15_history_of_mrlde.authcheckdam.pdf) (accessed March 19, 2016).

<sup>2</sup> Samuel P. Huntington, "Officership as a Profession," in *War, Morality, and the Military Profession*, ed. Malham M. Wakin (Boulder, CO: Westview Press, 1979), 12-15.

<sup>3</sup> *Ibid.*, 20; James Burk, "Expertise, Jurisdiction, and Legitimacy of the Military Profession," in *The Future of the Army Profession*, 2d ed., ed. Lloyd J. Matthews (Boston: McGraw Hill, 2005, 2005), 48-52.

<sup>4</sup> Eliot Freidson, "Theory and the Professions," *Indiana Law Journal* 64, no. 3 (Summer 1989): 428.

<sup>5</sup> C. Peter Dungan, "Avoiding 'Catch-22s': Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility," *Journal of the Legal Profession* 30 (2005-2006): 35.

<sup>6</sup> Bernard P. Ingold, "An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers," *Military Law Review* 124 (Spring 1989): 2.

<sup>7</sup> *Ibid.*; Warren E. Burger, "The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility," *Cleveland State Law Review* 29, no. 3 (1980): 384.

<sup>8</sup> Ingold, "An Overview and Analysis," 4.

<sup>9</sup> *Ibid.*

<sup>10</sup> Ibid.

<sup>11</sup> Dungan, "Avoiding 'Catch-22s'," 37.

<sup>12</sup> Frederick Bernays Wiener, "Courts-Martial and the Bill of Rights: The Original Practice I," *Harvard Law Review* 72, no. 1 (November, 1958): 11.

<sup>13</sup> Edward F. Sherman, "The Civilianization of Military Law," *Maine Law Review* 22 (1970): 28.

<sup>14</sup> U.S. Department of the Army, The Judge Advocate General's School, *The Background of the Uniform Code of Military Justice* (Charlottesville, VA: Judge Advocate General's School, 1959), 10.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 12.

<sup>17</sup> American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* (Chicago, American Bar Association, June 1970), 10. (hereinafter the Clark Report) [http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark\\_Report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf) (accessed March 19, 2016).

<sup>18</sup> Ibid.

<sup>19</sup> According to the ABA, California is the only state that has not adopted the format of the ABA Model Rules of Professional Conduct. See [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (accessed March 20, 2016).

<sup>20</sup> Bruce A. Green, "Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created," *George Washington Law Review* 64, no. 3 (March 1996): 463 (footnote 13).

<sup>21</sup> U.S. Code, title 10, secs. 827(b)(2) and 870.

<sup>22</sup> *Manual For Courts-Martial*, United States, Rule for Courts-Martial 109 (2012) (hereinafter MCM).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> U.S. Code, title 10, sec. 1044(b).

<sup>26</sup> U.S. Code, title 10, sec. 1044e(d)(1)(B).

<sup>27</sup> U.S. Code, title 10, sec. 3037(c)(2).

<sup>28</sup> Ingold, "An Overview and Analysis," 7.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., 8.

<sup>31</sup> Ibid., 1.

<sup>32</sup> Clark Report, preface, xiii.

<sup>33</sup> Burger, "The Role of the Law School," 384.

<sup>34</sup> Ingold, "An Overview and Analysis," 6.

<sup>35</sup> Lynk and Rosen, "The ABA Model Rules For Lawyer Disciplinary Enforcement: A Look Back And Plans For The Future."

<sup>36</sup> American Bar Association Commission on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* (Chicago: American Bar Association, February 4, 1992) [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html) (accessed March 19, 2016) (hereinafter the McKay Report).

<sup>37</sup> Leslie C. Levin "The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions," *American University Law Review* 48, no.1 (October, 1998): 6, 33.

<sup>38</sup> U.S. Department of the Army, *Rules of Professional Conduct for Lawyers*, Army Regulation 27-26 (Washington, DC: U.S. Department of the Army, May 1, 1992), 1.

<sup>39</sup> Ibid., 2.

<sup>40</sup> Ibid., 31.

<sup>41</sup> The scope of this paper is limited to Chapter seven of AR 27-1 and the disciplinary process related to violation of the Rules of Professional Conduct for Lawyers. Chapter eight of AR 27-1 covers inquiries related to mismanagement of legal offices. Those investigations relate to the TJAG's responsibilities as an employer and senior supervisor of legal offices. Such responsibilities are not related to the discipline of lawyers for their conduct in the law. Rather those inquiries are related to a lawyer's ability to lead and supervise. Those functions fall well within the standard process for investigation and discipline found throughout the Army for all leaders and Soldiers. This paper does not propose changes to chapter eight of AR 27-1.

<sup>42</sup> The regulation actually refers to the Standards of Conduct Office (SOCO). However, since the publication of the regulation the name of SOCO has been changed to Professional Responsibility Branch (PRB).

<sup>43</sup> U.S. Department of the Army, *Judge Advocate Legal Services*, Army Regulation 27-1 (Washington, DC: U.S. Department of the Army, September 30, 1996), 15.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., 16.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., 17.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., 18.

<sup>53</sup> American Bar Association, "Model Rules for Lawyer Disciplinary Enforcement," August 12, 2002, [http://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_18.html](http://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_18.html) (accessed March 22, 2016).

<sup>54</sup> American Bar Association, *Standards for Imposing Lawyer Sanction* (Chicago: American Bar Association, February 1992) [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/corrected\\_standards\\_sanctions\\_may2012\\_wfootnotes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf) (accessed March 19, 2016).

<sup>55</sup> Clark Report, preface, xiv.

<sup>56</sup> Ibid.

<sup>57</sup> McKay Report, Introduction.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Mary M. Devlin, "The Development of Lawyer Disciplinary Procedures in the United States," *Journal of the Professional Lawyer*, October 17, 2008, 375, <http://www.americanbar.org/content/dam/aba/migrated/cpr/pubs/devlin.authcheckdam.pdf> (accessed March 19, 2016).

<sup>62</sup> Ibid.

<sup>63</sup> Ibid., 376.

<sup>64</sup> American Bar Association, *Standards for Imposing Lawyer Sanction*.

<sup>65</sup> U.S. Department of the Army, *Judge Advocate Legal Services*, 15.

<sup>66</sup> Ibid., 16-17.

<sup>67</sup> Ibid.

<sup>68</sup> Devlin, "The Development of Lawyer Disciplinary Procedures," 374.

<sup>69</sup> Clark Report, 41, 49-53.

<sup>70</sup> Ibid., 41.

<sup>71</sup> Ibid., 57-58.

<sup>72</sup> As the Clark Report noted, "a principal source from which the new member acquires the necessary knowledge to perform tasks assigned to him is the older, more experienced member." Clark Report, 40. Unfortunately not all SSJA have the experience in investigations to pass on and not all investigating attorneys can work for someone with experience when the Army does not have a professional staff or training in disciplinary enforcement.

<sup>73</sup> Clark Report, 39.

<sup>74</sup> As endnote 72 supra notifies us, a "a principal source from which the new member acquires the necessary knowledge to perform tasks assigned to him is the older, more experienced member." Given the interest at stake in a PSI, a new deputy SJA who has never conducted a PSI should be assigned a mentor who PRB knows has done good quality PSIs in the past. That mentor should be able to guide the new deputy SJA through the initial PSI.

<sup>75</sup> American Bar Association, "Model Rules for Lawyer Disciplinary Enforcement."

<sup>76</sup> Jack P. Sahl, "From Grievance and Complaint to Sanction: Attorney Misconduct in Ohio," *University of Dayton Law Review* 23 (Winter 1998): 305.

<sup>77</sup> U.S. Department of the Navy, *Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of The Judge Advocate General*, JAG Instruction 5803.1E (Washington, DC: U.S. Department of the Navy, January 20, 2015), enclosure (2), 9.

<sup>78</sup> U.S. Department of the Air Force, *Professional Responsibility Program*, Air Force Instruction 51-110 (Washington, DC: U.S. Department of the Air Force, August 5, 2014), 9.

<sup>79</sup> Office of the Secretary of the Treasury, *U.S. Code of Federal Regulations*, 31, sec. 10.76 (2003)

<sup>80</sup> U.S. Patent and Trademark Office, *U.S. Code of Federal Regulations*, 37, sec. 11.49 (2009).

<sup>81</sup> Executive Office for Immigration Review, *U.S. Code of Federal Regulations*, 8, sec. 1003.106 (2012).

<sup>82</sup> *In Re Winship*, 397 U.S. 358, 370 (1970) (Justice Harlan Concurring).

<sup>83</sup> *Addington v. Texas*, 441 U.S. 418, 424 (1979).

<sup>84</sup> *Spadone v. McHugh*, 864 F. Supp 2d 181 (D.D.C. 2012); *Knehans v. Alexander*, 566 F.2d 312 (D.C. Cir., 1977).

<sup>85</sup> *Partington v. Houck*, 723 F.3d 280 (D.C. Cir., 2013).

<sup>86</sup> *In Re Ruffalo*, 390 U.S. 544, 551 (1968).

<sup>87</sup> See *Partington v. Houck*, 723 F.3d 280 (D.C. Cir., 2013).