



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
901 N. STUART STREET, SUITE 520
ARLINGTON, VIRGINIA 22203-1837

REPLY TO
ATTENTION OF:

DAJA-SC

12 May 2006

MEMORANDUM THRU Chief, Trial Defense Service, U.S. Army Legal Services Agency,
Room 740, 901 North Stuart Street, Arlington, VA 22203

MEMORANDUM FOR Commander, 22d Legal Support Organization, Hanby-Hayden
Memorial U.S. Army Reserve Center, 612 East Davis Street, Mesquite Texas 75149-4798

SUBJECT: Requirement of Trial Defense Counsel to Represent Officers at Administrative
Separation Boards when No Attorney-Client Relationship has been Established

1. This memorandum responds to your question as to the propriety of the regulatory requirement in AR 135-175, Separation of Officers, 28 February 1987, paragraph 2-17g, subject as above, when compared with certain Army Rules of Professional Conduct ("Army Rules") contained in AR 27-26 that would appear to prohibit representation under these circumstances. This problem has arisen because of the increasing number of Army Reserve officers who do not, for whatever reason, respond to command notification that they will be required to show cause for retention on active duty before a Board of Inquiry (BOI). In addition, we are advised that this issue currently affects "several thousand" absent officers (a number likely to increase in the future), and that if you add absent enlisted Soldiers to the current total, the number rises to over 12,500 currently absent USAR Soldiers in this category (NOTE: although the often-used colloquial term to describe these personnel is "ghosts," [i.e., personnel listed on unit reports as present for duty but who are in fact not physically present with whereabouts purportedly unknown], the terms "absent officers," "absent clients," and "absent respondents," will be used to facilitate understanding and avoid confusion.

2. An Executive Summary of this opinion is contained at Attachment 1.

3. For reasons explained below, we have concluded:

a. Although TDS attorneys presently may be required by AR 135-175, para 2-17g, to place on the record at BOIs why they cannot ethically represent absent respondents, they may not be forced over their objection to undertake representational duties on behalf of officer respondent clients they have never met or with whom they have never spoken, and therefore with whom they have not established an attorney-client relationship (or any relationship at all). Representing absent clients under these circumstances makes it impossible for TDS attorneys to fully comply with the Army Rules, specifically Rules 1.2, 1.3, and 1.4, and, arguably, 1.7, leaving them vulnerable to accusations that they are acting contrary to these Rules (as well as, potentially, Rules from their other licensing authorities).

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b. In the absence of specific Army guidance on this matter, trial defense counsel may rely upon DoD guidance which indicates that nonresponse by an officer respondent to a show-cause board notification letter may be construed as the respondent voluntarily electing not to appear before the board.

4. As we understand it, this problem substantially increased in magnitude in 2005 after the Department of Defense republished an updated version of DoD Directive 1235.13, Management of the Individual Ready Reserve (IRR) and the Inactive National Guard, July 16, 2005. Paragraph 4.5 of this directive indicates that officers who have fulfilled their military service obligation (MSO) and have not taken action to remain in the IRR shall be advised of the requirement to remove them from the military within 2 years after their fulfillment of their MSO unless they positively elect to remain in the IRR past their MSO. The Army has begun attempts to implement this directive. However, the problem does not involve only IRR soldiers, but also drilling reservists, including members of troop program units (TPUs).

5. You have identified at least four Army Rules as matters of concern, Rules 1.2, 1.3, 1.4, and 1.7. In pertinent part:

a. Rule 1.2, Scope of Representation, states that an attorney shall abide by the client's desires concerning the objectives of representation and that the lawyer shall abide by client decisions as to choice of counsel, selection of forum, and whether the client will testify.

b. Rule 1.3, Diligence, requires that an attorney must act with reasonable diligence and must consult with the client early and often in the course of representation.

c. Rule 1.4, Communication, requires an attorney to keep a client reasonably informed so that a client can make informed decisions about the representation.

d. Rule 1.7, Conflict of Interest, indicates that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client. You are concerned that trial defense counsel may end up representing the interests of the government in eliminating their clients from service (often with an unfavorable characterization of discharge) if they attempt to represent the client in absentia.

Obviously, the problem of the absent client makes it impossible for trial defense counsel to fully comply with these rules. It is not possible for them to make decisions concerning scope of representation and to be adequately diligent and communicative with someone with whom they have not communicated. All of the Army Rules you cite presuppose communication between lawyer and client at some point (and ideally on a continuing basis) during the process. The

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Army Rules are silent with respect to the specific issue of absent clients, as this situation was not contemplated at the time the Rules were last updated. No case law appears on point as to this precise issue. It is presumed that state bar rules are similar, if not identical, to Army Rules in these areas.

6. In the scenario you describe, no relationship commences between the client and the trial defense counsel at any point in the administrative separation process. Ordinarily, such a relationship arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either the lawyer manifests to the person consent to do so; or the lawyer fails to manifest lack of consent to do so, and (2) the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or a tribunal with power to do so appoints the lawyer to provide the services. See Chapter 2; Restatement of the Law Governing Lawyers, Third, section 14 (Official Draft 2000). In addition, there are traditionally three ways that the attorney-client relationship may commence. See Rotunda, Ronald D., *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, 2002-2003, section 3.1, page 71. The closest one applicable to this scenario is when a tribunal, acting within its authority, appoints a lawyer to handle a matter. See Rule 6.2; Restatement, *op. cit.*, section 14(2). None of these conditions match the scenario you describe. The comment to this rule, paragraph g, further clarifies that that a lawyer may be required to represent a client when appointed by a court or other tribunal with power to do so and that when a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services. However, the context of the comment clearly contemplates that there has been communication between lawyer and client prior to, or simultaneous with, such court direction. In these scenarios involving USAR BOI respondents, you indicate such communication does not take place at any time in the process. Also, it is the general officer show cause authority (GOSCA), not the board of inquiry, which appoints the counsel for the respondent. While the proposition of whether a board of inquiry constitutes a tribunal, whether by itself or as an appointed entity of a GOSCA considered to be a "competent authority," could be vigorously debated¹, a GOSCA himself is not a tribunal for these purposes.² You are therefore correct when you assert that an attorney-client relationship has not been formed in these

¹ Though similar, the definition of "tribunal" varies. "A court. The place in which a session of court is held." (The Law Dictionary, @2002 Anderson Publishing Co.) or "A court or forum of justice" (emphasis added) (Merriam-Webster Online Dictionary as of this writing) or "A court. The seat or bench for the judge or judges of a court." (Ballentine's Law Dictionary, @1969 Lexis Law Publishing).

² The definition of a "tribunal" is unsettled even in the courts depending on the context of its usage. One court opined that "the President (of the United States) is not a tribunal" within the meaning of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Article 5. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 162 (D.D.C. 2004) *reversed by* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). Another opined that a military commission appointed by the President as a competent authority is a competent tribunal for the purposes of Army Regulation 190-8, which "implements international law, both customary and codified, relating to enemy

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circumstances. (NOTE: it is recognized that the acronym "GOSCA" is not often used in the Reserve community, but it accurately describes the authority that convenes Army Reserve administrative separation boards. A GOSCA is defined in AR 600-8-24 as "a commander exercising general court martial authority and all general officers in command who have a judge advocate or legal advisor available." Typically, commanders of Reserve Readiness Commands [RRCs] are GOSCA's in the Army Reserve).

7. The process of representation connotes an active rather than passive role for an attorney acting on behalf of a client. Common definitions of representation include the act of being another's agent and acting as an attorney for a client. Agency, in turn, concerns a voluntary arrangement in which an agent, a lawyer, agrees to work for the benefit of a principal, a client. The client-lawyer relationship normally comes into existence only if the client consents. Restatement, *op. cit.*, Chapter 2, Introductory Note. Taking into account that these normal prerequisites have not been met, we opine that adequate "representation" between attorney and client cannot occur when there has been no attorney-client relationship, no client consent for lawyer representation, and, in fact, no communication at all between client and attorney.

8. Even though an absent respondent's presumptive waiver of rights is not mentioned in AR 135-175, Department of Defense Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, September 16, 1997 indicates that "nonresponse to the notification letter may be construed as the respondent voluntarily electing not to appear before the board." As this language has been promulgated by the Office of the Secretary of Defense, is later in time than Army guidance, and is not inconsistent with the language of AR 135-175, 2-17g, we opine that the above "nonresponse" language may be applied to Army Reserve officers as well. Army reservists have a responsibility to provide current address information to their unit and/or the Army Reserve. AR 135-133, Ready Reservists, Qualification Records System, and Change of Address Reports, 30 June 1989, chapter 4. A Soldier assigned to the Individual Ready Reserve or a Soldier serving as an Individual Mobilization Augmentee will be determined to be an unsatisfactory participant if he fails to report a change of his new address to the Commander, Human Resources Command, St. Louis within 45 days following the change of address. AR 135-91, Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures, 1 February 2005, paras 4-6 and 4-7. Unsatisfactory participation is a basis for separation from the Army Reserve. AR 135-175, para 2-12i(2).

9. As you have indicated, AR 135-175, paragraph 2-17g, indicates that when the whereabouts of the officer are unknown and ascertained after complying with the procedures prescribed in

prisoners of war, retained personnel, civilian internees, and which includes those persons held during military operations other than war." AR 190-8 § 1-1(b). Hamdan, 415 F.3d at 43.

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AR 135-133 (see chapter 4 concerning the ensuring of updated addresses in the officer's records), or if the officer refuses to accept or respond to the required notification, the BOI will proceed in the officer's absence, except that counsel will be appointed to represent him in his absence (emphasis added). Again, as the reasonable and commonly accepted definition of representation implies an active role on the part of the attorney executing an agency relationship on behalf of a client, we opine that actual "representation" by TDS attorneys of absent officer client respondents in these circumstances is, at least, inconsistent with (and, at worst, violative of) professional responsibility rules and therefore should not occur.

10. We are advised that Headquarters, U.S. Army Trial Defense Service, intends to issue a policy directing TDS counsel not to attend BOI proceedings in cases where they have been unable to contact the respondent and establish an attorney-client relationship. In the absence of such a policy, however, we opine that the Army Rules of Professional Conduct do not prohibit either commands or BOIs from requiring trial defense counsel to justify why they believe they cannot ethically represent an officer respondent whom they have been detailed to represent. For example, a TDS attorney who has been appointed to represent an absent officer respondent may attend the proceeding to place on the record that he has been detailed to represent the respondent but that, despite his (and the government's presumed) best efforts, he has been unable to communicate with the respondent and so cannot represent him as his counsel. The TDS attorney could describe his efforts before the board members, and, presuming the board president was satisfied with these efforts, the president could decide to continue the board in the respondent's absence. As he would already be physically present, the TDS attorney could remain present at the board proceeding (if the board president directed that it continue) to ensure that the board is conducted in an administratively and legally correct manner (in tandem with the recorder). Alternatively, the TDS attorney could submit an affidavit in person to the board president acknowledging his detail to represent the respondent, describe his unsuccessful attempts to contact the respondent, declare that he has been unable to form an attorney-client relationship with the respondent and therefore will not purport to represent the respondent, even if the attorney remains at the board to monitor its adherence to administrative and legal requirements. The board president could then decide whether to proceed as described above, in the absence of both respondent and counsel. To ensure that no confusion develops among the board members or the GOSCA as to whether he is actually representing the client when he is in fact not doing so, a variant of this option could include the TDS attorney submitting the affidavit (without being physically present) to the board detailing his unsuccessful efforts to contact the respondent, declaring that he has been unable to form an attorney-client relationship with the respondent and therefore indicating that he cannot ethically represent the respondent. Without such an affidavit of "non-representation," the attorney runs the risk that the lay board president will not understand his words or actions or will not accept the attorney's position that he is not the respondent's defense counsel.

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11. While trial defense counsel are required to give primacy to the Army Rules (see Rule 8.5f and the Comment thereto), nothing in this opinion prevents or restricts a TDS attorney from also citing authority to a BOI or GOSCA from another State or other jurisdiction in which he is licensed, in support of an explanation that he is not ethically able to represent an absent officer respondent. We recognize that other licensing authorities may have different opinions and may issue different guidance in response to such questions presented.

12. Having issued this opinion and recognizing that other related issues remain unresolved, we also make the following suggestions:

a. It is undisputed, we believe, that the government and the command bear the burden of locating BOI respondents and providing current contact information. Having said that, we are advised that TDS attorneys also make their own diligent efforts to locate respondents over and above, and separate from, the government's efforts. Having heard repeated anecdotal evidence that the scope of this problem can be noticeably reduced without requiring prohibitive additional effort, we believe commands should seek to undertake more aggressive means to locate these absent officers and reduce the severity of this problem for the Army. We are advised that the current method of attempting to locate them is simply to send them notice of the impending BOI, by certified mail, to the last known address. If there is no response, the conclusion is made that the officer cannot be found. Although USARC asserts it is not staffed or funded to undertake more aggressive searches to locate absent Soldiers, even without physical searches current technology certainly can help electronic searches to produce more positive results (e.g., coordination with the Defense Finance and Accounting Service (DFAS) and/or Human Resources Command, Internet search engines such as "Google," Internet pay sites that charge a certain fee to locate information on individuals, and LEXIS and WESTLAW legal research services). Examples of successful results using these methods include the following:

1. OSJA, HQ, FORSCOM successfully employed a WESTLAW program as far back as 1995 to locate individuals by social security number. Current home addresses and phone numbers were often located using this method.

2. The Naval Reserve equivalent of the Army JAGC's Personnel, Plans and Training Office advises that it routinely coordinates with its Bureau of Naval Personnel (BUPERS) and has not had problems locating officers in similar situations. BUPERS, in turn, gets its information from DFAS.

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3. By utilizing commercial research locator services and paying for them with a government charge card, the Trial Counsel Assistance Program recently and successfully located numerous key witnesses for recent trials by court-martial relating to detainee operations.

Consideration should be given to employing these and similar methods despite the additional effort and cost it would require. Even though not required by Army Regulation, doing so ensures the maximum available due process is given to respondents while simultaneously demonstrating to the public the integrity and fairness of the Army Reserve's implementation of their separation policies. By active, sustained coordination with commands and by helping to ensure that the government has in fact exerted sufficient effort to locate BOI respondents, the TDS community in the USAR could, perhaps, assist in reducing the scope of this growing challenge. The Staff and Command Judge Advocates to whom copies of this opinion are furnished are urged to assist their commands in this endeavor, as appropriate.

b. AR 135-175 needs to be revised and updated accordingly. Coordination should be made with the proponent (Army G-1, Mr. Heflin, e-mail: Rowland.heflin@us.army.mil, 703-695-7277, DSN 225-7277) and the Administrative Law Division, OTJAG to ensure that suggested changes are reviewed and sent to the proponent for inclusion into the next version of the regulation. The possibility of "rapid action revisions" (expedited changes to existing regulations) should also be explored, as this has been done twice since 2004 concerning AR 135-178, Enlisted Administrative Separations. See AR 25-30, paragraph 3-5. The Administrative Assistant to the Secretary of the Army may grant authority for limited staffing in certain cases.

13. POCs for this advisory opinion are the undersigned at DSN 425-6707, edward.sheeran@us.army.mil or Mr. Eveland (dean.eveland@us.army.mil), DSN 425-6714.

FOR THE JUDGE ADVOCATE GENERAL:


EDWARD J. SHEERAN
LTC, JA
Chief, Professional Responsibility Branch
Standards of Conduct Office

cf:
SJA, USARC
SJA, FORSCOM
CJA, HRC (St.Louis)

EXECUTIVE SUMMARY

1. Applied to the scenario presented, Army Regulation 135-175, para 2-17g contains language that requires trial defense counsel to act contrary to professional responsibility rules and therefore must be changed.

2. Although the Army Rules of Professional Conduct do not prohibit trial defense counsel from personally appearing before boards of inquiry or submitting affidavits to explain why they cannot represent clients whom they have been detailed to represent, trial defense counsel may not be forced to undertake representational duties on behalf of absent officer clients whom they have been detailed to represent but with whom they have had no communication because of the clients' absence.

3. AR 135-175 indicates that if an officer refuses to accept or respond to the required notification, the BOI will proceed in the officer's absence. Even given the guidance expressed in this opinion, Department of Defense authority permits the separation of USAR commissioned officers who do not respond to BOI notification letters requiring them to show cause for retention in the armed forces. Nonresponse to notification letters may be construed as respondents voluntarily electing not to appear before BOIs.