



# Civil & Administrative Law Branch

# PRACTICE ADVISORY

No. 2-15

2 February 2015

## Professional Responsibility Update

1. **Purpose.** To summarize key changes in JAGINST 5803.1E, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General.
2. **Major Points.**
  - **Effective Date:** Signed 20 Jan 15; [http://www.jag.navy.mil/library/instructions/JAGINST\\_5803-1E.pdf](http://www.jag.navy.mil/library/instructions/JAGINST_5803-1E.pdf)
  - **Notification of Potentially Exculpatory Evidence Discovered Post-Trial.** Responds to DODIG-2013-033, Review of DoD Response to Noncompliant Crime Laboratory Analyses, December 21, 2012. Adds language to Rule 3.8 (Special Responsibilities of a Trial Counsel and Other Government Counsel) and the comments to the rule that imposes a duty on trial counsel and other government counsel to disclose when they know of new, credible, and material evidence creating a reasonable likelihood that a convicted accused did not commit an offense of which the accused was convicted. Based on 2008 amendments to ABA Model Rule 3.8.
  - **Summary Dismissal.** Allows summary dismissal of PR complaints if the Rules Counsel determines the JAG does not have jurisdiction or the complaint, on its face, fails to establish probable cause for a violation of the Rules of Professional Conduct.
  - **Complaint Processing Procedures.** Removes the Preliminary Inquiry step from the PR complaint process. Previous version contained both a Preliminary Inquiry and an Ethics Investigation with little distinction between the two. The Ethics Investigation provides sufficient due process and the standard of proof for the Ethics Investigation remains “clear and convincing evidence.”
  - **Requests for Reinstatement.** Adds a paragraph describing the procedures to request reinstatement for attorneys whose certification to practice law in any area under the cognizance of the JAG has been suspended. Sets forth in writing the policy decision by the JAG in 2001 to follow Model Rule 25 of ABA Model Rules for Lawyer Disciplinary Enforcement. Does not allow application for reinstatement for 5 years (ABA standard and majority of states). Consistent with ABA Model Rule and state practice, requires request in writing, signed under oath, describing with particularity the manner in which the request meets eight specific criteria.
  - **Notice of Appearance by Civilian Counsel.** Adds a requirement for non-USG attorneys to submit a notice of appearance (similar to a court-martial setting) when representing an individual in any matter for which the JAG is charged with supervising the provision of legal services. At a minimum, the notice of appearance should contain the attorney’s licensing source, the attorney’s contact information and certification(s) that the attorney is in good standing and agrees to abide by JAGINST 5803.1E.

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- **Other Rules Changes:**

- **Adds Rule 1.0 (Terminology).** Adopted verbatim from ABA Model Rule 1.0.
- **Rule 1.4 (Communication).** Change makes rule identical to ABA Model Rule 1.4 to include (a)(1): duty to inform client of decision or circumstance with respect to which client's informed consent is required; (a)(2): duty to consult with client about means; and (a)(5): consultation with client regarding ethical and legal limitations on covered attorney's conduct.
- **Rule 8.3 (Reporting Professional Misconduct).** Changes phrase "having knowledge" to "who knows" to mirror language in ABA Model Rule 8.3. "Who knows" relates to Rule 1.0(f)(Terminology) that contains definition of "knowingly, known or knows" as denoting "actual knowledge of the facts in question."
- **Rule 8.6 (Requirement to Remain in Good Standing).** Adds list of proceedings where non-USG attorney must be in good standing with their licensing authority: board of inquiry, disability evaluation proceedings, or any matter under cognizance of the JAG. Requires non-USG attorney to submit Notice of Appearance.

3. **Point of Contact.** Mr. Michael D. Graham, GS-15, Senior Attorney, JCA, (703) 614-2510/DSN: 224-2510, [michael.d.graham@usmc.mil](mailto:michael.d.graham@usmc.mil)