THE TWENTY-THIRD EDWARD H. YOUNG LECTURE IN LEGAL EDUCATION: LEGAL EDUCATION AND PROFESSIONALISM IN PARALLEL UNIVERSES[1]

W. FRANK NEWTON[2]

I. Introduction

Professionalism is composed of two essential elements: valid theoretical principles and effective application of those principles in the prac-

1. This article is an edited transcript of a lecture delivered on 29 March 1999 by Mr. W. Frank Newton to members of the staff and faculty, distinguished guests, and officers attending the 47th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The lecture is named in honor of Colonel Edward H. (Ham) Young, who served two tours as the Commandant of The Judge Advocate General's School. He was the first Commandant of the School when it was established in Washington, D.C., in 1942. He presided over the School for two years and oversaw its expansion and transfer to the University of Michigan. He returned as Commandant when the School was reactivated at Fort Myer in 1950. His distinguished military career began when he received his commission in 1918 from West Point and served with the American Expeditionary Force and the Army of Occupation in Europe after World War I. His impressive legal career in the Army also included assignments as an Assistant Professor of Law at the United States Military Academy, the China Theatre Judge Advocate and legal advisor to the Far East United Nations War Crimes Commission, the Chief of War Crimes Branch in the Office of The Judge Advocate General. Colonel Young ended his career in the Army in 1954 while serving as Staff Judge Advocate, Headquarters, Second Army.

2. Dean and Professor of Law, 1985. B.A., Baylor University, 1965; J.D., 1967; LL.M., New York University, 1969; LL.M., Columbia University, 1978. Admitted to practice in Texas. Dean Newton entered private practice with the Stubbeman McRae Sealy Laughlin and Browder law firm of Midland, Texas, where he engaged in civil defense work, commercial litigation, and a major oil concession interest in Ecuador. Dean Newton left private practice to enter the Judge Advocate General's Corps of the United States Navy. Initially he served as defense counsel in general and special courts-martial. He also served as special prosecutor for major felony cases. After an assignment to the international affairs office of the Judge Advocate General in Washington, he was selected to serve on the staff of the Secretary of the Navy as a member of the Presidential Task Force on Law of the Sea. Dean Newton returned to Texas to join the faculty at the Baylor School of Law. In addition to teaching, he was an advisor on a project designed to revise the Constitution of the State of Texas. He also served the State Bar of Texas as Chair of the Standing Committee on Legal Services to the Poor in Civil Matters. Dean Newton has been appointed by the Supreme Court of Texas as Chair of the Texas Equal Access to Justice Foundation. He also serves as Trustee of the Texas Center for Legal Ethics and Professionalism and is active as a member of the American Law Institute.

I thank James Ranspot and Jeffrey Waller for research assistance and particularly Derek Hampton, now serving as Lieutenant (junior grade) in the Navy JAG, for research and editorial assistance.

tice of law.[3] The Colonel Edward H. "Ham" Young Lecture at The Judge Advocate General's School provides a prime opportunity for us to exhume the theoretical principles of professional conduct by asking how effectively we apply those principles in practice. Our respective systems of legal education play essential roles in both areas.

Presentations in law school settings often focus on validity issues, an arena that is as interesting as it is elusive. The professional principles that we pursue are composed of myriad elements including moral ideals expressed in philosophy and in the rules of conduct for lawyers. Many philosophies feature components that examine the depth and weight of moral paragons. Other philosophies are remembered as a single formula, such as Kant's postulate–"Act only on that maxim by which you can at the same time will that it should become a universal law."[4] Kant's "universal law" considers the aspects of an individual's freedom to act and principles of "right" and "correct" actions that coexist with the freedom to act.[5]

Today's complex philosophical counterparts to Kant are rooted either in Plato and Aristotle's position on the control of truth and reason[6] or in Hume and St. Augustine's concept involving the control of will and love.[7] Many of us inherited a preference directed toward Plato and Aristotle through the influence of John Stuart Mill. In 1971, John Rawls offered a current version of this line of philosophy in his classic book, *A Theory of Justice*.[8] These very Western and American philosophical views provide the framework for the American Bar Association's (ABA) 1969 Code[9] and the 1983 Model Rules.[10] The Model Rules are the basis of many current state-adopted rules applicable to practicing lawyers today.[11] Most recently, the American Law Institute has developed *The Law Governing*

3. *See, e.g.*, ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953); C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

4. IMMANUEL KANT, FUNDAMENTALS OF METAPHYSICS CUSTOMS (1795).

5. *See* IMMANUEL KANT, THE SCIENCE OF RIGHT 3 (1790).

6. *See* Deborah Rhode, *Why the ABA Bothers*, 59 TEX. L. REV. 689 (1981).

7. *See generally* CAN A GOOD CHRISTIAN BE A GOOD LAWYER? (Thomas E. Baker & Timothy W. Floyd eds., 1998).

8. *See* JOHN RAWLS, TOWARD A THEORY OF SOCIAL JUSTICE (1971). *See also* T. M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) (encompassing a newer version of Rawl's work).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

10. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

11. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 40 (1986).

Lawyers.[12] These codes, or rules of conduct for lawyers, represent our commitment to the effective application of principles in practice.

Today we will focus on professional principles in practice. Our discussion will be primed by review of several experiences I enjoyed during my brief tenure in the Navy JAG. These experiences, which are loosely historical, are designed to take advantage of what philosophers George Lakoff and Mark Johnson call "Philosophy in the Flesh."[13] They persuasively argue that metaphors–word pictures–are powerful philosophical teaching and learning tools. As Aristotle proclaimed, "[T]he greatest thing by far is to be a master of metaphor[s]."[14] If the metaphor is the medium, then the goal is to open a constructive dialogue between the parallel universes of military and civilian legal education and practice. We should expect to both reaffirm and enrich our respective professionalism. Certainly, that is the experience of the civilian bar in drawing on the strength of the military bar.[15] This review will highlight several significant advances that should provide us both a platform and an impetus for further development. Let us turn to the first word picture to frame our dialogue examining these parallel universes.

II. Decommissioning the Admiral's Barge

My first duty station in the Navy Judge Advocate General's Corps was the Naval Air Station at Corpus Christi, Texas. At that time, the concept of a law center comprised of thirty defense counsel and fifteen prosecutors, who were to try special and general court-martials for a several state command, was being tested. When I arrived, the process was well under way and everyone seemed to know everyone else. Except for the judges and a lone executive position, every lawyer at the law center was a Navy lieutenant. I assume that is why no one bothered to use Lieutenant–we just used last names. As I was struggling during my first week to learn

12. RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS (1998).

13. *See* Edward Rothstein, *Giving the Truth a Hand: We Construct the World, the Authors Believe, in the Image of Our Own Bodies*, N.Y. TIMES BOOK REV., Feb. 21, 1999, at 25.

14. ARISTOTLE, POETICS § 22 (McKeon trans., 1941).

15. Major General Walter Huffman, The Judge Advocate General of the Army, is currently serving a three-year term as Director of the State Bar of Texas. During this term of service General Huffman has used expertise born of the experience of serving as "managing partner" of the world's largest and most far-flung law firm to advance the cause of members of the bar who live and practice outside the borders of the state.

names, Charlton came running through our offices yelling in a singsong voice, "Tilden's going to decommission the Admiral's Barge . . . Tilden's going to decommission the Admiral's Barge." *En masse*, my colleagues, drawn from all parts of the United States, poured down the stairs from our second floor offices and spilled out into the parking lot.

It was four-thirty on a Friday afternoon in April. Corpus Christi was at its best. The bright sun hung in the clear sky, and a light breeze danced through the mild afternoon air. It was sixty-six degrees and the humidity was relatively low. We all looked so good–all forty-five of us in our formal khaki uniforms–as we left thirty minutes early. There were no trials in progress–a real rarity–and our lone executive, Commander Lake, was in his office practicing discretion. We piled into the nearest cars–three or four to a vehicle–and roared out of the parking lot. I had the distinct sensation that every eye on the base and every alert brain was aware that the young Turk lawyers were playing hooky. Beyond that, I was confused. If we were going to watch the decommissioning of the Admiral's Barge, why were we heading away from the bay and toward the back gate?

In just a matter of minutes, we had exited through the back gate of the base and pulled into the mulched seashell parking lot of a low windowless concrete-block building. A sign on the flat roof, painted on plywood and supported by a simple, weathered two-by-four frame, read "Battery Ann's." As we had spilled out of our office into the cars, so we spilled out of the cars into "Battery Ann's." It was just plain dark inside for anyone leaving the bright April Texas sun. I just followed along and found myself in a roughly formed line heading toward a bar on the far wall. Halfway there the line parted where it met a short woman dressed in Levi jeans, square boots, and a tee-shirt that said "Battery Ann's." Her face suggested how the bar may have been named, although along one wall was a rack of car batteries that suggested an alternative possibility. I quickly fished out a dollar bill, following the lead of those ahead of me, handed it to Battery Ann, and followed the line that turned to the left. I discovered I had voted for two Lone Star long necks instead of two Pearl long necks. A double row of these two local brews, cold and sweating, had been lined up on the bar. Every lawyer, after giving Battery Ann the dollar due, had grabbed a beer in each fist and returned to the sun-soaked, mulched white-seashell parking lot.

Outside, we surrounded a car I had not previously noticed–a rusted, black and white 1955 Buick two-door convertible. On each front-fender, just above the three chrome portholes, appeared "Admiral's Barge" in cur-

sive chrome. "This is Tilden's drunk car," explained the lawyer next to me. "He drives it slowly through on-base housing and by the BOQ with "Louie Louie" blaring from oversized speakers. Lawyers can catch up on foot, scramble up the broad trunk, and jump into the car. It always goes to "Battery Ann's" and everyone ties one on." Just as I was digesting this information, Tilden emerged from the front door of "Battery Ann's" onto the seashell parking lot. He had a beer in each fist. The assembled group yelled "Tilden!" He raised the long neck in his left-hand high overhead. In turn, we raised our left-hand beers and took a drink. Tilden drained his bottle. Then, Tilden raised his right-hand beer. We raised our right-hand beers and took a drink. Tilden drained his other bottle.

Tilden then walked directly toward the middle of the hood of the rusted, black and white 1955 Buick convertible. On one side of Tilden was Johnson, who had played down lineman at Tulane, and on the other side was King, who had played down lineman at Notre Dame. Tilden, five feet, eight inches tall and maybe 140 pounds in lead-lined shoes, was hoisted onto the hood of the Buick by Johnson and King. As the assembled crowd roared their approval, Tilden pulled out a forty-five revolver and shot through the hood into the engine block. The roar of the revolver temporarily silenced us. Nevertheless, we were quick to cheer as Tilden turned on his heels, jumped down, and motioned for us to follow him back into Battery Ann's.

It seemed that the night before, the engine on the fifteen-year-old Buick had completely seized up and the car was a total loss. Perhaps the car sacrificed itself, or perhaps it was Tilden's habit of adding beer instead of oil to the crankcase that caused the Buick's demise. Tilden's decommissioning of the Admiral's Barge became an instant legend at NAS Corpus Christi Law Center. At every opportunity, the story was retold, which is a good thing because Tilden did not remember what happened. Tilden was an alcoholic.

This is a lecture on legal education and professionalism and, therefore, you are fully justified in wondering what is alcoholism, and what does it have to do with legal education and professionalism.

A. What is Alcoholism?[16]

Alcoholism is a "secret sickness" that could affect anyone at any and in every level of society.[17] "By definition," a former addict explained, "the addict is a person who is living secretly. The treatment is to help an alcoholic come out of that secret life to a place where he can deal with shame and guilt and anger and suffering and remorse and be open with other people."[18] This "secret" is often found in lawyers, physicians, airline pilots, and professors; individuals who are all considered by society as providing the highest role models. Individuals in these role model positions are "pedestal professionals."[19] Winos on skid row and crack addicts in jail are a world removed from "pedestal professionals." Certainly, lawyers, in or out of military service, are not less vulnerable than others to substance abuse. Indeed, there are several indications that "pedestal professionals" may experience substance abuse more frequently than members of the general public.[20]

Substance abusing or addicted "pedestal professionals" are often top students.[21] Frequently they are efficient, hardworking, high achievers who are admired by clients and colleagues alike. One active recovering alcoholic I know was a model law review member while addicted.[22] A drive to succeed may be part of the underlying "addiction" to perfection, which can generate a need to be exceptionally productive. This need to produce often manifests itself in other-directed goals and values including money, power, prestige, and rank. The desire for these goals can exert tremendous pressure on a person. When fear, exhaustion, and failure close in, and there are not enough hours in the day, then drugs and alcoholism can be a friend to someone in need. That need is often for temporary relief from the pressures and goals involving the desire to produce.

Chemical psycho-stimulates produce temporary relief. "[B]ut slowly, insidiously they change from a help to a hindrance." Recovering alcoholics in Alcoholics Anonymous have a saying: "First the man takes a drink;

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16. This section draws information from ROBERT HOLMAN COOMBS, DRUG-IMPAIRED PROFESSIONALS (1997).

17. *See id.* at 4 (citing Videotape: A Secret Sickness: Just How Secret Is It? (Texas Young Lawyers Association 1990)).

18. *See id.* at 3.

19. *Id.*

20. *See id.* at 48.

21. *See id.*

22. *See* Speech by Mike Crowley to the Texas Tech School of Law, August 21, 1998.

then the drink takes a drink; then the drink takes a man."[23] All addicts eventually lose control. That loss of control is characterized by behavior that leads inexorably to professional, financial, familial, and personal ruin. The risk of ruin often extends beyond the alcoholic.

In every case, clients and professional colleagues are also at risk. Paradoxically, professional colleagues often help conceal addiction, although they are also at risk. This is true because we do not want to concede that lawyers, particularly lawyers we know, are drunks and addicts. Too often it is just easier to "cover up" any problems.

> The addicted professional fears the loss of a practice, and even more devastating, the loss of a license to practice; the office staff fears reprisal and termination of employment; the family fears discovery by the community; the spouse fears loss of income and disintegration of the family; peers face loss of respect for the profession; professional licensing boards fear that harm will come to the public and embarrassment to the professional society; close friends fear that friendships will be terminated. So everyone tip toes around the problem, maintaining a conspiracy of silence.[24]

If a lawyer with a problem is a member of a firm, the firm may terminate the lawyer, or if that is problematic, simply cover up the problem fearing the loss of insurance, higher premiums, or other problems. This type of approach or attitude does nothing to correct the problem and may only compound the final cost. In many cases, the addiction of a lawyer is initially facilitated by the elitist attitude common among professionals. Lawyers often believe they are too smart and well educated to become addicted. All this adds up to a false sense of security and invincibility. But the facts belie any sense of professional immunity.

The North Carolina Bar Association conducted a study and found that almost seventeen percent of new North Carolina attorneys consumed three to five alcoholic drinks a day.[25] In a random ten-percent sample, the State of Washington discovered that one-third of its attorneys suffered from depression, problem drinking, or cocaine abuse.[26] It is estimated that at

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23. COOMBS, *supra* note 16, at 5.

24. *Id.* at 8 (citing S. William Oberg, *There are 18,000 Dentists Who Need Our Special Attention* (Part I), 56 J. AM. C. DENTISTS 4 (1989)).

25. *See* NORTH CAROLINA BAR ASSOCIATION, *Report of the Quality of Life Task Force and Recommendations* 33 (1991).

least one in seven lawyers in California has a "serious substance abuse problem."[27] In fact, this problem appears to start as early as law school. The ABA reported that thirteen percent of law school graduates show signs of drug or alcohol dependency.[28] Law students show significantly higher usage rates for alcohol when compared with college and high school graduates of a similar age.[29]

> The drug problem in America is much more pervasive than is commonly recognized. As a nation we usually target the most visible addicts–those in our inner cities who use illicit drugs. Fanned by uniformed political rhetoric, we prosecute and imprison them. Rarely do we notice or publicize professionals and other white-collar drug abusers who have much easier access to controlled substances. Our national understanding about the nature of chemical dependency and those who succumb to it is faulty.[30]

B. What Does Alcoholism Have to do With Professionalism?

Alcoholism directly affects professionalism in two distinct ways. First, alcoholism causes us to confront a moral obligation owed to others. Second, alcoholism requires us to act to support effective programs to protect clients. Either of these independent bases would be enough to encourage a response; together they present us with an inescapable professional obligation.

Moral obligations are formally described in theology and philosophy. For most of us, the lesson of the Good Samaritan comes readily to mind as a theological expression of this moral obligation.[31] John Rawls coined a popular current philosophical expression. His "veil of ignorance" analysis invites us to consider the proper action in a situation without knowing which role we will ultimately be assigned.[32] Either way, these theological

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26. *See* G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyer*, 13 INT'L J.L. & PSYCHIATRY 233 (1990).

27. *See* COOMBS, *supra* note 16, at 33.

28. *See id*. (citing J. H. Robbins & Tim F. Branaman, *The Personality of Addiction*, TEXAS BAR J., Mar. 1992, at 266).

29. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools* (1993).

30. COOMBS, *supra* note 16, at 35.

31. *See Luke* 10:25-37.

and moral concepts play against a central reality of our profession: lawyers spend a lot of time at work with other lawyers. Aside from family and close, personal friends, lawyers are the people who matter most to lawyers. We must, therefore, accept moral responsibility for our alcoholic colleagues or forswear professional moral responsibility altogether.[33]

Moreover, there exists a professional obligation independent of any moral base.[34] Our professional obligation is to police our profession effectively to assure client protection.[35] Most disciplinary actions brought against lawyers involve either client neglect or conversion of client funds.[36] In many of these cases, perhaps fifty to seventy percent, substance abuse is the reason for client neglect or conversion of client funds. Client neglect usually results from devotion of too much time and energy to the abuse of substances.[37] Conversion of client funds occurs in order to support drug abuse.[38] Drug abuse, including prominently alcoholism, is a major lawyer discipline problem.

Initially, alcoholism among lawyers was treated as a matter of "moral turpitude."[39] Dr. Benjamin Rush, founder of the American Psychiatric Association, argued in the early nineteenth century that alcoholism was a disease.[40] It was not until 1945, however, that the American Medical Association formally accepted alcoholism as a disease.[41]

Since then, the disease model has become the dominant rationale for treating chemical dependencies and has been officially endorsed by the World Heath Organization, the American Psychiatric Association, the National Association of Social Workers, the American Public Health Association, the National Council on Alcoholism, and the American Soci-

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32. *See* JOHN RAWLS, TOWARD A THEORY OF SOCIAL JUSTICE (1971).

33. *See generally* CAN A GOOD CHRISTIAN BE A GOOD LAWYER? (Thomas E. Baker & Timothy W. Floyd eds., 1998)

34. *See* THE LAWYER AS A PROFESSIONAL (Timothy W. Floyd & W. Frank Newton eds., 1991).

35. *See, e.g.*, POUND, *supra* note 3; WARREN, *supra* note 3.

36. *See* Stephanie B. Goldberg, *Drawing the Line: When is an Ex-Coke Addict Fit to Practice Law?*, 76 A.B.A. J. 48, 51 (Feb. 1990).

37. *See* Elaine Johnson, *From the Alcohol, Drug Abuse, and Health Administration*, J. AM. MED. ASS. (1992).

38. *See, e.g.*, *In re* Adams, 737 S.W.2d 714 (Mo. 1987) (en banc).

39. *See, e.g.*, State v. Edmundson, 204 P. 619 (Or. 1922).

40. *See Drug and Alcohol Addiction as a Disease*, *in* COMPREHENSIVE HANDBOOK OF DRUG AND ALCOHOL ADDICTION (Norman S. Willard ed., 1991).

41. *See* Coombs, *supra* note 16, at 174.

ety for Addiction Medicine. The disease model defines substance abusers as people who are ill or unhealthy, not because they have an underlying mental disorder, but because they have the disease of chemical dependency, which manifests itself in an irreversible loss of control over alcohol and other psychoactive substances. The disease may go into remission, but because there is no known cure, complete abstinence is the treatment goal. The disease is progressive and, without abstinence, often fatal.[42] Great progress has occurred since the American Medical Association recognized alcoholism as a disease in 1945. Today, alcoholism is accepted as a disease and programs to help arrest its progress, as well as to provide for rehabilitation and restitution, exist alongside and cooperate with the formal discipline process.[43]

The ABA has been active in providing responses to this disease that afflicts so many American lawyers. In 1990, the ABA promulgated a *Model Law Firm/Legal Department Personnel Impairment Policy.*[44] This work was the first product of the Commission on Lawyer Assistance Programs (COLAP) established by the Board of Governors of the ABA in 1988. The mission of COLAP includes all of the following: educating the legal profession concerning alcoholism and other forms of chemical dependency; assisting and supporting bar associations and lawyer assistants in developing and maintaining methods of providing effective solutions for recovery; maintaining a national clearinghouse on lawyer assistance programs and case law relating to addiction; and providing a national network of lawyer assistance program leaders and staff as a resource to each other and attorneys in need of assistance through a directory and national workshops on lawyer addiction.[45]

Many materials on chemical abuse have been produced by COLAP following its mission. In 1991, it produced *Guiding Principles for a Lawyer Assistance Program*.[46] In 1995, COLAP produced a *Model Lawyer Assistance Program*.[47] In 1998, COLAP produced a *Model Recovery*

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42. *Id.* at 175.

43. *See, e.g.*, *In re* Robert Kunz, 524 N.E.2d 544, 549 (Ill. 1989). *See also* Raymond P. O'Keefe, *The Cocaine Addicted Lawyer and the Disciplinary System,* 5 ST. THOMAS L. REV. 217 (1992); Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY L.J. 1263 (1993).

44. *See* MISCONDUCT & DISCIPLINE: DISCIPLINARY PROCESS, LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) § 101 (Sept. 25, 1991).

45. *See id*.

46. *See* ABA COMMISSION ON IMPAIRED ATTORNEYS REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, GUIDING PRINCIPLES FOR A LAWYER ASSISTANCE PROGRAM (1991).

Monitoring Guide.[48] Additionally, there are now annual national workshops for lawyer assistance programs.[49] The Association of American Law Schools (AALS), the professional organization of American Law Schools, has similarly focused on alcoholism and substance abuse. In May of 1993, a *Report of the Special Committee on Problems of Substance Abuse in the Law School* was completed and submitted to the Executive Committee of AALS.[50] This report was adopted the same year.[51]

All of this national activity was built on work previously performed at the state level. This is natural because, in the United States, the states are the entities that license lawyers to practice. Additionally, bar admissions and lawyer discipline are governed at the state level. Review of the Texas program, which I am familiar with and know is a premier program, will serve to provide pertinent illustrative detail. Beginning in the mid 1980s, the State Bar of Texas sought statutory authorization to create a lawyer assistance program. In 1989, pursuant to Chapter 467 of the Texas Health and Safety Code, the State Bar of Texas established the Texas Lawyer's Assistance Program (TLAP).[52]

The TLAP is funded and staffed by the State Bar of Texas under a statutory grant that authorizes the identification of lawyers who are substance abusers, and also authorizes peer intervention, counseling, and rehabilitation. In addition to substance abuse, the statute covers personal difficulties adversely affecting a lawyer's practice such as physical or mental illness, or emotional distress.[53] The TLAP is governed by a committee made up of about thirty lawyers from around Texas. These lawyers are appointed to staggered terms by the State Bar President. Day-to-day management of TLAP is in the charge of a full-time director who is supported by a full-time assistant director. Both director and assistant director are lawyers.[54] These two positions are of great importance, but the heart of the

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47. *See* ABA COMMISSION ON IMPAIRED ATTORNEYS, AMERICAN BAR ASSOCIATION MODEL LAWYER ASSISTANCE PROGRAM: REPORT TO THE HOUSE OF DELAGATES (1995).

48. *See id.*

49. *See* Feature, *Center Update*, 7 NO. 2 PROF. LAW. 26 (1996).

50. *See* Association of American Law Schools, Special Committee, *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35 (1994).

51. *See id.*

52. *See* TEX. HEALTH & SAFETY CODE ANN. § 467 (1989).

53. *See id.*

54. TEXAS LAWYERS' ASSISTANCE PROGRAM, VOLUNTEER HANDBOOK 1-2 (1997) [hereinafter HANDBOOK].

TLAP is the statewide network of over 400 volunteers committed to helping an estimated ten to fifteen thousand lawyers who need help.[55]

> TLAP not only helps to save the lives and practices of impaired attorneys, it also contributes to the protection of the public, the continued improvement in the integrity and reputation of the legal profession, and, because assistance to an impaired lawyer often prevents future ethical violations, the reduction of disciplinary actions against impaired attorneys.[56]

Today the TLAP receives about 300 calls each month or about 3600 calls a year. About ten percent of those calls result in cases of individual lawyer referrals to substance abuse programs.

The Army approach to alcohol and drug abuse prevention and control is quite different from my personal experience at NAS Corpus Christi. Your current Alcohol and Drug Abuse Prevention and Control Program[57] recognizes the tension between two polices: rehabilitation of soldiers and military readiness.[58] This policy accepts alcoholism as a disease and adopts rehabilitation as a goal. This is commendable both on moral grounds and as a way of protecting the substantial investment that every soldier represents. Of course, the overarching policy is that of military readiness. Rehabilitation of an individual soldier cannot be pursued if military readiness must be sacrificed. Individual need must yield to collective need.

Because alcoholism is such a real problem, and because of the special tension between rehabilitation and readiness, one would expect that the Army would dedicate considerable resources to this problem. And this is the case. Your curriculum here at The Judge Advocate General's School is firm testament to that end.

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55. There are 87,102 lawyers licensed in Texas, 64,145 of which are in good standing. *See* Telephonic Interview with Representative of Membership Department, State Bar of Texas (Mar. 5, 1999).

56. HANDBOOK, *supra* note 54, 1-1.

57. *See* DEP'T OF THE ARMY, REG. 600-85, ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM, at 1 (C2, 1995).

58. *See* Lieutenant Colonel Karl M. Goetzke, MILITARY PERSONNEL LAW, 148TH JUDGE ADVOCATE OFFICER BASIC COURSE, ALCOHOL AND DRUG PREVENTION AND CONTROL PROGRAM, ch. O (1998).

Does this mean that each of us, in our parallel universe, has slain the dragon? May we declare victory and march on?

Certainly vast improvements have been made. Of course, each of you must support and employ these improved procedures and approaches in the discharge of your individual careers. Eternal vigilance is certainly the price of any victories won against alcoholism. I suspect we can, and certainly we should strive to, improve on current approaches. Our experience in Texas is that having lawyers talk to lawyers is a critical aspect of our program. Within one hour a recovering alcoholic is present or on the telephone with a lawyer in need. And the recovering alcoholic is not only knowledgeable but successful, a critical element in breaking through the wall of secrecy and stigma. Perhaps this could be employed in The Judge Advocate General's Corps. How helpful might it be for a captain to hear within an hour from a colonel who is a recovering alcoholic, and a successful career officer?

III. Forget the Constitution! This is a Navy Administrative Discharge Proceeding!

It was my first big case as a Navy JAG lawyer. Thirty-eight defendants had been charged with marijuana possession and use. Additionally, one defendant was charged with possession with intent to distribute. A frog-strangling rain was falling, and I was driving a motor-pool Chevy heading toward NAS Kingsville from Corpus Christi. I was excited! So even before driving to the Naval Air Station, I drove to the "Country Club." It was a location I knew as a result of reading the Naval Investigative Service report: a rented three-bedroom, one-bath house in Kingsville, Texas. The glass panes in the windows had been painted black on the inside. A central hall was the repository of the Turkish hashish tub. Holes had been drilled at the baseboard level to allow the tubes that protruded from the hashish tub to pass to each "pleasure area." The dining room, living room, and each of the three bedrooms was a "pleasure area." Each was independently outfitted with a sound system. There was a rock and roll room, a jazz room, a country and western room, a blues room, and a "mood" music room. Each venue was served by a tube-fed mouth piece which would allow club members to "draw the weed."

Alas, the Kingsville Country Club, with its professionally lettered sign reading "Music Appreciation Classes–Call 794-9943," had been raided, and thirty-eight "members" were arrested. As luck would have it,

the President of the Music Appreciation Club, Warrant Officer Wayne Bose Clarkson, was also present. I was the lawyer for the members and the president of this "country club."

My first meeting with my clients was memorable. I was ushered into an enclosed exercise area at Kingsville Brig. Mass confusion would be a conservative description of the situation–borderline riot is a more accurate portrait. Some of my clients were angry at each other. Some of my clients were irate at me. All of my clients were furious with the brig officers. In-turn the brig officers were clearly frightened and anxious to deliver my charges to me. These men were seething with anger. They had never been in trouble before. Many of the defendants were married and had been held incommunicado. The brig facility was very overcrowded and there was simply no way to interview my new clients. I decided to take this problem to the command.

Naval Air Station Kingsville was then commanded by a Navy captain who refused to receive me. I decided to stay in the waiting room until he would agree to see me. There were two receptionists sitting at their desks doing nothing so I approached one of them, introduced myself, and explained that I needed help in producing a formal request for relief on behalf of my clients. She received my request with some trepidation. In fact, she said she needed to ask the captain about my request. She called the captain and I could hear his response both from the receiver and through the wall–a rather firm "No!" I decided a handwritten request would do.

I was in the process of composing the request when the base legal officer, Marine Major James Settler, entered the room. He introduced himself and explained that the base commander was "hard" on drugs and that he was particularly upset by the fact that so many of the arrested sailors were aircraft mechanics. Apparently the base commander believed that drug-impaired aircraft mechanics were responsible for a recent rash of aircraft accidents–a development which presented a direct and real threat to the commander's career. I explained my problems and Major Settler assured me he would immediately try to work something out with the base commander. He entered the commander's office and I waited.

After an hour, with Major Settler still in the commander's office, two members of the shore patrol entered the office, silently approached me and stood on either side of my chair. At this point the receptionist I had earlier spoken to burst into tears, got up from her desk and ran out of the room.

This dramatic development distracted me, and I did not notice that Major Settler had left the commander's office and entered the reception area. Major Settler was not nearly as friendly or as easy going as he had been earlier. Major Settler informed me that the shore patrol would escort me off the base. They did.

It was the middle of the afternoon when I got back to my office in Corpus Christi. Major Settler had called and asked that I contact him. I called and he told me all of my clients were being transferred to the brig in Corpus and that I should arrange to visit my clients there. Major Settler planned to be in Corpus Christi the next day to file formal general court-martial charges against my clients. He was true to his word. He also dropped off, in my office, copies of the individual confessions of each of my clients. I decided to open a file for each client, and I asked my secretary to prepare the folders. Almost immediately, she came back to inform me that there were two copies of one confession and, therefore, only thirty-eight confessions instead of thirty-nine.

The Naval Investigative Service office was in the same building as my office. I often went there to get reports so I volunteered to go and get the missing confession. I knew the receptionist and she was familiar with the Kingsville "Country Club" case. She brought me a thick file and asked me to select the documents I wanted to have copied. Attached to the outside of the file by paper clip was a letter, which I then began to read. I found its contents most interesting.

The letter was from the head of the investigative office to the base commander in Kingsville. It proudly recited the fact that although the thirty-nine suspects had originally refused to confess, once they were told that failure to speak constituted perjury and that perjury was more serious than first time marijuana possession, they had all confessed. Judge Dan Flynn, our general court-martial judge, found the letter as interesting as I did. The confessions were thrown out. This displeased the Kingsville base commander. He granted immunity to the thirty-eight club members and then subpoenaed them to testify against Warrant Officer Clarkson. Not surprisingly, now that my former clients were government witnesses with immunity, they readily confessed recreational use of marijuana, but could offer no direct proof, as opposed to the rumors and hearsay they had recounted in their confessions, of any illegal possession, use, or distribution of marijuana by Warrant Officer Clarkson. He was acquitted.

This greatly displeased the Kingsville base commander. Immediately after the acquittal, the commander initiated an administrative discharge proceeding of Warrant Officer Clarkson using as evidence the "confession" which Judge Flynn had previously determined inadmissable in court. This displeased me and I sought to enjoin the use of the "confessions." This displeased Major Settler who was beginning to see possible career implications for himself. Major Settler arranged a meeting with the base commander in Kingsville. I was met at the gate and escorted to the commander's office by shore patrol officers.

The commander stood behind his desk and opened the conversation by saying that he appreciated the role I played as defense counsel, but since Warrant Officer Clarkson had been acquitted in court, "didn't I think an administrative discharge proceeding was proper given the need to protect our Navy flyers?" I replied that as long as he was seeking an undesirable discharge I thought the same constitutional hurdles that were applicable at the trial were on point. To which he replied, "Dammit Lieutenant, forget the Constitution! This is a Navy administrative discharge proceeding!"

A. Supervision Within Organizations of Lawyers–The Problem

Title C of Topic 5 of the Restatement of the Law Governing Lawyers is entitled "Supervision Within Organization of Lawyers." This general topic is in turn divided into two sections: one entitled, "Duty of Supervision of Lawyer"; and the second entitled, "Duty of Lawyer Subject to Supervision." Law firm practice and practice in The Judge Advocate General's Corps are addressed by these sections.

While the Restatement of the Law Governing Lawyers contains the most recent treatment of the special professional problems raised by subordinate and supervising lawyer situations, this area has a history that is directly informed by command concepts in the military. As World War II drew to a close, attention focused on the rules of war and affixing responsibility for violating these rules. The *Yamashita* war crimes trial was the most controversial, and for purposes of the development of subordinate and supervisory lawyer responsibilities, the most important case.

Yamashita and the Concept of Command/Supervisory Responsibility—A recent article reviewing the Yamashita case begins by proclaiming that "General Tomoyriki Yamashita was a man at the wrong place at the wrong time."[59] As World War II drew to a close, General Yamashita was

appointed to take command in the Philippines. This was an area where an Allied attack was likely.[60] General Yamashita's predecessor did little to help in the transition of command, and about all the General had time to do, in the mere eleven days which elapsed before the American invasion, was to put together a staff, learn the situation, and make basic defensive plans.[61]

In less than a month after General Yamashita's surrender, he was charged with having "unlawfully disregarded and failed to discharge his duty as commander to control operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."[62] Credible evidence existed that General Yamashita personally ordered or authorized at least two thousand summary executions.[63] A careful and conservative reading of the Supreme Court's consideration of the case against General Yamashita indicates merely that a commander has a duty to protect prisoners and civilians.[64] Many observers saw, however, the *Yamashita* case as precedent for absolute command responsibility as to war crimes.[65] It is now quite evident that *Yamashita* was the extreme case in establishing a commander's criminal responsibility for the actions of subordinates.

Two years after the Supreme Court issued its *Yamashita* decision, and no doubt mindful of Justice Murphy's concern that Yamashita was a scapegoat considering that the Americans had done everything possible to defeat all communications and thereby destroy Yamashita's command and control,[66] two cases at the Nuremberg Military Tribunals adopted a more limited liability standard for commanders.[67] The *Hostage Case* adopted a "should have known" standard, and the *High Command* case concurred.[68] This standard was to be applied later in situations arising during the Viet Nam conflict.

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59. *See* Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

60. *See id*.

61. *See id*.

62. *Id.* at 295

63. *See* W. Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

64. *See In re* Yamashita, 327 U.S. 1, 15-17 (1946).

65. *See* RICHARD LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 123, 127 (1982).

66. *See Yamashita*, 327 U.S. at 34-35 (Murphy, J., dissenting).

67. *See* Landrum, *supra* note 59, at 298.

68. *See id*. at 298-99.

In the trial of Captain Earnest Medina, the immediate supervisor of Lieutenant William Calley who, with his troops, was responsible for the 1969 My Lai massacre in Vietnam, the "should have known" standard from the *High Command* case was applied.[69] Protocol I to the 1949 Geneva conventions, agreed to in 1977, contained the High Command formulation in its Article 86.[70] Current problems in the former Yugoslavia, including indictments of Radovan Karadizic and Ratko Mladic, leaders of the Bosnian Serbs, will again invoke Protocol I.[71]

Under Article 86, liability exists if superiors "knew, or had information which should have enabled them to conclude in the circumstances at the time" that subordinates were committing crimes.[72] In addition, there is a responsibility to prevent and to suppress crimes once they are discovered.[73] Indeed, direct attention is given the suppression approach by the United Nations, which adopted a statute fixing liability upon a commander if the commander "knew or had reason to know" of commission of crimes by subordinates and "failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators of the crimes."[74] It is clear that military command situations have served as the historical model for the rule of responsibility of superiors for subordinates based on a knew or should have known standard.

B. Supervision Within Organizations of Lawyers–The Answer

Adopting a uniform set of conduct standards was not one of the first undertakings of the ABA after its 1878 organization. Not until 1908 did the ABA propose a common statement of professional principles.[75] The 1908 canons, largely copied from the 1887 Code of Ethics of the Alabama

69. *See* Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939, 971-72 n.111 (1998); W. J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 118 (1995).

70. *See* Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 86, 1125 U.N.T.S. 3 [hereinafter Protocol I].

71. *See* Fenrick, *supra* note 69, at 103.

72. Protocol I, *supra* note 70, at 3.

73. *See id*.

74. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808, U.N. Security Council, at 704, U.N. Doc. 5/25 (1993).

75. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 34 (1986); J. GOULDEN, THE BENCHWARMERS 60-61 (1974).

State Bar Association, were characterized primarily by their narrowness and lack of vision.[76] These canons focused almost exclusively on practice in the courtroom. As Professor Wolfram points out, "The canons assume that all lawyers are sufficiently homogenous to conform to common standards, an assumption that was probably unfounded in 1908 and certainly proved false as members of an increasingly stratified bar confronted a variety of contrasting practice settings in an increasingly industrialized and urbanized world."[77] One area not addressed in these canons, aimed as they were at honorable solutions between individuals, was that of subordinate and supervising lawyers.

This deficiency, along with many others, led then-ABA president Lewis F. Powell, Jr., to appoint a committee to study the canons and prepare suggested amendments.[78] Edward L. Wright, a practitioner, chaired the committee, which later came to bear his name. A new format and approach were taken and the 1969 Code was the result.[79] Within five years, every state had adopted the code or had changed its own local rules in light of the code.[80] The rapidity of adoption could not mask, however, the fact that the 1969 Code confronted a number of difficult legal issues, many of which were not satisfactorily resolved.

Even as the code was being adopted, it came under vigorous attack. Major criticisms came from several different and conflicting positions. First, criticism came from a reform-minded group convinced the code should have been more clear and responsive to modern practice. Second, criticism came from a group convinced that the code failed to provide relevant and helpful guidance to practitioners, and particularly sole practitioners.[81] Additionally, serious threats of antitrust attacks were raised. These criticisms and external pressures caused the ABA leadership to decide to take additional action.

In 1977, the ABA leadership appointed a commission to study the code. The Chair of the Commission was Robert J. Kutak, a practitioner from Omaha, Nebraska. In August of 1993, after Mr. Kutak had died, the ABA adopted the Model Rules.[82] The Model Rules are the most ambitious

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76. *See* WOLFRAM, *supra* note 75, at 54 & n.21.
77. *Id*. at 54-55.
78. Lewis F. Powell, Jr. later became a Justice of the United States Supreme Court.
79. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).
80. *See* WOLFRAM, *supra* note 75, at 56-57.
81. *See id*. at 60.
82. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1983).

and controversial attempt to set forth a comprehensive set of principles governing the conduct of attorneys.

A major innovation of the Model Rules are Rules 5.1 through 5.3 which address hierarchical authority.[83] Specifically, the Model Rules provide that a partner in a law firm "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct."[84] In addition, any lawyer having direct supervisory authority "shall make reasonable effort to ensure that the other lawyer conforms to the rules of professional conduct."[85]

Beyond the requirement for reasonable firm plans and direct partner-associate supervision, a lawyer may not order another to act in violation of the rules, ratify conduct in violation of the rules, or fail to avoid or mitigate consequences of rules violations when such consequences were subject to reasonable remedial measures. Finally, lawyers have similar obligations to associated non-lawyers, namely adoption of reasonable measures, effective direct supervision, prohibition of ordering or ratifying conduct, and the obligation to take reasonable measures to avoid or mitigate consequences of a rule violation. The basic command-responsibility principle born in the aftermath of World War II now applies to the more complex structures of modern legal practice.

Two distinct elements must be satisfied by a lawyer with supervisory authority: first, development and adoption of measures designed to ensure that associates and employees follow rules; and second, effective application of those rules. Consider a lawyer with a large staff. If the lawyer does not have a plan to instruct each staff member, including each new staff member, in a timely fashion, the lawyer has committed a violation.

In the most rudimentary case, a lawyer might simply assume that non-lawyers do not need to know about the Rules. That assumption, coupled with inaction, constitutes a violation of the obligation to develop and adopt a plan.[86] Apart from the influence of the state bar and the model rules, there is another influence that often helps to persuade lawyers to institute such plans. Lawyers in private practice are increasingly driven by their

83. *See generally id*. at Rule 5.1-5.3 (discussing the responsibility of supervising and subordinate lawyer in relation to each other and in relation to non-lawyer assistants).

84. *Id*. at Rule 5.1(a).

85. *Id*. at Rule 5.1(b).

86. *See In re* Galbasimi, 786 P.2d 971 (Ariz. 1990).

insurance carriers to adopt and monitor plans for associates and employees alike. Fortunately, lawyers are not charged with this responsibility without being offered commensurate means of support and help. Very helpful information is available through bar organizations and law reviews and peer review is now being accepted more readily. Nonetheless, it is clear that this is an area where much more progress is necessary in civilian practice.[87]

By contrast, the program of instruction for lawyers in the Army is both comprehensive and an organic part of professional education and practice. First comes the professional responsibility component of the officer basic course.[88] This course covers the Army's regulatory standards (adopted from the ABA Model Rules), the lawyer-client relationship, the lawyer as an advocate, obligations to third parties, duties of subordinates and supervisors, and professional responsibility complaints. Advanced professional responsibility courses are offered by the nonresident instruction branch of the JAG School,[89] an elective course in Professional Responsibility is offered in the legal assistance course, and Ethics Counselors Workshops have been held.[90]

This rich course offering, coupled with regular review of professional performances by lawyers and their staffs in practice, help insure that measures are developed, adopted, and implemented to ensure that junior officers and staff working in the military justice system follow the rules. While military readiness poses special problems in the case of rehabilitating alcoholic lawyers, by contrast the Army's hierarchical structure clearly facilitates supervision within its organization of lawyers, unlike what happens most of the time in civilian practice.[91]

While failure to develop and to adopt a proper plan for subordinates is in itself a violation, it does not automatically cause harm to clients. Too

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87. *See* Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271 (1996); Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329 (1995).

88. *See, e.g.*, Major Norman F. J. Allen III & Major Maurice A. Lescault, Jr., 148TH OFFICER BASIC COURSE, PROFESSIONAL RESPONSIBILITY (1999).

89. *See* UNITED STATES ARMY, JUDGE ADVOCATE GENERAL'S SCHOOL, CRIMINAL LAW DEPARTMENT, SUBCOURSE JA 160, ADVANCED PROFESSIONAL RESPONSIBILITY (1996).

90. *See* Faculty, The Judge Advocate General's School, *First Ethics Counselor CLE Workshop*, ARMY LAW., Sept. 1994, at 46.

91. *See* Angela Ward, *Raymark Files Swan Song Fraud Suit Against Baron & Budd*, 14 TEX. LAWYER 5 (1998).

often, however, this violation does result in harm. For example, let us assume that a lawyer has no plan for proper supervision of a non-lawyer. It is predictable that an enterprising employee might claim to be a lawyer, represent clients, and be in a position to embezzle client funds.[92] Alternatively, assume that a new non-lawyer assigned to legal assistance decides that no cause of action exists in a client's situation, then fails to allow a visit with a legal assistance counsel and a statute of limitations thereafter bars the action.[93] We all know that violations of the Rules do not automatically create liability for malpractice, and that quite different malpractice issues control in the case of a military lawyer. Nonetheless, the underlying principles of professionalism apply in both our parallel universes.

We commonly think of authority in the military context as top-down. This is the order of discussion in the Model Rules and the Law Governing Lawyers. The provisions of the rule on the duty of supervision contained in the Law Governing Lawyers, and its accompanying comments and reporter's notes, extends for eleven pages. By contrast, provisions of the rule on the duty of lawyers subject to supervision, with comments and reporter's notes, occupy only four pages. There are two parts to the rule covering the duty of supervised lawyers: first, a supervised lawyer is independent of supervision for purposes of the Rules; and second, in a case where a reasonable argument can be made both ways, a subordinate may yield to a supervisor.

This formulation is as simple as it is unsatisfying. No one would argue the logic and correctness of the part of the rule that makes the supervised attorney independently responsible for following the rules. The supervised attorney must obey the rules in the face of an order to the contrary by a superior.[94] This is a rule that grew out of the application of rules of war to junior officers in the Nuremberg Trials. Beyond the obvious, an attempt is made, in the Law Governing Lawyers, to identify a "safe haven" for subordinates. But, the "safe haven" comment to the rule is professional babble. It provides:

> In some instances . . . professional requirements may be unclear because a reasonable view of the facts or the lawyer code is subject to conflicting interpretations, or the matter may involve an

92. *See In re* Bonanno, 617 N.Y.S.2d 584 (N.Y. App. Div. 1994).

93. *See* Anderson v. Hall, 755 F. Supp. 1, 5 (D.D.C. 1991).

94. *See* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 293-94 (1994).

> exercise of professional discretion. When supervising and supervised lawyers disagree over such a matter, the supervisory lawyer may make either of two decisions. First, . . . the supervisory lawyer may reasonably decide that, given the strength of support for the supervised lawyer's position in light of the probable risk and magnitude of harm to a client or third person, the view of the supervised lawyer may be followed. Alternatively, the supervising lawyer may decide to direct, and is empowered to direct . . . that the course of action preferred by the supervisory lawyer be followed.[95]

While it is important to make it clear that a supervised lawyer is independently responsible, suggesting that a supervised lawyer might politely request that a supervisor think about the arguments raised before then trumping them is both banal and misleading. Surely as the twentieth century ends, no one seriously doubts professionals may disagree on the meaning or application of professional rules of discipline. Indeed, such discourses routinely take place over the entire subject of the law between judges and lawyers. Thus, the proclaimed "safe haven" is quite trite.

The larger deficiency of the comment in Section 13 of the Law Governing Lawyers is that it strongly suggests that there is no other, or better, way of dealing with a conflict between a supervising and a supervised attorney. This is simply not the case. One need look no further than the comment to Rule 5.1 of the Army Rules of Professional Conduct for Lawyers to find the proper model for an answer.[96] The comment provides:

> Supervisory lawyers must be careful to avoid conflicts of interest in providing advice to subordinate lawyers. For example, the chief of administrative law in an office may be the supervisory lawyer for both administrative law lawyers and legal assistance lawyers. Both subordinate lawyers may seek advice concerning an appeal to an adverse action handled by the administrative law lawyer and now being challenged by the client of the legal assistance lawyer. In such a situation, the supervisory lawyer should not advise the subordinate lawyers; depending on the circumstances, the supervisory lawyer may advise one subordinate lawyer and refer the other subordinate lawyer to another supervisory

95. RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS, ch. 13 (Final Draft 1998).

96. *See* DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 5.1 cmt. (1992).

> lawyer in the office, or the supervisory lawyer may refer both subordinate lawyers to separate supervisory lawyers in the office.[97]

What this comment teaches us is that we must: (1) anticipate the problem before it occurs; and (2) resolve the problem structurally. Thus, good practice dictates that conflicts between supervising and subordinate lawyers should be resolved by a third lawyer who enjoys status at least equal to the supervisor. In this setting, the views of the subordinate lawyer will receive a fair hearing. Moreover, the subordinate lawyer, who must ultimately yield, will at least experience a brand of procedural due process–the right to be heard by a "neutral" third party.

I am informed that command influence teachings, including those specifically raised in the supervisory/subordinate lawyer setting, champion the use of a neutral third party in resolution of such a conflict. Section 13 of the Law Governing Lawyers, and Rule 5.2 of the Army Rules of Professional Conduct, should be formally amended to acknowledge this good practice model. Once this is done, a supervising lawyer would be required, under section 12 of the Law Governing Lawyers and under Rule 5.1 of the Army Rules of Professional Conduct, to arrange for a neutral third party hearing. Clearly, this is the logical extension of the existing command influence concepts developed primarily by military law in the wake of the *Yamashita* case and the Nuremberg trials.

IV. Conclusion

Practice of law in the Army is not the same as private practice, but Army lawyers are still lawyers. We are all lawyers, even though we live in parallel universes. It is altogether fitting and proper that we explore, examine and enrich these parallel universes through this 23rd Colonel Edward H. "Ham" Young Lecture. He was an early colossus with a foot solidly in each universe, first directing specialized legal education for military lawyers at the University of Michigan, and then here on the grounds of the University of Virginia. Surely, Colonel Young would applaud the substantial work done in helping educate lawyers about alcoholism, because it is the single most important contributor to disciplinary action nationwide. And just as surely he would ask, are we doing all we can? Should there be a JAG alcohol hotline?

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97. *Id.*

Similarly, Colonel Young would be proud of the major contribution made by military law to the concepts, rules, and practices for supervision within organizations of lawyers. This problem, with roots in the unhappy and harsh realities of World War II, has grown to flower in subsequent decisions that inform our current model rules both in civilian and military practice. And the hierarchical Army organization sets a standard that must guide our civilian practice.

Each of us should learn from our shared profession even as we experience the differences that define our professional lives. I leave a richer lawyer because of the interchange with Major General Huffman, Major General Murray, Colonel Fulton, Colonel Taylor, Colonel St. Amand and the many faculty members here at the JAG School who sent me material and shared their time generously. I end the only way I can, by saying thank you.