

**ATTORNEY PROFESSIONAL RESPONSIBILITIES  
AND  
THE UNAUTHORIZED PRACTICE OF LAW**

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I. How Can Military Attorneys Provide Legal Assistance and Not Be Engaged in the Unauthorized Practice of Law?

a. Unauthorized Practice of Law (North Carolina)

1. North Carolina General Statute § 84-4

“Except as otherwise permitted by law, it shall be unlawful for any person or association of persons, except active members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, **to appear as attorney or counselor at law in any action or proceeding before any judicial body, including the North Carolina Industrial Commission, or the Utilities Commission; to maintain, conduct, or defend the same**, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; **and it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation any other legal document.**”

2. North Carolina General Statute § 84-2.1

“The phrase "practice law" as used in this Chapter is defined to be **performing any legal service** for any other person, firm or corporation, with or without compensation, **specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon**

**the legal rights of any person, firm or corporation:** Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition."

b. Federal Law

1. Authorizing Statute

10 U.S.C. § 1044. Legal assistance

(a) Subject to the availability of legal staff resources, the Secretary concerned may provide legal assistance in connection with their **personal civil legal affairs** to the following persons:

(1) Members of the armed forces who are on **active duty**.

(2) Members and former members entitled to **retired** or retainer pay or equivalent pay.

(3) Officers of the commissioned corps of the **Public Health Service** who are on active duty or entitled to retired or equivalent pay.

(4) Members of **reserve** components not covered by paragraph (1) or (2) following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary of Defense), for a period of time, prescribed by the Secretary of Defense, that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.

(5) **Dependents** of members and former members described in paragraphs (1), (2), (3), and (4).

(b) Under such regulations as may be prescribed by the Secretary concerned, the Judge Advocate General (as defined in section 801(1) of this title [10 USCS § 801(1)]) under the jurisdiction of the Secretary is responsible for the establishment and supervision of legal assistance programs under this section.

(c) This section does not authorize legal counsel to be provided to represent a member or former member of the uniformed services described in subsection (a), or the dependent of such a member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.

(d) The Secretary concerned shall define "dependent" for the purposes of this section.

2. Case Law – recognition

Woods v. Covington County Bank, 537 F.2d 804 (5<sup>th</sup> Cir. 1976)

“Ever since 1943, when the Navy initiated a formal legal assistance program, it has provided legal advice, office counseling and legal drafting to its personnel.”

3. Implementing Service regulations

c. Rule 5.5 Multijurisdictional Practice

II. What to Watch

a. Scope of Employment

1. Legal Assistance Activities – need to make sure activities confined to those authorized by statute, regulation, and/or other Service documents.

a) Topics – civil law only

b) Clients – make sure within 10 U.S.C. § 1044

2. Tort Exposure

a) 28 U.S.C. § 2679 on Tort Claims Procedures (excerpts)

“(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

...

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought

against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.”

b) Attorney General review

c) Court review – state law on scope of employment applied

1) Gilbar v. United States, 108 F. Supp. 2d 812 (S.D. Ohio 1999), *aff’d* 229 F.3d 1151 (6<sup>th</sup> Cir. Ohio 2000) – Military major's defamation and tortious interference action against officer was dismissed because officer acted within the scope of his federal employment when he filed and distributed a grievance, and the United States had sovereign immunity.

2) McHugh v. University of Vermont, 966 F.2d 67 (2<sup>nd</sup> Cir. 1992) – Military supervisor’s harassing behavior not in furtherance of master’s business, so not in scope of employment. Substitution of United States for military member not allowed.

3. Unauthorized Practice of Law exposure

a) North Carolina General Statute § 84-8 – the unauthorized practice of law is a Class I misdemeanor

b) North Carolina General Statute § 84-37 – the State Bar may seek injunction against person engaged in unauthorized practice of law.

b. Ethics

1) Case Law

Woods v. Covington County Bank, 537 F.2d 804 (5<sup>th</sup> Cir. 1976)

“A legal assistance officer's function, moreover, is significantly different from that of other government lawyers. *See Coles, Manter & Watson v. Denver District*

*Court*, 1972, 177 Colo. 210, 493 P.2d 374, 375. Rather than being charged with public matters in which the government is the client, a legal assistance attorney owes a preeminent duty to the private individual who, in effect, retains him. n15 Under section 1906(c) of the Navy Judge Advocate General' s Manual, for example, Nichols was required "to exercise his independent professional judgment on behalf of his client **within the standards promulgated in the Code of Professional Responsibility**. . . ." 32 C.F.R. § 726.6(c) (1975). n16 Similarly, the A.B.A. Code itself specifically mandates that a military legal assistance officer employ "his independent professional judgment on behalf of his client without interference or control by any organization or other person." A.B.A. Code of Professional Responsibility, DR 2-103(D)(3) (1970); *see* A.B.A. Standing Comm. on Ethics and Professional Responsibility, Informal Opinion 1166 (Aug. 9, 1970).”

- 2) Service Rules
- 3) State of Licensure Rules
- 4) State of Conduct Rules
- 5) Resolving Conflicts of Codes

a) Service Rules

b) Rule 8.5, Disciplinary Authority and Choice of Law  
North Carolina’s Rule 8.5

“(a) Disciplinary Authority. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer' s conduct occurs. A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of North Carolina, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer' s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer is not subject to discipline if the lawyer' s conduct conforms to the rules of a

jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer' s conduct will occur.

c) Rule 5.2 Responsibilities of a Subordinate Lawyer

North Carolina's Rule 5.2

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer' s reasonable resolution of an arguable question of professional duty.

III. Topics of Interest

a. Representation

Can legal assistance attorneys represent legal assistance clients in civilian courts?

1. Federal Law

a) Limitation in 10 U.S.C. § 1044, subsection (c)

“(c) This section [10 U.S.C. § 1044] does not authorize legal counsel to be provided to represent a member or former member of the uniformed services described in subsection (a), or the dependent of such a member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.”

b) Limitation recognized in case law

Woods v. Covington County Bank, 537 F.2d 804 (5<sup>th</sup> Cir. 1976)

“Ever since 1943, when the Navy initiated a formal legal assistance program, it has provided legal advice, office counseling and legal drafting to its personnel. As originally conceived, the program did not encompass in-court representation of clients. See M. Blake, *Legal Assistance for Servicemen; A Report of the Survey of the Legal Profession* (1951). By the late 1960s, however, it had become apparent that these traditionally provided services were no longer adequate to meet the increasingly complex needs of military personnel **in the lower pay grades who could not afford civilian representation**. As a result, the Defense Department established a pilot expanded legal assistance program which was formally approved in 1973.”

2. Service Regulation – know what it says and stay within it.

3. Local Agreements – know what the agreements are and stay within them.
4. Subject Matter of Representation – make sure proper under statute, service regulation, and local agreement.
5. Clients – make sure proper under statute, service regulation, and local agreement.

b. Ghostwriting B Can a legal assistance attorney draft court documents for legal assistance clients to file *pro se*?

1. North Carolina Ethics Opinion RPC 114

“. . . an attorney may counsel non-lawyers who wish to proceed pro se. In so doing an attorney may provide assistance in the drafting of legal documents, including pleadings. When an attorney provides such drafting assistance, the Rules of Professional Conduct do not require the attorney to make an appearance as counsel of record.”

2. North Carolina Unauthorized Practice of Law Statutes

- a) North Carolina General Statute § 84-4

“Except as otherwise permitted by law . . . it shall be unlawful for any person or association of persons except active members of the Bar, for or without a fee or consideration, to . . . prepare for another person, firm or corporation any other legal document.”

- b) North Carolina General Statute § 84-2.1

“The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including . . . preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; . . . the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work.”

3. Federal Statute
4. Service Regulations - know what it says and stay within it.
5. Subject Matter – make sure proper under statute, service regulation, and local agreement.

6. Clients – make sure proper under statute, service regulation, and local agreement.

c. Supervision of Non-Attorney Staff

1. Responsibilities Regarding Nonlawyer Assistants, Rule 5.3

“With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer' s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer' s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.”

2. Attorney Responsibility to not assist another in the Unauthorized Practice of Law, North Carolina Rules of Professional Conduct, Rule 5.5

“(d) A lawyer shall not assist another person in the unauthorized practice of law.”

3. Legal advice versus legal information