WAIT, MY FORMER LAWYER REPRESENTS *WHO*? HOW LACKADAISICAL SIDE-SWITCHING IN THE CALIFORNIA NATIONAL GUARD CREATES CONFLICTS OF INTEREST, IMPERILS CLIENT CONFIDENCES, AND ERODES TRUST IN THE MILITIA LEGAL SYSTEM

DWIGHT STIRLING* AND COREY LOVATO**

"The National Guard of California when not in federal service is a state force, the command of which is vested in the Governor as Commander-in-Chief."[1]

"[The California Rules of Professional Conduct] . . . shall be binding upon all members of the State Bar."[2]

"Individuals who head a government law office occupy a unique position . . . . The attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one."[3]

* Dwight Stirling is the Chief Executive Officer of Veterans Legal Institute in Santa Ana, California, a non-profit law firm and think tank he co-founded. He earned a J.D. at the University of Southern California in 2000, an M.A. in Education at Whittier College in 1996, and a B.A. at Pomona College in 1992. Corey Lovato is a Staff Attorney at Veterans Legal Institute, having earned a J.D. at the University of California, Irvine in 2014 and a B.A. at the University of Colorado, Boulder, in 2010. Mr. Stirling, a major, has served in the California National Guard (CNG) since 2001, the last eleven years as a judge advocate. Much of the information regarding the CNG's attorney rotation program stems from his personal experience within the CNG's JAG Corps, where he rotated five times during his JAG career. The authors would like to thank James Cronn, former CNG judge advocate and current captain in the Army Reserve JAG Corps, for his insight. The article is dedicated to the men and women in California's JAG Corps, an exceptional group of officers, non-commissioned officers, and paralegals.

** This article was prepared or accomplished by Dwight Stirling in his personal capacity. The opinions expressed in this article are the author's own and do not reflect the view of the California National Guard or the State of California.

[1] 11 Cal. Ops. Att'y. Gen. 253, 259 (1948) (citation omitted).

[2] CAL. RULES OF PROF'L CONDUCT. r. 1-100 (2015).

[3] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 853–54 (2006).

I. INTRODUCTION

We start with a hypothetical. Assume that a unit of a public law office consists of attorneys whose job it is to defend governmental employees accused of engaging in administrative or criminal misconduct. These defense attorneys protect the interests of the embattled employees, minimizing liability through written and oral advocacy.[4] With charges ranging from drug use to theft to workplace assault, the allegations of misconduct can, if substantiated, have major repercussions on the employees' lives and careers. If held liable, they face reprimand, termination, or, in the case of criminal charges, incarceration.[5] Hav-

[4] U.S. DEP'T OF ARMY REG., 27-10 § 6-11(b)(1) (2011), http://www.apd.army.mil/pdf-files/r27_10.pdf (authorizing defense counsel to form attorney-client relationships).

[5] CAL. NAT'L GUARD LEGAL GUIDE, ch. 3(C) (2011), *available at* http://www.calguard.ca.gov/SJA/Documents/Cal%20Guide%20Legal%20Guide,%20Version%201.1,%2019%20Dec%2011.pdf; *see* CAL. MIL. & VET. CODE § 456 (West 2015) (noting that California courts-martial expose militia employees to up to one year of confinement).

ing access to free defense services can make the difference between an employee losing his job, pension, and liberty—and escaping the crucible unscathed.

Further, assume that the public law office is structured such that attorneys only remain in the "defense wing" for about three years, after which they are transferred to the management side of the legal department. Once switched, they represent the agency itself rather than individual employees, cycled through a kind of "rotation" process. The former defense attorneys become general counsel, jacks-of-all-trades that safeguard the interests of the agency writ large.[6] As general counsel, a core responsibility is to advise agency officials on how to dispose of alleged employee misconduct—the exact opposite role they previously had, where they advised employees on how to mitigate personal liability.[7] If the alleged misconduct constitutes criminal behavior, the general counsel also function as makeshift prosecutors, deputized to file charges and conduct criminal trials.[8]

The peculiarity of this public law office does not end there. Assume, finally, that when attorneys are ordered to switch sides, the various ethical implications inherent to successive representation are ignored. Standard prophylactic measures such as conflict checks, screening, and restricted filing systems are not utilized, giving rise to startling variances from standard professional responsibility norms. Junior attorneys, when moved, are not obligated to maintain lists of former clients, isolated departmentally, nor barred from accessing former clients' files. Supervising attorneys, for their part, literally go from overseeing attorneys in the defense unit one day to overseeing attorneys in the management unit the next. Supervisors also find themselves writing performance eval-

---

[6] *See* CAL. ARMY NAT'L GUARD REG. 27-1 § 1-1 (2009). When militia attorneys render general counsel advice, they are said to be dispensing "command legal advice." The term "command" indicates that the advice is being rendered to a member of the militia is his official, e.g., "command" capacity, rather than his personal capacity. *See* LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 52 (2010).

[7] *See generally* CAL. NAT'L GUARD LEGAL GUIDE, Version 1.1 (2011), *available at* http://www.calguard.ca.gov/SJA/Documents/Cal%20Guide%20Legal%20Guide,%20Version%201.1,%2019%20Dec%2011.pdf. The range of personnel matters on which general counsel provide legal advice to militia employees include non-judicial punishment (Chapter 5), courts-martial (Chapter 6), administrative reprimands (Chapter 12), adverse evaluation reports (Chapter 14), and administrative separation (Chapters 18 and 19). *Id. See also* Dwight Stirling & Alex Lindgren, *Actually, Sir, I'm Not a California Attorney: The California National Guard, the State Bar Act, and the Nature of the Modern Militia*, 43 W.ST.L. REV. 1, 3 n.9 (2015) ("The general counsel role is the primary role performed by California National Guard attorneys, advising officials on the administration and operation of the militia.").

[8] CAL. MANUAL FOR COURTS-MARTIAL, r. 503.1(c)(1) (2015) (stating that trial and defense counsel are "detailed," or assigned, by the "state staff judge advocate," the senior attorney in the legal department).

uations for junior attorneys who were their former subordinates' opposing counsel only months earlier.

Amazingly, this hypothetical is not a madcap fact pattern concocted by an imaginative professional responsibility professor. Instead, it is a true-to-life distillation of the practices and protocols of the legal department of the California National Guard ("CNG").[9] The CNG's legal department, also known as the JAG Corps,[10] rotates its "judge advocates," i.e., military attorneys or JAG officers, back and forth between the management wing and the defense wing, part of a concerted effort to "broaden" the legal staff.[11] A laudable objective, the problems arise in the execution, where the leadership's laissez-faire attitude toward side-switching begets a dizzying array of ethical dilemmas, quandaries that exert immense destabilizing pressure on client confidences.[12]

The hypothetical captures the essence of how judge advocates are rotated back and forth, a process supervised by the senior leadership of the CNG's legal department. The senior leadership's failure to modulate the ethical considerations that flow from moving staff attorneys between diametrically opposed positions begs two questions. The first is whether there is something anomalous about the nature of the California JAG Corps that immunizes its attorneys from the ethical cannons circumscribing all other California lawyers. The answer is no. The CNG is governed by state law, including the State Bar Act,[13] a subdivi-

---

[9] "California National Guard" and "California militia" are synonymous terms used interchangeably in the article, the former the formal name for the latter. *See* CAL. MIL. & VET. CODE § 120 (2016); *see also* 32 U.S.C. § 101(4) (2012); Maryland v. United States, 381 U.S. 41, 46 (1965) ("The National Guard is the modern Militia reserved to the States by Art. 1, § 8, cl. 15, 16, of the Constitution.").

[10] The legal department is also known as the JAG Corps, a reference to the Judge Advocate General, the senior legal officer in a military branch of service. *See also* U.S. DEP'T OF ARMY, PAMPHLET 600-3 § 39 (2010), *available at* http://dopma-ropma.rand.org/pdf/DA-PAM-600-3.pdf.

[11] The assignment of CNG judge advocates is overseen by the Judge Advocate Executive Council, a committee consisting of senior militia attorneys. *See* CAL. NAT'L GUARD REG. 27-1 § 2-5 (2009). The CNG's rotation system is based upon the rotation system used in the federal Army. *See* U.S. DEP'T OF ARMY, PAMPHLET 600-3 § 39-6(b)(1)(c) (2010), *available at* http://dopma-ropma.rand.org/pdf/DA-PAM-600-3.pdf ("Professional development objectives [include] development of officers with technical, managerial and administrative skills to serve in positions of increasing responsibility in the Judge Advocate General Corps.").

[12] "Side-switching" is the recognized term for the situation where an attorney represents a client whose interests are directly adverse to a former client. *See* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152 (1998) ("The proposed representation in this inquiry is a classic case of side-switching in which a lawyer or a law firm which has consulted with one side about a case goes on to represent the opposing party in the same case.").

[13] 7 CAL. BUS. & PROF. CODE § 6125 (West 2015) ("No person shall practice law in California unless the person is an active member of the State Bar."); *see also* Stirling & Lindgren, *supra* note 7, at 16.

sion of California's executive branch.[14] Despite the term "national" in its name, the California National Guard is a California state agency, as much an instrumentality of the California government as the California Highway Patrol or the California Department of Transportation.[15] CNG JAG officers, accordingly, are bound by all aspects of California's positive ethical law,[16] including the rules barring successive representation of a party whose interests are adverse to a former client.[17] They are also bound by state jurisprudence on imputed conflicts of interest, the doctrine that ascribes an attorney's conflict to all attorneys in the office to which he belongs.[18]

While there is nothing exceptional about CNG judge advocates' obligations under California's ethical framework, the administrative complexity of the CNG obscures this fact.[19] The CNG is one of the most complicated agencies at any level of government, federal, state, or local.[20] Under the CNG's regulatory scheme, some, but not all, federal military rules are incorporated into California

---

[14] CAL. MIL. & VET. CODE § 51 (West 2015) ("The Military Department includes the office of the Adjutant General, the California National Guard, the State Military Reserve, the California Cadet Corps, and the Naval Militia.").

[15] *See* Stirling, *supra* note 7, at 7. *See also* MICHAEL A. DOUBLER, THE NATIONAL GUARD AND RESERVE: A REFERENCE HANDBOOK 58 (2008); Charles v. Rice, 28 F.3d 1312, 1315 (1st Cir. 1994) ("In each state, the Guard is a state agency, under state authority and control.").

[16] CAL. RULES OF PROF'L CONDUCT r. 1-100 (2015) ("The prohibition contained in these rules is not exclusive. Members are also bound by applicable law including the State Bar Act and opinions of California courts.").

[17] CAL. RULES OF PROF'L CONDUCT r. 3-310(E) (2015). *See also* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152 (1998).

[18] CAL. RULES OF PROF'L CONDUCT r. 1-100 (2015); City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 (2006). In *Cobra Solutions*, the 2006 landmark decision on supervisory level side-switching, the California Supreme Court upheld the disqualification of the San Francisco City Attorney's Office on the grounds the city attorney had personally represented the opposing party, a software company, in private practice. The court sanctioned the draconian measure even though the city attorney had been screened internally from participating in the case, concerned about the "[p]ublic perception that a city attorney and his deputies might be influenced by the city attorney's previous representation of the client, ..." *Id.* at 854.

[19] *See* Stirling & Lindgren, *supra* note 7, at 23.

[20] To determine the controlling rule in any particular situation, it must first be determined whether there is a state-specific rule on point. If so, the state-specific rule controls. If not, the federal rules are consulted. If there is a federal military rule on point, it must be further determined whether the federal rule pertains to the "the control, administration, or government" of the federal military or whether it pertains to the individual immunities and privileges of federal military members. If the federal rule falls into the former category, it is incorporated into state law and made applicable to the state militia. If it falls into the latter category, it is not incorporated. *See* Stirling & Lindgren, *supra* note 7, at 35.

law and made applicable to the CNG.[21] Federal military rules which pertain to the "government, administration, or control" of the federal military that "are not inconsistent with" California law circumscribe the conduct of state militia personnel.[22] If both conditions are met, the federal military rule under consideration is incorporated into California law, serving as a gap-filler in the militia's regulatory scheme.[23]

There is also an epistemological question – how did the CNG legal department's rotation program come to deviate so dramatically from acceptable norms of professional responsibility? Systems thinking, a theory of organization management, posits that to identify the cause of organizational dysfunction, the lens must be opened wide enough to see an organization's operation in its entirety.[24] As applied, systems thinking reveals that the ethical variances may stem from the fact that, stunningly, the five California Attorney General (CAG) opinions most salient to understanding the nature of the CNG were unknown within the legal department until recently.[25] The CAG opinions, published from 1945 to 1975, were issued in response to questions posed by the CNG's senior management, requests for authoritative guidance on how, when, and where to incorporate particular federal military rules.[26] Remarkable in their insight, the six CAG opinions enunciate a series of first principles, axioms which, when applied to specific scenarios, make detecting the controlling rule, state or federal, a matter of rational deduction.[27] Systems thinking suggests that

---

[21] CAL. MIL. & VET. CODE § 101 (West 2015).

[22] *Id.*

[23] The body of state-specific rules and regulations which govern the state militia, while enormous, is not comprehensive. The legislature has enacted nearly 1,800 state-specific statutes, while the adjutant general, the militia's senior officer, has promulgated hundreds of internal regulations. *See* Stirling & Lindgren, *supra* note 7, at 23. The incorporation system, where consistent federal military rules are made applicable to the CNG, relieves the California legislature from having to create its militia structure out of whole cloth, while concurrently harmonizing the state and federal military structures. *Id.*

[24] Peter M. Senge, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 69 (Currency Doubleday 2006).

[25] The opinions are not available on Westlaw, Lexis, or any other electronic database. During Mr. Stirling's 11-year tenure as a CNG attorney, he is not aware of a single reference to the CAG opinions in internal discussions, militia regulations, or legal opinions. Alex Lindgren, a former staff attorney at Veterans Legal Institute, obtained copies of the CAG opinions through a special request to the CAG's office in 2014, records subsequently brought to academia's attention in the 2015 article *Actually, Sir, I'm Not a California Attorney: The California National Guard, the State Bar Act, and the Nature of the Modern Militia*, 43 W.ST.L. REV. 1 (2015).

[26] 6 Ops. Cal. Atty. Gen. 272 (1945); 11 Ops. Cal. Atty. Gen. 253 (1948); 22 Ops. Cal. Atty. Gen. 15 (1953); 49 Ops. Cal. Atty. Gen. 13 (1967); 58 Ops. Cal. Atty. Gen. 144 (1975).

[27] 6 Ops. Cal. Atty. Gen. 272 (1945); 11 Ops. Cal. Atty. Gen. 253 (1948); 22 Ops. Cal.

the ethical aberrations manifested in the rotation context are second and third order effects of the JAG leadership's unawareness of the CAG opinions.

In one opinion, the CAG declares, "the National Guard of California when not in federal service is a state force, the command of which is vested in the Governor as Commander-in-Chief."[28] As state employees, CNG attorneys are bound by state law. In another, the CAG pronounces that when a federal military regulation conflicts with a state statute or regulation on the same topic, the federal military rule is not assimilated into state militia law.[29] The correlative maxim is that where the state has expressed a policy position on a certain topic, federal military regulations pertaining to that topic are not incorporated. In a third opinion, the CAG admonishes that "whenever it is suggested that a Federal statute has been adopted as state law . . . each particular statute must be studied with respect to the subject matter involved," a conclusion that makes deliberate, individualized analysis a condition precedent of incorporation.[30] Like geometric theorems, the CAG opinions can be used in any given situation to deductively reason which federal rules apply to the state militia and which do not.

In setting up its method of rotating attorneys, the senior judge advocates in the JAG Corps confronted a series of incorporation-related questions, dilemmas they apparently resolved without reference to the CAG opinions. Which rules of professional responsibility are apposite to state militia attorneys? Is it the California Rules of Professional Responsibility, the American Bar Association's model rules, and/or the United States Army's Rules of Professional Conduct? Do California judicial decisions pertaining to legal ethics apply to militia attorneys? And who is the final arbiter on the subject—the governor, the state attorney general, the State Bar, or the National Guard Bureau? Or does each office have a say? Trying to resolve these questions without reference to the dispositive rules contained in the CAG opinions is practically unsolvable. While understanding the difficult position that senior attorneys have been in makes the problems riddling the JAG Corps' attorney rotation program less surprising, it does not make them less excusable.[31]

Atty. Gen. 15 (1953); 49 Ops. Cal. Atty. Gen. 13 (1967); 58 Ops. Cal. Atty. Gen. 144 (1975).

[28] 11 Ops. Cal. Atty. Gen. 253, 259 (1948).

[29] Atty. Gen. Un. Pub. Opn. IL 65-124, p. 5 (1965) ("[W]e conclude, that sections 100 and 101, do not incorporate federal law in the areas covered by specific State statutory provisions . . . .").

[30] 22 Ops. Cal. Atty. Gen. 15, 16 (1953).

[31] Not knowing which canon of ethics applies is one thing; applying no ethical rules whatsoever is something different altogether. It must be remembered that there are three ethical codes appurtenant to CNG's legal department: the CRPC, the Army's Rules for Professional Conduct of Lawyers ("Army Rules"), and the ABA Model Code of Professional Responsibility ("ABA Model Code"). *All* contain provisions prohibiting the representation of a party who is adverse to a former client. CAL. RULES OF PROF. CONDUCT r. 3-310 (E)

This article looks at the California JAG Corps' attorney rotation program through the lens of the CAG opinions, that is, from the perspective that the positive law promulgated by California's State Bar, legislature, and judiciary applies with full force to the CNG's JAG Corps. Part I lays the groundwork by describing California's state militia system, the legal department (including the Trial Defense Service), and the rotation program. Part II focuses on the ethical rules which govern successive representation in California. Special attention is given to side-switching by supervising attorneys and imputed conflicts of interest. Part III applies California's ethical scheme to the rotation program, revealing the apathy, atrophy, and carelessness at the center of the system. Finally, Part IV recommends normative alterations to the rotation program, including the use of military judges as ethics advisors and the establishment of a standing committee on military affairs within the California State Bar.

II. THE STRUCTURE OF THE CALIFORNIA NATIONAL GUARD'S LEGAL DEPARTMENT

We start with a description of the CNG as an organization, outlining the agency's superstructure, legal department, defense unit, and attorney rotation system. The form and shape of the ethical lapses by the JAG Corps' senior leadership are idiosyncratic, the errors inextricably intertwined with the agency's composition, function, and norms. The Supreme Court's observation that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian" is equally true in the state militia context.[32] The California militia, in fact, is even more specialized, a subgroup of a subgroup, representing an amalgamation of both state and federal statutes and regulations.[33] Trying to understand the ethical terrain in the CNG's JAG Corps without first considering the nature of the CNG itself would be like trying to understand the 2008 financial crisis without considering the subprime housing market, repeal of the Glass-Steagall Act, and popularization of mortgage-backed securities.[34]

A. *The Structure of the CNG*

The CNG is a California state agency consisting of more than 21,000 em-

---

(2015); U.S. DEP'T OF ARMY REG., 27-26 §1.9 (1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf; MODEL CODE OF PROF'L RESPONSIBILITY, EC 5-15 (AM. BAR ASS'N 1980).

[32] *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[33] CAL. MIL. & VET. CODE § 101 (West 2015) (incorporating some, but not all, federal military regulations).

[34] *See The Origins of the Financial Crisis*, THE ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article.

ployees,[35] the vast majority of whom are employed on a part-time basis.[36] A subdivision of the California Military Department,[37] the CNG has two "missions," one pertaining to California and the other pertaining to the federal government.[38] The CNG's state mission is to protect the California population during large-scale emergencies.[39] In this way, the agency functions as a backstop to California's civilian emergency personnel, a trained labor pool of logistical and operational experts ready to respond to acute crises that overwhelm firefighters, police officers, and other first responders.[40]

The CNG's federal mission, on the other hand, is to support federal military personnel when called upon by the President of the United States.[41] The President can "federalize" state National Guard units in times of emergency, bringing state militia members under his control.[42] Relatively rare, the most common instance in the past fifteen years where CNG service members performed their federal mission has involved overseas deployments. There, the President has needed state military personnel to assist the United States Army, Navy, Air Force, and Coast Guard—the federal military—with international conflicts in Afghanistan, Iraq, and the Balkans, amongst other places.[43] When performing

---

[35] Michael Gardner, *National Guard has Independent Watchdog*, SAN DIEGO UNION TRIB. (December 3, 2012), http://www.utsandiego.com/news/2012/dec/03/national-guard-has-independent-watchdog/.

[36] CALIFORNIA MILITARY DEPARTMENT (CALIFORNIA NATIONAL GUARD), CALIFORNIA PERFORMANCE REVIEW, *available at* http://www.cpr.ca.gov/cpr_report/Issues_and_Recommendations/Chapter_6_Public_Safety/PS05.html (last visited October 24, 2015) (noting that over 17,000 of CNG's nearly 22,000 employees are part-time).

[37] CAL. MIL. & VET. CODE § 51 (West 2015).

[38] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36 ("The California National Guard has both a federal and state mission.").

[39] *Id.* ("Because of this dual role, the National Guard is available to the Governor for use in times of natural or man-made disaster or other emergencies and the preparations thereof. . . . Essentially, the Governor has at his disposal a ready force of nearly 22,000 Guard service members capable of quickly providing a wide range of emergency response capability. . . . The [(CNG)] is a multi-faceted force of full and part-time service members, available to the Governor and other civil authorities.").

[40] *Id.* ("[T]he National Guard is generally used as an option of last resort for emergencies and disaster response.").

[41] *See* Perpich v. Dept. of Defense, 496 U.S. 334, 343–44 (1990) (discussing statutes that authorize the President to draft state National Guard units into federal service).

[42] *See* United States v. Hutchings, 127 F. 3d 1255, 1258 (10th Cir. 1997). *Hutchings* explains: "Guardsmen do not become part of the Army itself until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress. When that triggering event occurs, a Guardsman becomes a part of the Army and loses his status as a state servicemen. But until a Guardsman receives orders directing him into federal service, he is a state servicemen, and not a part of the federal Army." *Id.* (citations omitted).

[43] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36 ("Additionally, the President may

their federal mission, CNG employees are temporarily removed from the California militia and placed into the federal Armed Forces for the duration of the federal orders.[44]

Nearly 80% of CNG employees are part-time,[45] putting in two days of state militia service per month.[46] So-called "weekend warriors,"[47] these militia members report to CNG facilities in their local communities called "armories,"[48] where they train, practice, and prepare, brushing up on the skills they would need to exhibit in the event of a real-life calamity.[49] During the remainder of the month, they are regular members of California society, indistinguishable from the population at large, holding jobs at Bank of America, Costco, the Post Office, Pizza Hut, and LAPD, to name a few; others take classes at colleges and universities.[50] The remaining 20% of CNG members work full-time, forming the backbone of the agency's operation, responsible for organizing, administering, recruiting, and instructing the part-time personnel.[51]

The locus of CNG's executive authority is reposed in the adjutant general, a cabinet-level official appointed by, and reporting directly to, California's gov-

---

mobilize individuals and units of the National Guard to assist in worldwide military operations or to assist in domestic emergencies."). Part of the bargain at the core of state National Guards–and the reason they are federally funded–is that the President can call upon these personnel for federal missions in the event of national emergency. *See* Stirling & Lindgren, *supra* note 7, at 11.

[44] *See Perpich*, 496 U.S. at 347 (State national members "ordered into federal service with the National Guard of the United States lose their status as members of the state militia during their period of active duty.").

[45] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36 ("The California National Guard consists of over 21,000 service members, with a full-time combined state and federal workforce in excess of 4,300 personnel.").

[46] *Joining the Army National Guard*, MILITARY.COM, http://www.military.com/join-armed-forces/join-army-national-guard-enlist.html (last visited October 25, 2015) ("Obligation - In the Army National Guard, you serve one weekend a month and two weeks a year.").

[47] Cate Doty, *Weekend Warriors; Reservists Are Getting More Than They Bargained For*, N.Y. TIMES, (Jan. 16, 2003), http://www.nytimes.com/2003/01/19/weekinreview/weekend-warriors-reservists-are-getting-more-than-they-bargained-for.html.

[48] ARMY NAT'L GUARD REG., 405-80 § 1-3 (a) (1977) (describing an armory as "a structure that houses one of units of a Reserve Component and is used for training and administering those units").

[49] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36.

[50] *Id.*

[51] ARMY NAT'L GUARD REG., 135-18 (2004), *available at* www.apd.army.mil/pdffiles/r135_18.pdf. The four full-time employments statuses in the CNG are active guard reserve, federal technician, state active duty, and state civil servant. *See* Robert Spano, *Full-Time Personnel Appropriate Use of Military Duty*, POLICY MEMORANDUM 2012-05 (January 11, 2012), http://www.calguard.ca.gov/HRO/Documents/Labor/Policy%20Memo%202012-05%20Full%20Time%20Personnel%20Appropriate%20Use%20of%20Military%20Duty.pdf.

ernor.[52] Stationed in Sacramento, the adjutant general works out of the Joint Forces Headquarters, a massive office building in a business district near Rancho Cordova.[53] As emergencies can occur anywhere, the adjutant general has positioned armories throughout the state, a patchwork of over one hundred facilities administered by mid-level executives called "commanders," commissioned officers who report up the bureaucratic hierarchy directly to the adjutant general.[54] Each commander has managerial responsibility for "units" of between 160 and 4,500 employees depending on his rank and experience.[55] Each of these organizational subdivisions possesses specific critical skills, such as logistics capabilities, aviation assets, and information technology.[56] Senior officials at the Joint Forces Training Base, a large regional training facility in Orange County, oversee the units in the southern portion of the state.[57] Upper-level personnel at installations in Paso Robles[58] and San Luis Obispo oversee many of the Northern California units.[59]

B. *The JAG Corps and the Trial Defense Service*

The mission of the CNG's JAG Corps, i.e., legal department, is to provide the commanders and staff with legal advice and guidance.[60] The approximately

---

[52] CAL. MIL. & VET. CODE § 160 (West 2015).

[53] Many of the CNG's senior officials and the majority of its full-time staff are also located at the Joint Forces Headquarters, including the commanders of the California Army National Guard and the California Air National Guard, subdivisions of the CNG. *See Mission,* CALIFORNIA MILITARY DEPARTMENT (2015), http://www.calguard.ca.gov/JFHQ-HHD.

[54] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36 ("The National Guard has 118 armories, 10 air bases, and three army bases located throughout California.").

[55] Units in the CNG range from a company (100–200 personnel) to a battalion (500–800 personnel) to a brigade (1,500–4,000 personnel). Valerie Turner, *How Many Troops Make Up a Brigade, Battalion, Company, Etc.?*, ORLANDO SENTINEL (March 29, 2003), http://articles.orlandosentinel.com/2003-03-29/news/0303290257_1_support-troops-battalion-divisions.

[56] The capabilities also include "airlift, air-refueling, and fighter aircraft, search and rescue helicopters and fixed-unit aircraft, medium lift and general support helicopters, long-haul truck transportation, combat engineering assets, petroleum and fuel transportation and distribution, power generation assets, water purification and transportation assets, and many other specialized equipment types." CALIFORNIA MILITARY DEPARTMENT, *supra* note 36.

[57] *Joint Forces Training Base*, GLOBALSECURITY.ORG (October 25, 2015), http://www.globalsecurity.org/military/facility/los-alamitos.htm.

[58] *Mission of Camp Roberts*, CALIFORNIA MILITARY DEPARTMENT, http://www.calguard.ca.gov/CR/Pages/Director-of-Plans,-Training,-Mobilization,-and-Security.aspx (last visited October 25, 2015).

[59] *History of Camp San Luis Obispo*, MILITARYBASES.COM, http://militarybases.com/camp-san-luis-obispo-army-base-in-san-luis-obispo-county-ca/ (last visited October 25, 2015).

[60] *See* CAL. ARMY NAT. GUARD REG., 27-1, § 1-1 (2009); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 1-1 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/

fifty attorneys and 100 paralegals in the department are responsible for keeping agency administrators on the right side of the law, assisting them in avoiding the legal and ethical pratfalls that would expose the agency to liability.[61] Akin to in-house counsel at large corporations, the attorneys in the legal department, known alternatively as "judge advocates" or "JAG officers," observe, assess, and analyze the agency's operations, advising whether the activities adhere to regulatory guidance or need to be changed.[62] The legal recommendations, while not binding, hold significant weight with commanders and other decision-makers; as in the civilian context, proceeding in the face of negative advice from one's lawyer is a proposition always fraught with risk.[63]

In order to ensure that the CNG's commander and staff have access to timely legal advice, JAG officers and paralegals are spread out throughout the state, embedded at every level of the agency's framework.[64] In this way, the structure of the JAG Corps mirrors the agency's overall structure, with attorneys physically located at agency subdivisions, apportioned according to the subdivision's size, function, and importance. The Joint Forces Headquarters, as the militia's nerve center, has the largest number of JAG officers assigned to it, including the "state staff judge advocate"—the CNG's senior lawyer—a colonel personally selected by the adjutant general.[65] The CNG's brigades are spread out

---

dr_a/pdf/fm1_04.pdf ("The mission of the Judge Advocate General's Corps is to develop, employ, and retain one team of proactive professionals, forged by the Warrior Ethos, who delivered principled counsel and mission-focused legal services to the Army and the Nation."); CAL. MIL. & VET. CODE § 101 (West 2015). U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 is incorporated into California militia law via section 101, assimilated due to the fact it pertains to the administration of the federal Army and is consistent with California law. *Id.*

[61] CAL. NAT'L GUARD, CAL. NAT'L GUARD LEGAL GUIDE 7–8 (2011) (listing ten situations where CNG managers should seek legal guidance from militia attorneys).

[62] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 1-12 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf ("No matter the level of command to which assigned, judge advocates have several roles. They are counselors, advocates, and trusted advisors to commanders and Soldiers.").

[63] LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 57-58 (2010) ("Commanders are expected to seek the advice of military attorneys when evaluating evidence and disciplinary options. They are not required to formally receive legal advice . . . but it has become an established practice for them to do so . . . .").

[64] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, §§ 4-11 – 4-38 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf (outlining the standard structure of legal departments, where "staff judge advocates," senior attorneys at large and centralized units, supervise "brigade judge advocates," mid-level attorneys stationed regionally). In Mr. Stirling's experience, general counsel are assigned to one of eight units: the Joint Forces Headquarters, the 40th Infantry Division, the 79th Infantry Brigade Combat Team, the 40th Combat Aviation Brigades, the 224th Sustainment Brigade, the 100th Troop Command, and the 49th Military Police Brigade.

[65] *See* U.S. DEP'T OF ARMY REG., 27-1 § 1-2 (1987).

throughout California, from San Diego to San Francisco.[66] Judge advocates in the general counsel role are assigned to these outlying brigades in two, three, or four person teams, forming brigade legal teams.[67]

Dispensing real time, in-person legal advice to the senior staff at brigades, CNG judge advocates render legal opinions on every conceivable legal issue.[68] One of the most common topics on which JAG officers are asked to opine is personnel law.[69] As in the federal military, the California militia regulates a much larger swath of employee conduct than civilian employers do, a consequence of the "military" nature of the organization.[70] Codified rules bar employees from being disrespectful to their bosses,[71] late to their jobs,[72] "derelict" in the carrying out their obligations,[73] and from having "inappropriate" relationships with other employees.[74] Additionally, certain tattoos are prohibited,[75] hair length and styles are regulated,[76] and uniforms must be worn in a particular manner.[77] The offending parties face negative employment actions.[78] Unan-

---

[66] The 79th Infantry Combat Team, for instance, the largest brigade in the CNG, is headquartered in San Diego. http://www.calguard.ca.gov/79IBCT. Mr. Stirling served as the brigade judge advocate for the 79th Infantry Brigade Combat Team from 2010 to 2014.

[67] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, §§ 4-12 – 4-13 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf (describing the size of a typical brigade legal team).

[68] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 §§ 4-12 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf ("The brigade judge advocate advises the commander and staff on operational law, military justice, administrative law, fiscal law, and other areas of the law as required. This judge advocate ensures the delivery of legal services to the brigade across the core legal disciplines.").

[69] LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 168–72 (2010).

[70] Parker v. Levy, 417 U.S. 733, 749 (1974) ("While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community."). The Uniform Code of Military Justice is incorporated into California law and made applicable to the CNG via the Military and Veterans Code section 102. *See* CAL. MIL. & VET. CODE § 102 (West 2015).

[71] 10 U.S.C. § 889 (2012).

[72] *Id.* § 886.

[73] *Id.* § 892.

[74] U.S. DEP'T OF ARMY REG., 600-20 §§ 4-14 – 4-16 (2014), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf.

[75] U.S. DEP'T OF ARMY REG., 670-1 § 3-3 (2015), *available at* http://www.apd.army.mil/pdffiles/r670_1.pdf.

[76] U.S. DEP'T OF ARMY REG., 670-1 § 3-2 (2015), *available at* http://www.apd.army.mil/pdffiles/r670_1.pdf.

[77] U.S. DEP'T OF ARMY REG., 670-1 chs. 4 – 20 (2015), *available at* http://www.apd.army.mil/pdffiles/r670_1.pdf.

[78] LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 168–172 (2010) (listing the panoply of negative employment actions).

nounced urinalyses are also regular occurrences for militia employees, where administrative officials cordon off a random portion of a unit's members, directing them into restrooms and testing their urine for traces of illegal or unauthorized substances.[79]

Each type of violation and disposition venue is governed by specific rules that are detailed and situational, many of which have Bill of Rights implications.[80] The constitutional dimensions of employment-related rules include the right against self-incrimination,[81] the right to be free from unreasonable searches,[82] and the right of free expression.[83] Militia attorneys play an important role in advising commanders and staff how to dispose of alleged rule violations, helping them understand the issues as well as their disposition options.[84] This process culminates with a legal review and a recommended course of action.[85] The possible dispositions are numerous, including but not limited to oral or written reprimand,[86] demotion,[87] negative performance evaluation,[88] loss or suspension of security clearance,[89] termination of employment,[90] and/or referral

---

[79] U.S. DEP'T OF ARMY REG., 600-85 § 4-2 (2014), *available at* http://www.apd.army.mil/pdffiles/r600_85.pdf ("Unpredictability is a determining factor deterring Soldiers from using drugs. 'smart testing' is random testing conducted in such a manner that it is unpredictable by the testing population.").

[80] In Middendorf v. Henry, 425 U.S. 25, 33–34, 42, 44 (1976), for instance, a divided Supreme Court wrestled with the 5th and 6th Amendment implications of summary courts-martial, quasi-criminal proceedings that could lead to thirty days in jail, but where defense attorneys are neither mandated nor commonly used.

[81] The so-called "Article 31 rights" must be provided to any military member suspected of criminal misconduct, whether or not in custody. 10 U.S.C. § 831 (2012). *See also* LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 50 (2010) ("*Miranda* only applies to custodial questioning by law enforcement officials, while Article 31 applies to all official questioning of a military suspect or accused by military officials or superiors.").

[82] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. III, r. 313-316 (2012).

[83] 10 U.S.C. § 888 (2012) (authorizing punishment for using "contemptuous words" against the president, secretary of defense, governors, and other senior military leaders).

[84] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 4-13 (2013), *available* at http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[85] *Id.*

[86] U.S. DEP'T OF ARMY REG., 600-37 § 3 (1986), *available at* http://www.apd.army.mil/pdffiles/r600_37.pdf.

[87] U.S. DEP'T OF ARMY, REG., 600-8-19 § 10 (2015), *available at* http://www.apd.army.mil/pdffiles/r600_8_19.pdf.

[88] U.S. DEP'T OF ARMY, REG., 623-3 § 3-26 (2015), *available at* http://www.apd.army.mil/pdffiles/r623_3.pdf.

[89] U.S. DEP'T OF ARMY, REG., 380-67 § 8-13 (2014), *available at* http://www.apd.army.mil/pdffiles/r380_67.pdf.

[90] U.S. DEP'T OF ARMY, REG., 135-178 § 3 (2014), *available at* http://www.apd.army.mil/pdffiles/r135_178.pdf.

to civilian law enforcement authorities.[91] Militia attorneys are also instrumental in executing the selected disposition by drafting written reprimands, advising investigators on how when to read a witness his rights, and arguing the agency's case before administrative boards.[92]

Because there are more ways to get in trouble in the militia than at a civilian job, the CNG's legal department has a special unit of attorneys dedicated to protecting the legal rights of service members accused of misconduct.[93] Known as the Trial Defense Service (TDS), this unit is comprised of approximately ten JAG officers and a corresponding number of support staff, equally divided between Northern and Southern California.[94] CNG employees are allowed to consult with a TDS lawyer whenever adverse action is taken against them.[95] TDS lawyers have no management-side obligations; their sole mission is to protect and defend accused employees, functioning akin to deputy public defenders.[96] TDS attorneys form attorney-client relationships with accused employees and use their "independent judgment" to advocate zealously for their clients' interests.[97]

---

[91] LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 40 (2010) ("For example, a soldier who commits an offense off the installation still can be charged by that civilian community for an offense over which the military can also claim jurisdiction. In practice, these are normally worked out as matters of comity . . . .").

[92] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, § 5-31 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[93] The home page for the CNG's Trial Defense Service is available at http://www.calguard.ca.gov/TDS/Pages/Trial-Defense-Services.aspx (last visited October 27, 2015). *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 4-39 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf (describing the functions of a trial defense service).

[94] *See* U.S. DEP'T OF ARMY, FIELD MANUAL, 1-04 § 4-43 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf ("Similarly, while functioning under the authority of Title 32, Army National Guard (ARNG) regional and trial defense teams are assigned to their respective states, ...").

[95] The legal services offered by the CNG TDS are "1) representing Soldiers charged with military criminal offenses at trial; 2) representing Soldiers during criminal investigations and before elimination or grade reduction boards; and, 3) counseling Soldiers regarding pretrial restraint, nonjudicial punishment, and various adverse administrative actions taken pursuant to military regulations." *Trial Defense Services*, THE CAL. MIL. DEP'T, http://www.calguard.ca.gov/TDS/Pages/Trial-Defense-Services.aspx (last visited Oct. 27, 2015). *See also* U.S. DEP'T OF ARMY REG., 27-10 § 6-10 (2011), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf.

[96] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 4-44 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf ("Judge advocates assigned to USATDS act independently of any other branch and the local Office of the Staff Judge Advocate . . . .").

[97] U.S. DEP'T OF ARMY, REG., 27-10 § 6-11(b)(2) (2011), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf.

C. *The Rotation Program*

The California JAG Corps' senior leaders effectively partition the defense and management sides of the legal department's operations, creating a clear line of demarcation between the two.[98] TDS attorneys have separate office space, computer equipment, electronic data management software, and filing systems.[99] Management-side attorneys are barred from evaluating the performance of TDS attorneys, an acknowledgment of the subtle, yet pernicious power that can be wielded when an attorney's evaluator has ties to the opposing side.[100] Problems arise, however, with regard to the procedure—or lack thereof—that senior JAG officers utilize to shift attorneys back and forth between the two wings, which is usually a slipshod, erratic process.[101]

A committee of senior judge advocates, the Judge Advocate Executive Council, manages the rotation of attorneys in the California JAG Corps.[102] The Council is supposed to guide judge advocate along a course of professional development, "overseeing . . . the assignment and professional development . . . of all Army National Guard Judge Advocates in the state."[103] In an effort to maximize each attorney's personal and professional growth, the Council transfers attorneys to new positions every three years or so, the compelled change intended to foster versatility and engender a larger, more sophisticated perspective.[104] While there is not a hard-and-fast formula, a typical career path involves starting in a junior management position at a regional headquarters, moving to the TDS as a junior defense attorney, shifting to a provincial armory as a brigade judge advocate, returning to the TDS in a supervisory capacity as a regional defense counsel, and finally assuming a leadership role in management

---

[98] U.S. DEP'T OF ARMY, REG., 27-10 § 6-4(g) (2011), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf.

[99] Capt. Cronn said: "TDS uses its own computer equipment and office space. This is separate and distinct from the equipment used by the government-side attorneys." Interview with Captain James Cronn, Former Militia Attorney, in Santa Ana on October 20, 2015.

[100] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 4-42 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[101] The failure to develop measures to eschew conflicts of interest runs contrary to explicit doctrinal prescriptions: "Army regulations require JAGC personnel to comply with military and civilian codes of professional responsibility and ethics that govern the practice of law. While all JAGC personnel are Soldiers first, judge advocates are prohibited from providing legal support in any way that violates an applicable rule of legal ethics. Judge advocates may not, for example, engage in conflicts of interest." *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 4-3 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[102] CAL. NAT'L GUARD REG., 27-1 § 2-5 (1996).

[103] *Id.*

[104] U.S. DEP'T OF ARMY, PAMPHLET 600-3 § 39-6(b) (2010), *available at* http://dopma-ropma.rand.org/pdf/DA-PAM-600-3.pdf.

as a senior supervisor, i.e. staff judge advocate.[105] A progression of this type takes between twenty and twenty-five years.[106]

A commendable objective, the problem is that few preventative steps are taken to militate the legion of ethical issues associated with moving lawyers in a small, self-contained military entity. The CNG has a little more than 21,000 employees and operates exclusively in California.[107] The approximately forty general counsels—all of whom are supervised by the state staff judge advocate—are assigned to one of only eight units.[108] Each unit is managed by a commander belonging to the same leadership hierarchy and reporting to the adjutant general.[109] The approximately ten defense lawyers work at one of two locations, overseen by the same senior defense counsel.[110] With so few attorneys and such a small organizational structure, it is inevitable that conflicts of interest will occur when attorneys move from management to the defense side.[111] The JAG Corps' structure is comparable to that of a small county district attorney's office, where attorneys are stationed at regional offices and rotations from management to defense are akin to a deputy district attorney at a regional office transferring to the public defender's office in the *same* county.[112]

The mechanics of how the California JAG Corps' leaderships moves its at-

---

[105] U.S. DEP'T OF ARMY, PAMPHLET 600-3, fig. 39-3 (2010), *available at* http://dopmaropma.rand.org/pdf/DA-PAM-600-3.pdf.

[106] *Id.*

[107] CALIFORNIA MILITARY DEPARTMENT, *supra* note 36.

[108] *See supra* note 65. The state staff judge advocate is the senior general counsel in the CNG, having oversight responsibility of all general counsel in the militia. *See* CAL. NAT'L GUARD REG. 27-1 § 1-1 (1996).

[109] CAL. MIL. & VET. CODE § 160 (West 2015) (stating that the adjutant general is the commander of all service members in the California militia).

[110] *Trial Defense Service*, THE CAL. MIL. DEP'T, http://www.calguard.ca.gov/TDS/Pages/Trial-Defense-Services.aspx (last visited Oct. 27, 2015).

[111] It is useful to contrast the size and structure of the CNG to that of the regular Army. The regular Army has an international footprint, nearly 500,000 personnel, and a multilayered organizational hierarchy. There are 123 federal Army bases in the United States and abroad, with Army personnel divided into six regional commands, nine armies, three corps, ten divisions, and thirty-two combat brigade teams. *See US Army Bases,* MILITARYBASES.COM, http://militarybases.com/army/ (last visited November 8, 2015). Accordingly, the rotations of the 1,950 attorneys in the federal Army have minimal conflicts of interest stemming from successive representation, where transferring attorneys change states or countries. *See* JUDGE ADVOCATE GENERAL, ANNUAL HISTORICAL SUMMARY OF THE JUDGE ADVOCATE GENERAL'S CORPS, UNITED STATES ARMY 2 (2014). A typical rotation might involve a general counsel at Ft. Benning, Georgia being switched to a TDS unit at Kaiserslautern, Germany, with the geographic diversity attenuating the odds of being adverse to a former client. For discussion of California rulings on conflicts within large government law offices, see *infra* note 236.

[112] *See generally* Chadwick v. Superior Court, 164 Cal. Rptr. 864 (Cal. Ct. App. 1980).

torneys denotes no cognizance of the ethical issues endemic to side-switching. The transfer orders contain only the most basic information – name, date, new office address, and titles of the current and former position.[113] Transferees are not given directions regarding how to manage professional responsibility obligations or guidance on how to manage the sudden, 180-degree shift of loyalties associated with going from management to defense or vice versa.[114] Neither are transferring attorneys required to provide a list of clients about whom they have acquired confidential information. Without this data, conflict checks cannot be performed and screens cannot be created at their new units of assignment.[115]

As a general rule, when a junior attorney is moved, he is introduced to the incoming attorney taking his place, told to disperse his open personnel actions, and ordered to educate his replacement on office protocol.[116] Once finished, he then switches sides, going from management to defense or defense to management. Without a formal vetting process, he will ineludibly face situations where attorneys at his new office are handling conflicted personnel actions.[117] All that stands in the way of his divulging confidences is self-regulation, or the extent to which he sees the issue and makes a conscious choice not to talk about the case. Even the most robust commitment to ethical rectitude can be debilitated by the powerful cross-currents this situation exerts. Courts have acknowledged these cross-currents and mandated the use of strict ethical screens even in the

---

[113] U.S. DEP'T OF ARMY REG., 600-8-105 §§ 2-6 – 2-9 (1994), http://www.apd.army.mil/pdffiles/R600_8_105.pdf.

[114] Captain James Cronn, a militia attorney with the CNG from 2002 to 2015, was moved back and forth between management and TDS positions many times. On the issue of ethical guidance from the Judge Advocate Executive Council, Captain states: "Each time I was switched, I received a phone call from a lieutenant colonel or colonel breaking the news and telling me the effective date. That was pretty much it. The issue of how to handle conflicts of interest never arose, nor were any ancillary instructions provided about screens or how to interact with former opposing counsel. The process was always quick, simple, and a-matter-of-fact, as though I was being moved intra-departmentally rather than between offices fundamentally adverse to one another." Interview with Captain James Cronn, Former Militia Attorney, in Santa Ana on October 20, 2015.

[115] Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 637 (Cal. Ct. App. 2010).

[116] Captain Cronn states: "Each time I was switched, the out-going boss came in and told me to train up the new guy, getting on my horse so that I could ship out to the new assignment. Once those transfer orders come down, supervising attorneys are pretty much done with you, not interested in belaboring the mechanics of the move any longer than necessary. They are focused on loading up the in-coming attorney with work." *Id.*

[117] Captain Cronn encountered conflicts of interest each time he was switched from management to defense during his twelve-year tenure in the CNG. He stated: "It was always strange that some of my new co-workers had been my opposing counsel a month or so earlier. Very few senior attorneys ever talked about this, and nothing was done to address it, but everyone was aware of it. There were no screening measures in place in the TDS offices I worked in. The attorneys would share computers, files, and support staff without limitation." *Id.*

government law context.[118]

When a supervising JAG officer switches sides, the ethical issues are even more considerable. Whereas the conflicts are localized when a captain is shifted, the impact is exponentially larger when a senior judge advocate such as lieutenant colonel or colonel changes sides. The transfer of a colonel from the TDS to the state staff judge advocate role—the CNG's senior JAG officer—for instance, unleashes shock waves up and down the supervisory chain.[119] In his TDS role, the colonel gained intimate, confidential details of most, if not all, defense cases being handled by the TDS judge advocates under his supervision.[120] When switched, this confidential information accompanies him to his new job, lodged in his memory. It is in his mind when he initially meets his new subordinates, the JAG officers advocating for the agency's interests, to outline his expectations and policies.[121] It remains in his consciousness when he consults with them about their management-side cases—cases with which he is familiar from his TDS tenure—and later when he conducts their performance reviews.[122]

Indeed, every action the state staff judge advocate takes is filtered through the confidential information he obtained previously in his TDS role. The insider knowledge gives his new client (the CNG itself) an unfair advantage, putting his former clients (individual CNG members accused of misconduct) at risk of having their secrets used against them.[123] As courts have noted, it is safe to assume that what a senior supervisor wants, explicitly or implicitly, is not lost on his subordinates, ambitious lawyers keenly attuned to their boss' wishes.[124]

---

[118] *See infra* Part III(C).

[119] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, fig. 39-3 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[120] Senior TDS attorneys, such as senior defense counsel or regional defense counsel, are responsible for supervising junior defense counsel and advising on strategy, negotiations, and disposition options. U.S. DEP'T OF ARMY REG., 27-10 § 6-3 (2016), *available at* http://www.apd.army.mil/pdffiles/r27_10.pdf.

[121] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 LEGAL SUPPORT TO THE OPERATIONAL ARMY § 4-36 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf.

[122] *Id.* ("As the next senior judge advocate in the brigade judge advocate's technical chain, the SJA [Staff Judge Advocate] should provide brigade judge advocates with technical guidance, direction, and insight on legal issues. Exercise of this function by the SJA can be based on policies and procedures agreed upon in advance with the brigade judge advocate, or it may be event-driven, based solely on the SJA's professional judgment.").

[123] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 854 (2006) ("Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against a client in a matter substantially related to the attorney's prior representation of the client.").

[124] The California Supreme Court has commented on the destabilizing pressure exerted

III. SUBSTANTIVE RULES OF SIDE SWITCHING IN CALIFORNIA

Describing the structural aspects of the CNG and the JAG Corps, we now assess the substantive rules of side-switching. Having a clear understanding of the substantive rules will allow us to evaluate the mechanics of the CNG's attorney rotation program, judging the way the JAG Corps' leadership shuffles attorneys back and forth between government and defense positions.

We start by addressing a threshold topic: which ethical admonitions bind CNG judge advocates' conduct, and which are advisory only? This conflict of law issue arises whenever the governing rules of the CNG are explicated. Normally a straightforward analysis, discerning the ethical standards that control the conduct of attorneys in the CNG is a multilayered enterprise due to the agency's administrative complexity.[125] Once the preliminary matter is sorted out, we will be able to determine the rules that bind militia attorneys in the ethical arena.

A. *The California National Guard Is a State Entity*

If the CNG is part of the federal military establishment, militia attorneys are "Army lawyers," falling within the regulatory mandate of the federal Army's Rules of Professional Conduct for Lawyers (ARPCL)[126] If, on the other hand, the CNG is a state entity, its attorneys are state employees, subject to California's ethical standards the same way all California attorneys are.[127]

After closely inspecting the controlling authority, it is clear that the CNG is a state entity, and its members are employees of the state of California.[128] The

---

on a subordinate by a conflicted supervisor: "Moreover, the attorneys who serve directly under [conflicted senior lawyers] cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as what their boss wants." *Id.* at 29–30.

[125] The analysis is normally easy because most California lawyers, practicing state law within the state's territorial boundaries, are bound by the California Rules of Professional Conduct. *See* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152 (1998).

[126] In addition to active duty Army judge advocates, an "Army lawyer" is "any Army Reserve judge advocate or judge advocate in the Army National Guard when on active duty, active duty for training, inactive duty for training, *or any other type of Federal duty as a judge advocate*." *See* U.S. DEP'T OF ARMY REG., 27-26 § 2 (1992) (emphasis added). Judge advocates in the California National Guard are only "Army lawyers" in the rare instances they are federalized. Army lawyers, practicing federal military law, are relieved from state licensure laws. *See* Sperry v. Florida, 373 U.S. 379, 385 (1963).

[127] CAL. RULES OF PROF'L CONDUCT, r. 1-100 (2015).

[128] The California National Guard, as with all state National Guards, is a state entity. Charles v. Rice, 28 F.3d 1312, 1315 (1st Cir. 1994) ("In each state, the Guard is a state agency, under state authority and control."). Corpus Juris Secundum states: "Members of the militia of their respective states, unless ordered into federal service, are considered state employees." *See* 6A C.J.S. Armed Services § 339 (2016).

Supreme Court settled the issue in 1964.[129] "It is not argued here that military members of the Guard are federal employees," the Supreme Court stated, "even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held."[130] The CAG has confirmed the state nature of the CNG, stating "[t]he National Guard of California when not in federal service is a state force . . . ."[131] The California judiciary, echoing this conclusion, has declared that "until they are called into active federal service, the various state National Guards are governed not by the federal government, but by the individual states."[132]

The upshot is that, unlike their Army brethren, CNG attorneys are not part of the United States Armed Forces.[133] California judge advocates have no federal status whatsoever, except in the rare instances when they are "federalized" by the president during a national emergency, a step that "disassociates," or removes, the affected lawyers from the state militia altogether, temporarily transferring them to the federal military for the period of activation.[134] When the federal orders are over, they are returned to the books of the state militia by operation of law.[135] "[A] member of the Guard who is ordered to active duty in

---

[129] Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 48 (1964), *vacated on other grounds*, 382 U.S. 159 (1965).

[130] *Id. See also* Gnaggy v. United States, 634 F.2d. 574, 579 n.19 (1980) (finding that a service member in the California National Guard "is a state employee"); N.J. Air Nat'l Guard v. Fed'l Labor Relations Auth., 677 F.2d 276, 277 (3d Cir. 1982) ("Within each state the National Guard is a state agency, under state authority and control.").

[131] 11 Op. Cal. Att'y Gen. 253, 259 (1948). State National Guard duty is referred to as "Title 32 status," a reference to Title 32 of the United States Code, the section pertaining to the National Guard. JAG officers are in Title 32 status whenever they perform duty under command of California's Governor. Title 32 status is contrasted by "Title 10 status," known as federal military status, the President-led status in which members of the federal Armed Forces operate. *See* Holmes v. Cal. Nat'l Guard, 109 Cal. Rptr. 2d 154, 159–60 (Cal. Ct. App. 2001); Kise v. Department of Military, 574 Pa. 528, 536 (Penn. Sup. Ct. 2003).

[132] *Holmes*, 109 Cal. Rptr. 2d at 172.

[133] *Maryland*, 381 U.S. at 46.

[134] Perpich v. Dep't of Def., 496 U.S. 334, 348 (1990). CNG judge advocates are "federally recognized," an acknowledgement by the federal military establishment that they have met federal military standards. *Holmes*, 109 Cal. Rptr. 2d at 167. Federal recognition allows CNG judge advocates to receive federal pay and enables the President to call them into federal service when needed. 11 Ops. Cal. Atty. Gen. at 260. Unless actually called into federal service, however, CNG judge advocates are categorically California state employees. United States v. Hutchings, 127 F. 3d 1255, 1258 (10th Cir. 1997); United States v. Benish, 5 F.3d 20, 25 (3d Cir. 1993) (Pennsylvania National Guard members not considered federal law enforcement officials when in state statues.); 6A C.J.S. Armed Services § 339 (2016).

[135] *Perpich*, 496 U.S. at 348.

the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service," and "[u]pon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their [state] National Guard status."[136]

Establishing the state nature of the CNG, we turn our attention to ascertaining which ethical rules bind militia attorneys. Because militia attorneys are employed by the state of California, commanded by its governor, and dispense legal advice within the state's territorial boundaries, they are required to be California attorneys.[137] As California attorneys, they are bound by the California Rules for Professional Conduct (CRPC), the ethical rules promulgated by the California State Bar. The rules state, "These rules together with any standards adopted by the Board of Governors pursuant to these rules *shall be binding upon all members of the State Bar. . . . Members are also bound* by applicable law including the State Bar Act and opinions of the California courts."[138] California JAG officers must comply with all precepts set down by California's legislature, judiciary, and regulatory agencies with regard to legal ethics and standards of practice.[139]

While the CRPC are compulsory, they are not the only ethical rules CNG attorneys can consult. The State Bar and California judiciary allow other sources to be considered for advice and guidance, including opinions handed down by professional ethics committees and canons disseminated by other jurisdictions.[140] The CRPC state: "Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."[141] In this way, California's framework of professional responsibility is comprised of two components, one obligatory (the CRPC and California case law) and the second advisory (ethical rules from other jurisdictions).

The federal Army's Rules of Professional Conduct for Lawyers (ARPCL) fall into the latter category, the advisory component.[142] By their own terms,

---

[136] *Id.* at 346.

[137] CAL. BUS. & PROF'L CODE § 6125 (2016) ("No person shall practice law in California unless the person is an active member of the State Bar.").

[138] CAL. RULES OF PROF'L CONDUCT r. 1-100(A) (2015) (emphasis added) (citations omitted).

[139] *Id.*

[140] *Id. See also* City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 847 (Cal. 2006) (noting that while "California has not adopted the ABA Model Rules . . . they may serve as guidelines absent on-point California authority or a conflicting state public policy").

[141] CAL. RULES OF PROF'L CONDUCT r. 1-100(A) (2015). Ethics committees are operated by a number of regional bar associations, including the Los Angeles County Bar Association, the San Francisco Bar Association, and the San Diego Bar Association.

[142] The California Supreme Court has indicated that ethical rules not adopted by the State

ARPCL are only binding upon "Army lawyers," that is, those "employed by the Department of the Army" or "judge advocate(s) in the Army National Guard" on a "tour of Federal duty."[143] CNG attorneys are not employees of the Department of the Army, nor are they members of the National Guard on tour of federal duty.[144] CNG judge advocates are state employees serving the California Governor in a "Title 32" status.[145] CNG attorneys thus fall outside the doctrinal definition of "Army lawyers."[146] Accordingly, the ARPCL are advisory only in relation to CNG judge advocates.[147]

B. *The Army's Ethical Rules Are Not Incorporated into California Law.*

The other precursory topic is whether the ARPCL have been incorporated into state law pursuant to California's incorporation mechanism. Under section 101 of the California Military and Veterans Code, certain federal military rules are automatically assimilated into state law and made applicable to the state militia, specifically, the rules pertaining to the "control, administration, or government" of the federal military.[148] "[Section 101] viewed in its entirety seeks to give the State the same control and administration over the militia as a State force as the Federal government exercises over its military establishment."[149] The arrangement operates to harmonize the organizational structure of the state militia with that of the federal military, ensuring that CNG's organization mirrors the federal model (e.g., comprised of divisions, brigades, battalions, etc.), and that the CNG's chief executives (i.e. commanders) have similar rights and liabilities to federal commanders.[150]

Bar, such as the ABA Model Rules, "may serve as guidelines absent on-point California authority or a conflicting state public policy." *Cobra Solutions, Inc.*, 38 Cal. 4th at 839. The ARPCL are adaptations of the ABA model rules. U.S. DEP'T OF ARMY, REG. 26-27, § 7(b) (1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf. (establishing and listing the ARPCL).

[143] U.S. DEP'T OF ARMY REG., 27-26 Glossary § II (1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf. A "judge advocate" is the technical term for a military lawyer. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 39-1 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf. *See generally* CAL. RULES OF PROF'L CONDUCT r. 1-100(A) (2015).

[144] "Members of the militia of their respective states, unless ordered into federal service, are considered state employees." *See* 6A C.J.S. Armed Services § 339. *See also supra* note 129.

[145] Holmes v. California Nat'l Guard, 109 Cal. Rptr. 2d 154, 171 (Cal. Ct. App. 2001).

[146] U.S. DEP'T OF ARMY REG., 27-26 Glossary § II (1992) (defining of "Army lawyer" for use within the ARPCL).

[147] CAL. RULES OF PROF'L CONDUCT r. 1-100(A) (2015). *See also Cobra Solutions, Inc.*, 38 Cal. 4th at 853.

[148] CAL. MIL. & VET. CODE § 101 (West 2016).

[149] 22 Ops. Cal Att'y Gen. 15, 16 (1953).

[150] 11 OPS. CAL. ATT'Y GEN. 253, 262 (1948); *see also* THE FEDERALIST NO. 29 (Alexan-

A nuanced instrument, section 101 contains a failsafe. Federal military rules which are inconsistent with "the rights reserved to [the] state" are not incorporated into state law and made applicable to the CNG.[151] As the CAG has declared, when California has enunciated a standard on a particular topic, federal military pronouncements to the contrary are excluded from entry into the California military law framework.[152] Relying on section 101, the California Court of Appeals held that the federal ban on military service by homosexual individuals is inconsistent with the California Constitution's guarantee of equal protection.[153] As a result, the court of appeals ruled that a federal military regulation allowing discrimination against homosexual service members were not incorporated into California law.[154] Similarly, the CAG refused to incorporate a federal military rule regarding payment of retirement-related transportation costs because the rule conflicted with a California rule on the same topic.[155] The CAG also denied incorporation to a federal regulation regarding dismissal of an officer, determining that it contravened a California regulation.[156]

All three branches of California's government have taken action with regard to the professional conduct of lawyers.[157] The state's statutes, case law, and regulations demonstrate that protecting Californians from incompetent legal services is a right the state has reserved to itself.[158] The redundancy and inconsistency between California's ethical rules and the federal Army's are both sub-

---

der Hamilton) ("It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service of the public defense. It would enable them to discharge the duties of the camp and off the field with mutual intelligence and concert an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in the military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.").

[151] CAL. MIL. & VET. CODE § 101 (West 2016).

[152] Atty. Gen. Un. Pub. Opn. IL 65-124 (1965) ("[W]e conclude that sections 100 and 101 do not incorporate federal military law in the areas covered by specific State statutory provisions . . . .").

[153] Holmes v. California Nat'l Guard, 109 Cal. Rptr. 2d 154, 171 (Cal. Ct. App. 2001).

[154] *See id.* at 164 n.7.

[155] 1945 OPS. CAL. ATT'Y. GEN. 124 at 3.

[156] 11 Ops. Cal. Atty. Gen. 253, 261 (1948).

[157] The legislature has enacted a comprehensive regulatory scheme, the State Bar Act. The judiciary has developed an extensive line of ethical jurisprudence. *See* Birbrower v. Super. Ct., 70 Cal. Rptr. 2d 304, 309 (1998). The State Bar has utilized its legislative authority to promulgate the CRPC. *See id.*

[158] CAL. BUS. & PROF. CODE § 6001.1 (West 2012) ("Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.").

stantial and conspicuous.[159] Consequently, none of the federal Army's professional responsibility framework—including the ARPCL—is incorporated into California law via section 101.[160] While the ARPCL can be consulted on an advisory basis, the regulation does not bind CNG judge advocates' conduct.[161]

C. *The Substantive Law of Side-Switching*

Side-switching implicates two canons of professional responsibility—client confidentiality[162] and the continuing duty of loyalty.[163] Side-switching also affects a number of first-order policy considerations, including preservation of the "public trust in the scrupulous administration of justice and the integrity of the bar,"[164] a client's right to counsel of choice,[165] an attorney's interest in representing a client,[166] the danger of disqualification gambits as tactical devices,[167] and the importance of ensuring high standards of professional conduct.[168] The State Bar and the California judiciary have enunciated a set of standards to modulate the maladies associated with side-switching, with the court's decisional law fleshing out the Bar's ethical axioms.[169]

---

[159] The ARPCL and the CRPC conflict, *inter alia*, regarding treatment of confidential information (CPRC Rule 3-100 v. ARPCL Rule 1.6), the definition of competency (CRPC Rule 3-110 v. ARPCL Rule 1.1), and the duty of loyalty (CRPC Rule 3-310 v. ARPLC Rule 1.7, Rule 1.8, and Rule 1.9). CAL. RULES OF PROF'L CONDUCT r. 3-100, 3-110, 3-310 (2015); U.S. DEP'T OF ARMY REG., 27-26 app. b §§ 1.1, 1.6, 1.7, 1.8, 1.9 (1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf.

[160] CAL. MIL. & VET. CODE § 101 (2015); 11 OPS. CAL. ATT'Y GEN. 11 253, 262 (1948).

[161] The key phrase in the ARPCL's definition of an "Army lawyer" is the phrase "any other type of Federal duty." U.S. DEP'T OF ARMY REG., 27-26 Glossary § II (1992). The phrase indicates that only judge advocates on "Federal duty" are Army lawyers. *Id.* As CNG judge advocates are on state (Title 32) duty rather than federal (Title 10) duty, CNG judge advocates are not Army lawyers. *See supra* note 130.

[162] Flatt v. Super. Ct., 9 Cal. 4th 275, 283 (1994).

[163] Matthew Lenhardt, *Ethical Screens in the Modern Age*, 50 SANTA CLARA L. REV. 1345, 1358 (2010) ("California diverges dramatically from the ABA and other states with respect to its rules of professional responsibility because it tends to be more protective of client confidentiality. Because confidentiality is a central pillar supporting the rules governing conflicts of interest, it is not surprising that California has not formally adopted screening provisions for either public or private attorney movement. Similarly, California's Rules of Professional Conduct are silent on vicarious disqualification of attorney conflicts within a firm.").

[164] People *ex rel.* Dept. of Corp. v. SpeeDee Oil Change Systems, Inc., 20 Cal. 4th 1135, 1145 (1999).

[165] Kirk v. First American Title Ins. Co., 108 Cal. Rptr. 3d 620, 642–44 (Cal. Ct. App. 2010).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] Lenhardt, *supra* note 163, at 1359.

1. The Duties of Confidentiality and Loyalty

All California attorneys are bound by two fundamental fiduciary obligations: they must maintain the confidentiality of client communications and they must show undivided loyalty to their clients, both current and former.[170] A brief overview of these oft-conflated duties is necessary in order to illuminate the ethical issues arising when an attorney switches sides. The duty of loyalty establishes all attorneys' commitment to maintain undivided loyalty to their clients in order to avoid undermining public confidence in the legal profession and the judicial process.[171] Absent informed consent in writing, attorneys are therefore barred from concurrently representing clients with conflicting interests, regardless of whether the simultaneous representations have anything in common.[172] Clients would otherwise be justifiably concerned if attorneys were permitted to represent their litigant adversaries in any other matter.[173] Accordingly, disqualification is automatic in such circumstances.[174]

The duty of confidentiality recognizes the fiduciary relationship in which clients divulge confidential information to their attorneys and forbids attorneys from disclosing this privileged information outside of the attorney-client relationship.[175] Attorneys must preserve their clients' secrets, even to their own detriment.[176] This concern for client confidences—and the attorney's duty to preserve those confidences—begins with preliminary consultations with a pro-

---

[170] *See* CAL. RULES OF PROF.'L. CONDUCT r. 3-310 (2015) (establishing the ethical duties of confidentiality and loyalty for California attorneys); *See also* Flatt v. Super. Ct., 9 Cal. 4th 275, 282–84 (1994) (discussing the duties of confidentiality and loyalty as they apply to California attorneys along with the differences between the two).

[171] *Flatt*, 9 Cal. 4th at 285 ("A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.").

[172] *Id.* at 284 ("Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*. Indeed, in all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one.").

[173] *Id.*

[174] People *ex rel.* Dept. of Corp. v. SpeeDee Oil Change Systems, Inc., 20 Cal. 4th 1135, 1147 (1999) ("The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. Therefore, if an attorney-or more likely a law firm-simultaneously represents clients who have conflicting interests, a more stringent per se rule of disqualification applies." (citing *Flatt,* 9 Cal. 4th at 284)).

[175] *See* CAL. RULES OF PROF'L. CONDUCT r. 3-310 (2015); *See also Flatt*, 9 Cal. 4th at 282–84.

[176] *Flatt*, 9 Cal. 4th at 289 ("One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client.").

spective client and continues after the attorney's services end.[177] Accordingly, when a conflict of interest arises from successive representation of clients with potentially adverse interests, the duty of confidentiality is jeopardized. Therefore, the duty of confidentiality is at issue when a former client seeks to have her previous attorney disqualified from serving as counsel to a successive client with potentially adverse interests to the former client.[178]

2. Disqualification Standards

The authority to disqualify an attorney stems from a trial court's inherent power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."[179] This power is rooted in common law rather than statute or the CRPC, which generally governs attorney discipline rather than creates disqualification standards.[180] The California Supreme Court has held that "a trial judge may exercise his power to disqualify a district attorney from participating in the prosecution of a criminal charge when the judge determines that the attorney suffers from a conflict of interest which might prejudice him against the accused and thereby affect, or appear to affect, his ability to impartially perform the discretionary functions of his office."[181]

Courts have looked to the CRPC and the American Bar Association's Model Rules of Professional Conduct for guidance when evaluating the circumstances under which an attorney may be disqualified.[182] CRPC Rule 3-310(E), the rule

---

[177] *Id.* at 283.

[178] *Id.* ("Where the potential conflict is one that arises from the *successive* representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client *confidentiality*.").

[179] Henriksen v. Great American Savings & Loan, 14 Cal. Rptr. 2d 184, 186 (Cal. Ct. App. 1992) ("The trial court is vested with the power '[t]o control in furtherance of justice, the conduct of its ministerial officers.' That power includes the disqualifying of an attorney.").

[180] *See, e.g.*, Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 630–31 (Cal. Ct. App. 2010) ("Generally speaking, the California State Bar's Rules of Professional Conduct govern attorney discipline; they do not create standards for disqualification in the courts."); *See also* City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 847 (2006) ("Although the rules governing the ethical duties that an attorney owes to clients are set out in the California Rules of Professional Conduct, those rules do not address when an attorney's personal conflict will be imputed to the attorney's law firm resulting in its vicarious disqualification. Vicarious disqualification rules are a product of decisional law.").

[181] Spaccia *v.* Super. Ct., 146 Cal. Rptr. 3d 742, 750–51 (Cal. Ct. App. 2012).

[182] *Kirk*, 108 Cal. Rptr. 3d at 630–31 ("[C]ourts analyzing questions of disqualification often look to the Rules of Professional Conduct for guidance. . . . While the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA) address the issue of *vicarious* disqualification, the California Rules of Professional Conduct do not."). *See* MODEL RULES OF PROF'L CONDUCT r. 1.11 (AM. BAR ASS'N 2009). The American Bar Association's Model Rules of Professional Conduct have not been adopted in California, although

pertinent to conflicts of interest and the duty of confidentiality, provides:

> A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.[183]

Courts have reasoned that CRPC 3-310(E) precludes an attorney from agreeing to represent an adversary of the attorney's former client unless the former client provides "informed written consent" in order to preserve the confidences of the former client.[184] If the attorney fails to obtain the former client's consent and begins representing an adversary of the former client, the former client may seek to have the attorney disqualified by showing that a "substantial relationship" exists between the subjects of the prior and current representations.[185] If the former client establishes a substantial relationship between the two representations, the attorney is automatically disqualified from representing the second client.[186]

Courts have adopted two approaches in order to establish a substantial relationship; each depends on whether the attorney had a direct relationship with

---

they may serve as a guideline absent on-point authority or conflicting state public policy. Courts have considered the Model Rules and their accompanying comments on issues such as screening and automatic disqualification due to imputed knowledge and how these issues play out in the private and public contexts. While the Model Rules are certainly relevant to the subject matter in this article, because they are not authoritative and have been superseded by the court rulings in which they are considered, their discussion does not serve the purposes of brevity and on-point legal authority relevant to side-switching in the California National Guard. *See Kirk*, 108 Cal. Rptr. 3d at 630–31.

[183] CAL. RULES OF PROF'L. CONDUCT r. 3-310(E) (2015).

[184] *Id.*; *see also* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152 (1998) ("A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client, where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.").

[185] Henriksen v. Great Am. Savings & Loan, 14 Cal. Rptr. 2d 184, 186–87 (Cal. Ct. App. 1992) ("In order to seek disqualification, the former client need not establish that the attorney actually possesses confidential information. It is enough to show that there was a "substantial relationship" between the former and the current representation. If the former client establishes the existence of a substantial relationship between the two representations the court will conclusively presume that the attorney possesses confidential information adverse to the former client and order disqualification.").

[186] Beltran v. Avon Products, Inc., 867 F.Supp.2d 1068, 1078 (C.D. Cal. 2012) ("Where a substantial relationship between the successive representations is established, 'access to confidential information by the attorney in the course of the first representation . . . is *presumed* and disqualification of the attorney's representation of the second client is mandatory.'" (quoting Flatt v. Super. Ct., 9 Cal. 4th 275, 283 (1994))).

the former client.[187] For the first, the court must determine whether the attorney had a direct professional relationship with the former client, during which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation.[188] If so, the attorney is presumed to possess actual, confidential information as to the subject matter of that case.[189] Consequently, courts deem an attorney to have a substantial relationship with a former client if the attorney directly represented that client in a matter closely related to the current one.[190]

If the attorney did not have a direct relationship or contact with the former client, the second approach requires the court to examine both the attorney's personal relationship to the prior client and the relationship between the prior and the present representation.[191] When the subjects of the prior representation are such as to "make it likely the attorney acquired confidential information" that is relevant and material to the present representation, then the two representations are said to be substantially related.[192] For its part, "confidential information" encompasses any information that is material, directly at issue in, or has some critical importance to the second representation.[193] If a substantial relationship exists between the attorney and the former client, that attorney is automatically disqualified from representing the second client.[194]

3. Imputed Knowledge and Vicarious Disqualification

If an attorney switches jobs and joins a firm that represents that attorney's former client, creating a conflict of interest, the question becomes whether disqualification of the firm in that client's conflicted case is warranted. Known as vicarious disqualification, the theory is based on the notion of imputed knowledge, extending an attorney's confidential information about the client to the rest of the new firm.[195] This principle "recognizes the everyday reality that attorneys, working together and practicing law in a professional association,

---

[187] *Id.* at 1077.

[188] Farris v. Fireman's Fund Ins. Co., 14 Cal. Rptr. 3d 618, 621–22 (Cal. Ct. App. 2004).

[189] H.F. Ahmanson & Co. v. Salomon Bros., Inc., 280 Cal. Rptr. 614, 621 (Cal. Ct. App. 1991).

[190] *Beltran*, 867 F.Supp.2d at 1078.

[191] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 847 (2006).

[192] *Id.*

[193] *Id.* ("[M]aterial confidential information is that which is 'directly at issue in' or has 'some critical importance to, the second representation.'" (quoting *Farris*, 14 Cal. Rptr. 3d at 618)).

[194] *Id.* ("When a substantial relationship between the two representations is established, the attorney is automatically disqualified from representing the second client." (quoting Flatt v. Super. Ct., 9 Cal. 4th 275, 283 (1994))).

[195] People *ex rel.* Dept. of Corp. v. SpeeDee Oil Change Systems, Inc., 20 Cal. 4th 1135, 1153–54 (1999).

share each other's, and their clients', confidential information."[196] When attorneys work together they presumptively share access to privileged and confidential matters, causing the California Supreme Court to rule that one attorney's disqualification extends vicariously to the entire firm.[197] The disqualification extends even to parties who are "of counsel" to a firm, a broad policy, including when the "of counsel" attorney runs a separate practice to the firm with which he has the arrangement.[198]

The underlying policy rationale behind a firm's vicarious disqualification is as much about preserving public confidence as protecting client confidentiality.[199] Determining whether a conflict of interest requires disqualification involves more than just the interests of the parties; it is ultimately a balance between the client's right to their choice of counsel and the need to maintain ethical standards of professional responsibility.[200] The "paramount concern" is to preserve public trust in the judicial system and uphold the integrity of the bar.[201] The confidentiality stemming from the attorney-client privilege is "a hallmark of our jurisprudence."[202] As previously discussed, an attorney's duty to preserve client confidences continues after the services end and necessarily follows the attorney to his new firm.

4. Ethical Screens Generally

As the number of lawyers switching firms continues to rise in the modern legal landscape, ethical screens have become more prominent as a means of "walling off" a conflicted attorney.[203] This avoids the vicarious disqualification stemming from one attorney's conflict of interest.[204] The CRPC do not address

---

[196] *Id.* ("The vicarious disqualification rule recognizes the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information.").

[197] *Id.* at 1153 ("[T]he need to protect client confidences can cause one attorney's conflict of interest disqualification to be imputed to other attorneys in the same firm. When attorneys presumptively share access to privileged and confidential matters because they practice together in a firm, the disqualification of one attorney extends vicariously to the entire firm." (citing *Flatt*, 9 Cal. 4th at 283)).

[198] *Id.* at 1155 ("[T]he prevailing view is that for purposes of disqualification, the of counsel attorney is considered to be affiliated with a firm so that the disqualification of one from representation must be imputed to the other.").

[199] *Id.*

[200] *Id.* at 1145 ("Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.").

[201] *Id.*

[202] *Id.*

[203] *See also* Matthew Lenhardt, *Ethical Screens in the Modern Age*, 50 SANTA CLARA L. REV. 1345, 1352 (2010).

[204] Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 637 (Cal. Ct. App. 2010).

ethical screens, and the Supreme Court has never reached the use of screens on the merits.[205] However, lower courts have addressed the issue and held that vicarious disqualification is the general rule.[206] An ethical wall will generally not preclude disqualification of the firm, but instead creates a presumption that each member of the firm has imputed knowledge of the confidential information.[207]

The California Supreme Court has suggested that whether a proper ethical screen in private law offices can avoid vicarious disqualification is still an open question.[208] The Second District Court of Appeal has held the imputed knowledge assumption to be rebuttable by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.[209] The court found any effective screen must: (1) be timely imposed when the conflict first arises; and (2) implement preventative measures to guarantee that information will not be conveyed.[210] A number of additional elements will almost certainly be necessary, though the court was careful to stress that "the efficacy of any particular ethical wall is *not* to determine whether all of a prescribed list of elements (beyond timeliness and the imposition of prophylactic measures) have been established.[211] It is, instead, a case-by-case inquiry focusing on whether

---

[205] *Id.* ("Although we stated that an ethical wall will *generally* not preclude disqualification, we did not address in what circumstances an ethical wall *may* preclude disqualification, or whether the presumption can ever be rebutted. . . . Given this history, we conclude that it is improper to rely on *Flatt* as creating an absolute rule of vicarious disqualification in California. Instead, we believe that neither *Flatt* nor *SpeeDee Oil* addressed the issue of whether vicarious disqualification is absolute.").

[206] Henriksen v. Great Am. Savings & Loan, 14 Cal. Rptr. 2d 184, 186–87 (1992) ("As a general rule in California, where an attorney is disqualified from representation, the entire law firm is vicariously disqualified as well.").

[207] *Id.* ("[T]he ethical wall concept has not found judicial acceptance in California on our facts: a nongovernmental attorney armed with confidential information who switches sides during the pendency of litigation."). *See also Kirk*, 108 Cal. Rptr. 3d at 637.

[208] *Kirk*, 108 Cal. Rptr. 3d at 638 ("We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney's law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.").

[209] *Id.*

[210] *Id.* at 645–46 ("The specific elements of an effective screen will vary from case to case, although two elements are necessary: First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion. . . . Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of *preventive measures* to guarantee that information will not be conveyed.").

[211] *Id.*

the court is satisfied that the tainted attorney has not had (and will not have) any improper communication with others at the firm concerning the litigation."[212] Thus, although the legitimacy of ethical screens for private law offices in California remains dubious, there is at least some guidance establishing what might constitute proper implementation.

5. Side Switching in Government Law Offices

California courts have elaborated upon the circumstances under which a government attorney may be disqualified, most notably in *Younger v. Superior Court*.[213] In *Younger*, a former partner in a well-known Los Angeles criminal defense firm became the number three prosecutor for Los Angeles County.[214] Though the partner was screened from cases in which his previous job presented a conflict of interest, the court nevertheless held that the entire district attorney's office was disqualified from those cases.[215] Importantly, the court noted that "[i]t is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice.[216] This requires that public officials not only properly discharge their responsibilities, but also that such officials avoid, to the extent possible, the *appearance* of impropriety."[217]

The *Younger* court focused on the attorney's supervisory position, stating:

> "[t]he presence of a former leading criminal defense attorney, near the top of a public prosecutor's office, suggests to those of a paranoid and conspiratorial turn of mind the presence of a fox in the hen house. We do not think that such abnormal suspicion has any reasonable basis in fact whatsoever, but [. . .] for appearance's sake, the basis for this suspicion must be eliminated."[218]

Furthermore, because of the supervisory position he occupies, the attorney could "quite innocently recommend or otherwise participate in the formulation of prosecutorial policies" that could substantially affect the outcome of the

---

[212] *Id.* at 645.

[213] Younger v. Sup. Ct., 144 Cal. Rptr. 34 (Cal. Ct. App. 1978). *Younger*, a decision from the Second District Court of Appeals, expands upon the foundation laid in People v. Superior Court (Greer), 19 Cal. 3d 255 (1977) to disqualify a district attorney's office and direct the Attorney General to take over the prosecution. As discussed, the standard established in *Greer* and applied in *Younger* has been superseded by Penal Code section 1424, but because the Supreme Court cited *Younger's* rationale behind conflicted heads of public law offices favorably as having "not lost their relevance" in *Cobra Solutions*, its policy implications have thusly been resurrected and merit discussion. *See* CAL. PENAL CODE § 1424 (West 2016).

[214] *Id.* at 897.

[215] *Id.*

[216] *Id.*

[217] *Younger*, 144 Cal. Rptr. at 36 (emphasis added).

[218] *Id.*

cases.[219]

Two years later, the legislature adopted Penal Code section 1424, which establishes a new standard for the disqualification of a district attorney.[220] Penal Code section 1424 provides that a motion to disqualify a district attorney "may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."[221] This created a higher standard for recusal of a district attorney than outlined in *Younger*, requiring an actual likelihood of unfair treatment arising from a conflict of interest rather than the previous standard of an appearance of impartiality.[222] Thus, disqualification for a prosecutor is subject to a different, higher standard after the enactment of Penal Code section 1424.[223]

Similarly, the California Supreme Court has considered the disqualification standards for a city attorney in the context of a civil case. In *City and County of San Francisco v. Cobra Solutions*, a San Francisco attorney had formerly represented a client in government contract negotiations with the city.[224] The former client was subsequently sued for breach of contract by the city, and the client moved to have the entire city attorney's office disqualified.[225] Because the case dealt with a civil matter, the court held that Penal Code Section 1424 did not apply.[226] However, in considering whether to apply the rule of vicarious disqualification to a government law office in a civil matter, the court noted that the policy concerns laid out in *Younger* remained valid and justified dis-

---

[219] *Id.*

[220] Spaccia v. Superior Ct, 146 Cal. Rptr. 3d 742, 751 (Cal. Ct. App. 2012) ("Two years later, the Legislature adopted Penal Code section 1424, which set forth a new standard for recusing a district attorney.").

[221] *Id.*; CAL. PENAL CODE § 1424 (a)(1) (2015).

[222] *Spaccia*, 146 Cal. Rptr. 3d at 751 ("The language of Penal Code section 1424 prohibiting recusal unless a conflict exists that would 'render it unlikely that the defendant would receive a fair trial,' was intended to abrogate *Greer*'s standard allowing recusal for an appearance of impartiality. . . . Under the statute, a district attorney cannot be recused unless there is a conflict that creates 'an *actual likelihood* of leading to unfair treatment.'").

[223] *Id.* at 104 ("Our Supreme Court and Courts of Appeal recognized this change in the law and have routinely acknowledged that, after the enactment of Penal Code section 1424, neither a district attorney nor an entire district attorney's office could be recused for a mere appearance of impartiality, but could only be recused when there existed an actual likelihood of unfair treatment.").

[224] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839 (2006).

[225] *Id.* at 850.

[226] *Id.* ("The disqualification standard that the Court of Appeal applied in *Younger* no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code section 1424, which provides for the recusal of local prosecuting agencies only when 'the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.' Section 1424 is inapplicable to this case, which is a civil action." (Citations omitted)).

qualification of the city attorney's office.[227]

As in *Younger*, the *Cobra Solutions* court gave special attention to the attorney's supervisory position.[228] To begin, the court noted that disqualifying a government attorney is essentially a balancing act between societal and personal interests.[229] The societal interests at stake include "preserving high ethical standards for every attorney," as failure to preserve client confidentiality undermines public confidence in the judicial system.[230] In addition, senior supervisory attorneys at public law offices have additional ethical obligations. The California Supreme Court found that supervisory attorneys at city attorney offices "possess 'such broad discretion' that the public 'may justifiably demand' that they exercise their duties consistent "with the highest degree of integrity and impartiality, and with the appearance thereof."[231]

Conversely, the personal interests at stake include the clients' right to retain their chosen counsel and receive a fair trial. When a client's chosen counsel is disqualified, it is the client who must bear the cost of finding new counsel and paying them for time spent catching up on the case.[232] In addition to the financial burden on the client, these greater legal costs increase the likelihood that litigation decisions will be driven by financial considerations rather than the public interest.[233] When the disqualified law office is the government's, the expense of hiring outside counsel to finish the work is ultimately borne by the taxpayers[234] The court must balance these considerations, among others, when ruling on a vicarious disqualification motion in the context of a government law office.[235]

6. Ethical Screens in the Government Context

In order to avoid the high societal and personal costs of disqualification, the presumption of imputed knowledge is uniformly rebuttable and may be overcome by a proper ethical screen when the issue arises in the context of government and former government attorneys.[236] This is a decidedly more lenient ap-

---

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.* at 851.

231 *Id.* (Citations omitted).

232 *Id.*

233 *Id.* ("Greater legal costs caused by hiring private sector attorneys raise the specter 'that litigation decisions will be driven by financial considerations,' not by the public interest." (Citations omitted)).

234 *Id.*

235 *Id.*

236 Kirk v. First American Title Ins. Co., 108 Cal. Rptr. 3d 620, 637–38 (Cal. Ct. App. 2010). *See also* Chadwick v. Superior Court, 164 Cal. Rptr. 864, 868–69 (Cal. Ct. App. 1980) ("In a formal opinion, the ABA Standing Committee on Ethics and Professional Responsibility, the authoritative interpreting body for the disciplinary rules, concluded that

proach than that governing vicarious disqualification of private sector firms, supported by several unique aspects of a government law office.[237] Unlike private sector attorneys, public sector attorneys have no financial interest in the matters on which they work.[238] Consequently, they have far less incentive to breach confidentiality in furtherance of a current matter.[239] They also do not solicit clients or accept fees, eliminating any financial incentive to favor one client over another.[240] Furthermore, government law offices are typically much larger than private sector firms, with many more offices across a greater geographical area. The likelihood of one attorney sharing confidential information such that it could be imputed to the rest of the firm falls considerably with increased size.[241] In light of these considerations, courts have been much more willing to accept screening procedures rather than vicarious disqualification in cases involving public law offices.[242]

Nonetheless, the benefits of allowing an ethical screen must be weighed against the concerns outlined in *Younger* and *Cobra Solutions* regarding supervisory positions. Though courts allowed the use of ethical screens in several cases, each involved "simply one of the attorneys in the government office" rather than the supervisor "under whom and at whose pleasure" all lower ranking attorneys serve.[243] Where the attorney with the actual conflict has managerial, supervisorial, or policymaking responsibilities in a public law office, screening may be insufficient to avoid vicarious disqualification of the entire office.[244] As the *Cobra Solutions* court explained,

---

[rules stating that an attorney's knowledge of confidential information is deemed imputed to the entire firm], are inapplicable to government lawyers. . . . We believe the ABA's interpretation of the imputed knowledge rule to be the better view.").

[237] *Kirk*, 108 Cal. Rptr. 3d at 637–38.

[238] *Chadwick*, 164 Cal. Rptr. at 868.

[239] *Id.*

[240] *In re* Charlisse C., 45 Cal. 4th 145, 163 (2008) ("Public sector lawyers also do not recruit clients or accept fees. As a result, they have no financial incentive to favor one client over another.").

[241] *Chadwick*, 164 Cal. Rptr. at 868–69 ("A free flow of information may be assumed to exist within a law partnership, but the size and diversity of government agencies makes similar assumptions about agencies wholly unrealistic.").

[242] *Charlisse*, 45 Cal. 4th at 163 ("[C]ourts have more readily accepted the use of screening procedures or ethical walls as an alternative to vicarious disqualification in cases involving public law offices." (Citations omitted)).

[243] City and County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4th 839, 853 (2006); *see also Chadwick*, 164 Cal. Rptr. at 868; Chambers v. Super. Ct., 175 Cal. Rptr. 575, 578–79 (Cal. Ct. App. 1981).

[244] *Charlisse*, 45 Cal. 4th at 163 ("Courts have also held, however, that where the attorney with the actual conflict has managerial, supervisorial, and/or policymaking responsibilities in a public law office, screening may not be sufficient to avoid vicarious disqualification of the entire office.").

> "Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one."[245]

In addition to the potential for actual conflicts to arise under a screened supervisor, courts voiced concern for public perception and confidence in the judicial system as cause to disallow screening for senior positions.[246] Public perception that a government attorney might be influenced by the attorney's previous representation of a client, at the expense of the best interests of the government, would "insidiously undermine public confidence in the integrity of municipal government and its [government] attorney's office."[247] Attorneys who head public law offices shoulder additional ethical obligations as soon as they become public servants.[248] They possess such broad discretion that the public may justifiably demand that they exercise their duties "with the highest degree of integrity and impartiality, and with the appearance thereof."[249] Citizens are entitled to public attorneys that unreservedly represent the public's best interests. Perception that a public attorney or his deputies may be influenced by an attorney's prior client—at the expense of the public interest—would "insidiously undermine public confidence" in the integrity of the government and its attorney's office.[250]

IV. THE ETHICAL IMPLICATIONS OF SWITCHING SIDES

We now arrive at the doctrinal heart of the analysis, the application of California's substantive rules on side-switching to the CNG's rotation program. While there are dozens of permutations side-switching takes within the agency,[251] with attorneys of all levels moving back and forth systematically, we train our attention on two specific scenarios, fictional exemplars that capture

---

[245] *Cobra Solutions*, 38 Cal. 4th at 853–54.

[246] *Id.* at 854.

[247] *Id.*

[248] *Id.*

[249] *Id.* at 851 (citing People v. Sup. Ct. (Greer), 19 Cal. 3d 255, 266–67 (1977)).

[250] *Id.* at 854.

[251] In Mr. Stirling's experience, the permutations stem from four factors, dimensions which combine uniquely in each situation: (1) the level of the attorney, i.e. junior (first lieutenant, captain), mid-level (major), or senior (lieutenant colonel or colonel), (2) the direction of the move, i.e. from defense to management or from management to defense, (3) the type and level of the units at issue, i.e. the division headquarters or a brigade, and (4) and the nature of the legal issue, i.e. a violation of an administrative regulation or a criminal statute.

the most common ethical quagmires.[252] First, we look at a situation where a junior level judge advocate is moved, mid-case, from management to the TDS, joining an office where her new colleagues include her former opposing counsel. Next, we assess a situation where a senior JAG officer switches from the chief of the TDS to the deputy state staff judge advocate, the number two position on the management side of the JAG Corps, a position where he supervises nearly every management-side attorney in some capacity.

A. *When a Junior Attorney Transfers from Management to Defense*

Shannon is a part-time militia attorney assigned to the 224th Sustainment Brigade, a unit of about 3,000 militia members specializing in logistics and managed by a colonel.[253] An associate at a real estate firm in her civilian life, Shannon drills one weekend per month at the brigade's Long Beach headquarters, the junior-most attorney in the brigade's legal office. In her role as captain, she works under the supervision of the brigade judge advocate, advising along a wide array of legal issues, including serving as the prosecutor on separation boards, conducting research regarding whether a field exercise will negatively impact indigenous species, and advising mid-level administrators on the proper accounting of gifts.[254]

One of the matters on which Shannon has worked centers around retaliation. The case is based on a whistleblower allegation by a human relations employee, a sergeant first class who contends her private personnel records were hacked after she reported departmental misconduct. Pointing the finger at three of her colleagues, the brigade commander appointed an investigator to ferret out the truth, assigning Shannon as legal advisor. Shannon met with the investigating officer numerous times to confer about the case and discuss the substance

---

[252] Both fictional examples are based on actual events observed by Mr. Stirling and Captain Cronn during their ten-year and twelve-year tenures, respectively, as militia attorneys in the CNG legal department. In these attorneys' experience, the examples represent situations common to all CNG judge advocates' practice of law within the JAG Corps.

[253] *See 224th Sustainment Brigade*, CURRENTOPS.COM, http://currentops.com/units/US-Army/224-SB. As with all sustainment brigades, the 224th Sustainment Brigade "provide(s) a full gamut of services including distributing supplies such as ammunition, food and water, maintaining vehicles and equipment . . ." as well as the "nuts-and-bolts work of supplying water, food and fuel, maintaining vehicles and providing other support and services." U.S. ARMY, 224TH SUSTAINMENT BRIGADE (2016), http://www.elpasotimes.com/story/news/military/ft-bliss/2015/05/10/muleskinners-sustainment-brigade-changes-name-get-ready-deploy/31269141/.

[254] The areas of law on which general counsel render legal advice are breathtakingly diverse. "Judge advocates serve at all levels in today's area of operations and advise commanders on a wide variety of operational legal issues. These issues include the law of war, rules of engagement, lethal and nonlethal targeting, treatment of detainees and noncombatants, fiscal law, foreign claims, contingency contracting, rule of law, the conduct of investigations, and military justice." *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04 § 1-4 (2013).

of the allegations, including how to question the suspects and the contours of the CNG's privacy regulations.[255] From their communication, Shannon has gained an in-depth understanding of the investigator's strategy and objectives, as well as the strengths and weaknesses of the allegations.

One day, during a drill weekend, the brigade judge advocate tells Shannon that the JAG Executive Council has transferred her to the TDS, effective the following month. She spends the rest of the weekend briefing her replacement, another captain, and providing short synopses of her open cases, including the retaliation matter. The following month, she reports to an armory in the city of Bell, south of Los Angeles, home to one of the state militia's two regional TDS offices. There, she finds that her new co-workers include the attorneys representing the human resource employees, the attorneys on the other side of the retaliation case. Her new supervisor is unimpressed by the coincidence, giving her a box of defense cases and telling her to get to work.[256] She proceeds to set up at a computer station in the same office as the other TDS attorneys, including the defense attorneys handling the retaliation matter. She shares the same support staff as well as the physical and electronic filing systems as the defense attorneys, with no limitations placed on her access.[257] Her supervising attorney oversees all the defense attorneys in the office, advising on strategy and tactics and conducting performance evaluations.[258]

The issue is whether Shannon's personal conflict of interest regarding the retaliation matter must be imputed to all the attorneys in the TDS office. Her interactions with the investigator have illuminated the details of the 224th Sustainment Brigade's "case theories, strategies, and analyses," confidential information and work product that, if shared with her new colleagues, could be leveraged against the 224th Sustainment Brigade.[259] Generally the rule states that one attorney's conflict is extended to all attorneys in a firm.[260] Should this rule be applied to Shannon's retaliation matter wherein all attorneys in her TDS office are vicariously disqualified?

Determining whether Shannon's conflict should be imputed to her new colleagues turns on the strength of the ethical screen imposed upon her arrival. While the specifics of an efficacious screen are case-specific, two elements are required: the screen must be imposed in a timely manner and preventative measures must be imposed to ensure confidential information is not shared inappro-

---

[255] *Id.*

[256] *See* Capt. Cronn, *supra* note 116.

[257] *See* Capt. Cronn, *supra* note 117.

[258] *Id.*

[259] People *ex rel.* Dept. of Corps. v. SpeeDee Oil Change Systems, Inc., 20 Cal. 4th 1135, 1149 (1999).

[260] *Id.* at 1139 ("When a conflict of interest requires an attorney's disqualification from a matter, the disqualification normally extends vicariously to the attorney's entire law firm." (citing Flatt v. Super. Ct. 9 Cal. 4th 275, 283 (1994))); *see also* Henriksen v. Great American Savings & Loan, 14 Cal. Rptr. 2d 184, 186–87 (1992).

priately.[261] Further, it is usually essential that a "memorandum . . . be circulated warning the legal staff to isolate the [tainted] individual from communications on the matter and to prevent access to the relevant files."[262] Additional components of an effective screen include physical and departmental isolation, penalties for divulging confidential information, restricted access to confidential information and files, and a vigorous continuing education program.[263]

Judged against these criteria, it is fair to say that what occurred in Shannon's situation is a failure. The TDS office has not only neglected to isolate her, it has not even made an effort to isolate her. She has not been assigned separate office space, quarantined from accessing certain files, or advised of the penalties for discussing information pertaining to cases in which she had participated in her former role.[264] Assimilated into the operations of the TDS office carte blanche, her former client has not provided written consent nor has cautionary memoranda ordering her new colleagues not to talk with about the retaliation matter been circulated.[265] Nothing has been done, in other words, to address "the everyday reality that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information."[266]

As a result, her conflict is imputed to the other attorneys in the TDS office, disqualifying the entire staff from representing the subjects of the fraud/retaliation investigation. "When attorneys presumptively share access to privileged information and confidential matters because they practice together in a firm, the disqualification of one attorney extends vicariously to the entire firm."[267] Unless ethical screening measures are immediately and aggressively utilized, the "confidential information obtained by one lawyer in a law firm is deemed possessed by all other attorneys in the firm.[268] Perhaps most disturbing is the indifference on display in this scenario, an alarming disregard for safeguarding

---

[261] Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 645–46 (Cal. Ct. App. 2010).

[262] *In re* Complex Asbestos Litig., 283 Cal. Rptr. 732, 745 (Cal. Ct. App. 1991).

[263] *Henriksen*, 14 Cal. Rptr. 2d at 188 n.6.

[264] In the CNG legal department, there are no private keys issued, secret codes given, or special access meted out. *See* Capt. Cronn, *supra* note 116.

[265] The State Bar's committee on professional responsibility has opined that a California lawyer should not accept representation of a client whose interests are adverse to a former client of the attorney's firm without first obtaining the written consent of the former client. *See* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152 (1998).

[266] People *ex rel.* Dept. of Corps. v. SpeeDee Oil Change Systems, Inc., 20 Cal. 4th 1135, 1152 (1999).

[267] The California definition of "law firm" includes a public law office, *i.e.* a government legal department. *See* CAL. RULES OF PROF. CONDUCT r. 1-100(B)(1)(d) (2015).

[268] *See* THE STATE BAR OF CAL. COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 1998-152, 2 (1998); *see also* Rosenfeld Construction Co. v. Sup. Ct., 235 Cal. App. 3d 566, 573 (1991).

the 224th Sustainment Brigade's "legitimate expectations that their attorneys will protect client confidences."[269]

As discussed earlier, government service is the one setting where vicarious disqualification is not automatic.[270] In the public legal context, where an attorney either joins a private firm or assumes another public position, the presumption of disqualification is rebuttable.[271] Public attorneys, the court has said, know that "participation and use of confidential information against a former client would subject [them] to a host of problems including tort liability and state bar discipline."[272] Being shielded from the profit motive, however, is insufficient by itself to prevent imputation. Instead, "courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client's confidences through timely, appropriate, and effective screening measures and/or structural safeguards."[273] The dispositive factor is still the effectiveness of the screen erected.[274] While public attorneys are treated more leniently, a robust screening process is nonetheless a *sine qua non* to rebutting the presumption of conflict imputation.[275]

Chadwick v. Superior Court, the leading California case on side-switching in the government context, confirms the conclusion of office-wide imputation.[276] In *Chadwick*, a deputy public defender with no supervisorial responsibility switched after three and a half years to the deputy attorney's office in the same county.[277] Unlike the TDS supervisor's approach with Shannon, the supervisor at the district attorney's office immediately imposed a rigorous ethical screen, foreclosing the possibility that he have any contact with the cases he had han-

---

[269] *SpeeDee*, 20 Cal. 4th at 1139 (quoted in *In re Charlisse*, 45 Cal. 4th 145, 161 (2008)).

[270] *See infra* Part III(C)(6); *see also In re Charlisse*, 45 Cal. 4th at 162 ("California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices.").

[271] The greater leniency stems from the special circumstances of public employment, including concern about damaging recruitment of talented lawyers into government service and the absence of a profit motive. *Id.*; Chambers v. Super. Ct., 175 Cal. Rptr. 575, 578–79 (Cal. Ct. App. 1981); *see also* Kirk v. First American Title Ins. Co., 108 Cal. Rptr. 3d 620, 641–42 n.24 (2010); Matthew Lenhardt, *Ethical Screens in the Modern Age*, 50 SANTA CLARA L. REV. 1345, 1359 (2010).

[272] Santa Barbara v. Super. Ct., 18 Cal. Rptr. 3d 403, 410 (Cal. Ct. App. 2004).

[273] *In re Charlisse*, 45 Cal. 4th at 162.

[274] *Santa Barbara*, 18 Cal. Rptr. 3d at 410; *Kirk*, 108 Cal. Rptr. 3d at 645 ("The showing must satisfy the trial court that the [tainted attorney] has not had and will not have any involvement with the litigation, or any communication with attorneys or [ ]employees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed.").

[275] *Kirk*, 108 Cal. Rptr. 3d at 641 ("It is undisputed that the presumption of imputed knowledge is uniformly rebuttable and may be overcome by a proper ethical screen when the issue arises in the context of government and former government attorneys.").

[276] Chadwick v. Superior Court, 164 Cal. Rptr. 864 (Cal. Ct. App. 1980).

[277] *Id.*

dled in his defense role. He was isolated from the prosecutors handling his former cases, placed at an office at the courthouse rather than inside the district attorney's facility, and assigned a separate supervisorial chain.[278] He was given juvenile cases to handle for the first six months after switching, with no overlap between his new and old cases.[279] Finally, he formerly swore not to discuss his former cases with prosecutorial personnel.[280]

As a result of the rigid ethical screen, the *Chadwick* court did not inpute the switching attorney's conflict to the entire district attorney's office.[281] The court held that the strict measures employed were reasonably calculated to prevent disclosure of client confidences.[282] The district attorney's deliberate, conscientious approach displayed in *Chadwick* stands in stark relief to the lackadaisical, haphazard approach the TDS office took in Shannon's situation, where Shannon was assimilated into the defense operations without utilization of any screening procedures. It is hard to imagine how a court could sanction the amateurish approach taken by TDS, almost certainly compelled to disqualify *all* of Shannon's new colleagues as a result.

B. *When a Senior Supervisory Attorney Transfers from Defense to Management*

We now turn our attention to the second fictional scenario, the common situation where a senior level judge advocate switches from managing defense operations to managing government-side operations. For nearly four years, Ed has been the regional defense counsel for the CNG's TDS operations, the highest-ranking supervisory attorney for the legal department's labor unit.[283] A lieutenant colonel with over twenty years of militia service under his belt, he exercises managerial responsibility over all defense activities in substantive arenas, such as adverse administrative actions and criminal cases.[284] A part-time militia employee, he performs his one-weekend-per-month state military duty at the militia's statewide headquarters in Sacramento at the Joint Forces Headquarters[285] The rest of the month, he administers a chain of hair salons in the Bay Area in his civilian capacity.[286] As the chief of TDS, he sets office-wide policy, controls personnel assignments, writes performance reviews, and bears direct re-

---

278 *Id.*

279 *Id.*

280 *Id.*

281 *Id.*

282 *Id.*

283 Cal. Nat. Guard. Reg., 27-12 § 3-2 (2014).

284 As a lieutenant colonel, Ed would be a standing member of the CNG's Executive Council. *See* CAL. NAT'L GUARD REG., 27-1 § 2-5 (2009).

285 The CNG's main TDS office is located at the JFHQ in Sacramento. *Trial Defense Services*, THE CAL. MIL. DEP'T http://www.calguard.ca.gov/TDS/Pages/Trial-Defense-Services.aspx (last visited Oct. 27, 2015).

286 Though not the norm, a number of CNG attorneys have non-legal civilian jobs. *See*

sponsibility for all defense cases.[287]

One of the cases Ed oversees is a general court-martial, a serious criminal matter adjudicated within the militia's criminal justice system. The case involves allegations of sexual assault, false official statements, and maltreatment of subordinates. Two years earlier, the case went to trial before a military judge and a jury of officers, where the defendant was convicted on all counts and served six months in jail.[288] Ed advised the defense attorney on tactics and, later, starting counseling the TDS' appellate attorney regarding legal theories, arguments, and negotiations.[289] Through his supervisory-level involvement in the case, he has acquired considerable confidential information from the defendant, information protected by the attorney-client privilege.[290]

While the appeal is pending, Ed gets a call informing him that his tenure with TDS is over and that he is being reassigned as deputy state staff judge advocate, the second most senior position in the CNG JAG Corps. Ed's new position makes him the "executive officer" of the legal department.[291] His responsibilities as executive officer include crafting state-wide departmental policy, evaluating management-side attorneys, and allocating logistical resources.[292] He must also supervise the militia's chief of military justice, the JAG Corps' senior judge advocate for adverse personnel actions and courts-martial, essentially the chief of criminal law.[293]

As in Shannon's case, when the change is made, no screening measures are taken to prevent Ed from involvement in his former cases. He is neither restricted from accessing case files, instructed to sign paperwork acknowledging his duty of confidentiality, nor compelled to notify CNG employees about whom

---

Stateside US Army Bases, MILITARYBASES.COM, http://militarybases.com/army/ (last visited November 8, 2015).

287 U.S. DEP'T OF ARMY REG., 27-10 § 6-3 (2011).

288 California state proceedings, sentences of confinement stemming from California courts-martial, are served in county jails pursuant to California Military and Veterans Code section 464. CAL. MIL. & VET. CODE § 464 (West 2015).

289 R. Peter Masterson, *The Defense Function: The Role of the U.S. Army Trial Defense Service* ARMY LAWYER, March 2001, at 21-25, *available at* https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/c82df279f9445da185256e5b005244ee/4b3a83481a548a4d85256e5b0054d743/$FILE/Article.pdf.

290 The militia has the authority to try charges in its criminal justice system in the event the civilian law enforcement authorities decline to prosecute. *See* United States v. Ali, 71 M.J. 256, 261 (2012).

291 *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY § 4-24 (2013), *available at* http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm1_04.pdf ("The deputy SJA ensures that every member of the OSJA receives the mentorship, training, equipment, and support to meet mission requirements consistent with the SJA's intent.").

292 *Id.*

293 U.S. DEP'T OF ARMY, REG. 27-10 § 21-2 (2011).

he acquired confidential information in his senior defense position.[294]

The question is whether, in light of his side-switching, Ed's personal conflict must be imputed to the entire CNG JAG Corps, resulting in the legal department's vicarious disqualification from continuing to prosecute the general court-martial matter. The answer is an unequivocal yes. The instant Ed started as the executive officer, his taint accompanied him, attaching to every attorney working under him.[295] To be effective, ethical screens must be "implemented *before undertaking* the challenged representation or hiring the tainted individual."[296] If a screen is not "timely imposed,"[297] and if the prophylactic measures are not initiated at the time "when the ethical conflict (is) discovered,"[298] the conflict passes to the tainted attorney's colleagues without delay.[299]

But that is not all. Even had a timely screen been initiated, imputation would still have been necessary because no cautionary memorandum was disseminated.[300] An essential component of any ethical screen is circulation of a memo "warning the legal staff to isolate the [tainted] individual from communications on the matter and to prevent access to the relevant files."[301]

What is particularly problematic about Ed's situation is that, in his new role as deputy state staff judge advocate, he is the supervisor of the chief of military justice. There are two ways Ed can use his former role in TDS to noxiously influence the JAG Corps' senior criminal law attorney. First, he can share confidential information with this prosecutorial official, giving the government an unfair advantage. Alternatively—and far more likely—he could pressure the prosecutor, directly or indirectly, to pull punches, leveraging his seniority to obtain an outcome less deleterious to the defendant than the one being pursued. The impetus could stem from a bond Ed formed previously with the embattled employee, believing he is innocent of the accusations or is being rail-roaded. In such an instance, Ed may resolve his divided loyalties in favor of the defendant (his former client) instead of the CNG (his current client). Both variations are

---

[294] The court in *Kirk* observed that each of these steps are components of an effective ethical wall. Kirk v. First American Title Ins. Co., 108 Cal. Rptr. 3d 620, 646–47 (Cal. Ct. App. 2010).

[295] *See* Klein v. Super. Ct., 244 Cal. Rptr. 226, 237–38 (Cal. Ct. App. 1988).

[296] *In re* Complex Asbestos Litig., 283 Cal. Rptr. 732, 745 (Cal. Ct. App. 1991) (emphasis added).

[297] *Kirk*, 108 Cal. Rptr. 3d at 645–46.

[298] Hitachi, Ltd. v. Tatung Co., 419 F. Supp. 2d 1158, 1165 (N. D. Cal. 2006) (alteration in original).

[299] *See In re Complex Asbestos Litig.*, 283 Cal. Rptr. at 745; *Kirk*, 108 Cal. Rptr. 3d at 645 n.31.

[300] *See In re Complex Asbestos Litig.*, 283 Cal. Rptr. at 745; *Kirk*, 108 Cal. Rptr. 3d at 645 n.31.

[301] *See In re Complex Asbestos Litig.*, 283 Cal. Rptr. at 745; *Kirk*, 108 Cal. Rptr. 3d at 645 n.31.

equally insidious, classic cases of the proverbial fox in the hen house.[302]

A larger point must be made. Even had the legal department's senior judge advocates endeavored to create an ethical wall rather than taking no preventative steps whatsoever, imputation of Ed's conflict to the entire management side of the office may still be compulsory. Moving a senior supervisory attorney from one side to the other, where the new job includes overseeing the same personnel actions, may, in other words, never pass ethical muster in the absence of prophylactic measures such as a cooling off period.[303] In *Cobra Solutions*, the California Supreme Court imputed a city attorney's personal conflict to the entire office, despite the fact the attorney had been screened from participating in the case.[304] The court stated,

> "Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. . . . [T]he attorneys who serve directly under them *cannot be entirely insulated* from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants."[305]

Supervising adverse personnel actions for the opposing side, as such, without a cooling off period in between, appears to be ethically untenable within the

---

[302] Younger v. Sup. Ct., 144 Cal. Rptr. 34, 37 (Cal. Ct. App. 1978).

[303] City and County of San Francisco v. Cobra Solutions, 38 Cal. 4th 839, 853–54 (2006).

[304] The screen included removing the city attorney from the reporting system, locking files, and making computer records inaccessible. *Id.* at 854. The court was also concerned about the appearance of impropriety, noting the "compelling social interest in preserving the integrity of the office of a city attorney" and the importance of citizens knowing he "unreservedly represents the city's best interests when it undertakes litigation." *Id.*

[305] *Id.* at 853–54 (emphasis added). The California Supreme Court reached the same conclusion two years later in 2008, imposing the personal conflict of a supervisor of one unit of the Children's Law Center of Los Angeles on another unit, disqualifying the attorney in both units from representing the law center against a former client. The court was concerned that the tainted attorney, due to her supervisory position, would "participate in formulating prosecutorial policies that might affect the office's prosecution" of the former client and that her "membership on the office's promotions committee . . . might impact how attorneys in the office handles cases" against the former client. *In re* Charlisse C. v. Shadonna C., 45 Cal. 4th 145, 164 (2008); *see also* People v. Lepe, 211 Cal. Rptr. 432, 434 (1985) (disqualifying the entire district attorney's office after an attorney representing a criminal defendant became *the* district attorney: "As the deputies are hired by [the district attorney], evaluated by [him], and fired by [him], we cannot say that the office can be sanitized such to assume the deputy who prosecutes the cases will not be influenced by the considerations that bar [the district attorney] himself from participation in the case"); *Younger*, 144 Cal. Rptr. at 37 (disqualifying the Los Angeles District Attorneys' Office on the grounds that "[t]he presence of a former leading criminal defense attorney, near the top of a public prosecutor's office, suggests to those of a paranoid and conspiratorial turn off mind the presence of a fox in the hen house").

CNG JAG Corps under any circumstances. The California judiciary has never sanctioned the practice in any form in any context, civilian or military.[306]

V. RECOMMENDATIONS

We conclude by proposing changes to the CNG's lawyer rotation program, normative modifications designed to return the JAG Corps' operations to sound ethical footing. A number of the recommendations are novel; most are not, originating from the California jurisprudence in the conflict of interest sector. The constellation of preventative measures which the court has recognized as efficacious in the civilian context have direct applicability in the California militia context, because they are carefully constructed standards that can be used to regulate JAG officers' movement between the management and defense wings. Our objective here is to construct a series of bulwarks which will hermetically seal a client's communication with his militia lawyer, buttresses that to every eye and from every angle will permanently extinguish doubt as to the inviolability of what a CNG employee says to his assigned judge advocate.

A. *Adoption of Judicial Screening Protocol*

For junior level attorneys with no supervisory duties—such as Shannon in the example above—the best fortification is an ethical screen, a wall preventing any involvement with cases in which there was prior participation. The court in *Kirk* provided a comprehensive framework to guide the implementation of effective screens.[307] While the civilian judiciary does not require every element in every situation, the CNG should formally adopt and adhere to the entire assemblage as stated policy. Unlike the civil litigation setting, where an aggrieved former client can file a motion to disqualify, formal litigation is rare in the militia context.[308] Outside of the occasional court-martial or administrative board, proceedings officiated by legal officers who rule on motions, there is no arbiter to whom to complain in most successive representation situations.[309] Moreover, accused employees rarely have visibility as to which CNG attorneys

---

[306] Factors to be considered in a motion to disqualify a supervisory attorney include the role in "setting policies that might bear on the subordinate attorneys' handling of the litigation," as well as other circumstances that are "likely to cast doubt on the integrity of the governmental law office's continued participation in the matter." *Cobra Solutions*, 38 Cal. 4th at 850 n.2.

[307] Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 647–48 (Cal. Ct. App. 2010).

[308] *See generally* Feres v. United States, 340 U.S. 135 (1950) (barring civil suits against military officials in most situations).

[309] While a CNG member is free to submit a request for redress to his unit commander under Article 138 of the Uniform Code of Military Justice, it is unlikely that a militia member, especially at the junior level, would possess the sophistication to challenge a former attorney's loyalty. *See* 10 U.S.C. § 938 (2012).

are advising their unit commander at any particular time.[310] Employees, accordingly, have no way of knowing if *their* former attorney is amongst the attorneys giving the advice. The opaqueness of the CNG's internal operations necessitates strict adherence to *all* of the *Kirk* factors.

The first two *Kirk* factors are the timely imposition of the screen and the utilization of preventive measures to guarantee that information will not be conveyed to the screened attorney.[311] Because the CNG has a relatively small legal department of around fifty lawyers, conflicted cases must be identified and immediately screened every time a junior lawyer is transferred.[312] As soon as an attorney is transferred to a new role where his interests might be adverse to those of his former clients, the attorney must compile a client list and take measures to categorically bar him from working on these cases in any way.[313] A memorandum should be circulated extorting all attorneys and paralegals, both management and defense, not to communicate with the screened attorney with regard to the listed clients.[314] Dissemination of a cautioning memorandum represents an active preventive measure to guard against inadvertent disclosures and establishes an evidentiary record.[315]

The other court-sanctioned elements of an effective ethical screen are: physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; continuing education in professional responsibility; and notice to the former client.[316] Isolating the conflicted attorney is the most straightforward way to prevent an accidental disclosure of confidential information.[317] While it may not be possible to move the screened attorney to another geographical location, there should at a minimum be some physical separation within the office between the conflicted attorney and the attorneys working on the conflicted attorney's former cases.

Strong prohibitions against the discussion of confidential information must be established. A directive from the state staff judge advocate cautioning JAG officers to exhibit solicitude when changing jobs would be a "basic first step toward establishing this goal."[318] The directive should enunciate the penalties

---

[310] In Mr. Stirling's experience, employees facing adverse action within the CNG system almost never know the identity of the JAG officer advising the CNG's management.

[311] *Kirk*, 108 Cal. Rptr. 3d at 645.

[312] Screening is a central component of the *Kirk* factors. *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.* at 645–46. *Kirk* also describes a fifth element—establishment of procedures preventing a disqualified attorney from sharing in the profits from the representation. Since government lawyers do not receive a share of the profits from representation, this element is impertinent in the CNG context.

[317] *Id.* at 646.

[318] *Id.* at 647.

and disciplinary consequences for any lawyer who discusses improper cases with a screened attorney.[319]

As to preventing access to screened information, all physical files should be stored in a separate location, one to which the tainted attorney has no access, and any digital files should be stored in a location protected by a password. Posting warnings on file room doors or as pop-up screens or labels on digital files is also imperative, as are special keys, access codes, and the use of document management software.[320]

Finally, the legal department's senior leadership should initiate a vigorous continuing education program while providing prompt notice to the former client the attorney is side-switching.[321] Continuing legal education courses should be administered at least biannually, covering the mandatory components of an ethical wall, the most common mistakes made when switching sides, and the punishment for disclosing client confidences or misusing supervisory authority. The curriculum should also include anecdotes drawn from real-life scenarios and fact patterns used by instructors to facilitate group discussion, which encourages maximum participation. Further, prompt notice should be provided to the clients an attorney leaves behind when transferred to the other side.[322]

B. *One-Year Cooling Off Period*

In the supervisory context, even the most cogent screen is inadequate. As the California Supreme Court has stated, where a senior lawyer who has significant control over policy, evaluations, and resources changes sides—such as in Ed's case above—it is virtually impossible to construct a screen that frees subordinates "from real or perceived concerns as to what their boss wants."[323] The

---

[319] Violating a directive of this type would be punishable via a court-martial in extreme situations or through adverse administrative action, such as a reprimand, in less severe cases. 10 U.S.C. § 892 (2012).

[320] City and County of San Francisco v. Cobra Solutions, 38 Cal. 4th 839, 853–54 (2006) (explaining the importance of securing electronic information).

[321] Henriksen v. Great Am. Savings & Loan, 14 Cal. Rptr. 2d 184, 188 n.6 (Cal. Ct. App. 1992).

[322] MODEL RULES OF PROF'L CONDUCT r. 1.10(a)(2)(ii) (AM. BAR ASS'N 2014). The language from Rule 1.10(a)(2)(ii) of ABA Model Rules of Professional Responsibility should be used a template: "[W]ritten notice [must be] promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and the screened lawyer's compliance with these Rules . . . (and) an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures." *Id.* Written advisement is especially important in the militia context, a tightly structured culture where disrespect for superiors can constitute criminal conduct. Taught to be obedient to orders, personnel might be reluctant to inquire into the on goings of a former attorney, concerned of causing offense or being perceived as insubordinate. *Id.*

[323] *Cobra Solutions*, 38 Cal. 4th at 853–54.

ethical bulwarks erected must be even more prescriptive, involving normative changes of a structural nature. A hard and fast rule must be implemented that prohibits senior judge advocates who supervised personnel matters from supervising personnel matters for the opposing side for at *least one year*.[324] No half measure will suffice. A mandatory one-year cooling off period will allow most of the conflicted personnel matters to proceed to conclusion, eliminating the risk that the tainted attorney will influence a former subordinate's handling of a case.[325]

During the one-year cooling office period, the senior level attorney should be assigned to a non-personnel related position. There are numerous JAG positions that do not involve advising on personnel matters. Non-personnel topics include operational and administrative matters, topics encompassing ethics, fiscal law, military support to civil authorities, and environmental and real estate issues. At the expiration of the cooling off period, the state staff judge advocate or a military judge should conduct an assessment. If the quantity of conflicted matters is still significant, the attorney's quarantine from personnel actions should be extended. If the number of conflicted matters is insubstantial – five or fewer – he should be allowed to assume a senior level position with authority over personnel actions, calibrated for the situation. Obviously, all of the screening measures set forth above in the junior attorney section should be scrupulously and immediately implemented.

C. *Independent Ethics Advisors and State Bar Committee*

Two additional normative modifications should be made. First, a number of independent ethics advisors should be assigned within the CNG's JAG Corps, unbiased officials charged with advising, prescribing, and making recommendations with regard to professional responsibility matters. The legal department's military judges could be used in this role. As lieutenant colonels and colonels, military judges' primary responsibility is to officiate at court-martial proceedings. They have neither general counsel nor defense counsel responsibilities, relieved of advocacy obligations in order to preserve their neutrality. Courts-martial within the CNG's JAG Corps having peaked in 2012, decreasing precipitously since the CNG's military judges have been left with light

---

[324] During the cooling off period, an absolute division must be imposed. The supervisor should be walled off from affecting the conduct of junior attorneys handling the conflicted cases in any way, and prohibited from writing performance evaluations, controlling resources, making assignment decisions, and setting policy that could have a direct or indirect impact. The appearance of impropriety standard set forth in *Cobra* should be used when evaluating whether the tainted attorney should be allowed to participate in particular decision. If the "public perception" would be that "his deputies might be influenced," he should be barred from participating. *See id. at* 854.

[325] In Mr. Stirling and Captain Cronn's experience, most personnel actions reach final disposition within a year of initiation. Interview with Captain James Cronn, Former Militia Attorney, in Santa Ana on October 20, 2015.

dockets. As independent ethics advisers, they would not only monitor the rotation of attorneys, ensuring compliance with the judicial screening standards and other aspects of the CRPC, they would also be available to answer specific ethics-related questions posed, anonymously or otherwise, by CNG attorneys. In this way, having military judges function as independent ethics advisors would provide CNG attorneys with a safe, efficient source of hand-tailored ethical guidance.

Finally, the State Bar should assist the CNG's legal department in assessing, understanding, and resolving the ethical challenges the department faces in the professional responsibility context. A standing committee should be created with the mission of gaining longitudinal institutional knowledge about the unique characteristics of the state militia, including the section 101 incorporation mechanism, the composition of the legal department, and the rotation program. Much like the ABA's Standing Committee on the Armed Forces, which conducts analyses, generates scholarship, and forwards recommendations regarding federal legal issues to Army JAG Corps, a standing State Bar committee would constitute an enduring professional resource to the militia's legal corps, a collegial forum for academic examination, feedback, and input.[326]

VI. CONCLUSION

Trust is a fragile substance. The American legal system is founded upon trust, the leap of faith a person takes when he speaks the unvarnished truth to his lawyer. Without trust, the system collapses upon itself, imploding like a mansion built upon a bed of dry leaves. If a CNG employee is not sure his attorney will maintain the secrecy of the information he communicates, his trust in the lawyer – and, by extension, in the system itself – is badly damaged, an erosion of confidence that, if extrapolated widely enough, will debilitate JAG Corps' viability as a legal services provider.

Swift, decisive remedial action is needed to address improvident side-switching, including reforms that inject rigor, scrupulousness, and regimentation into the CNG's attorney rotation process. The magnanimous objective underlying the rotation process has been utterly subverted by administrative sloppiness,

---

[326] *See Standing Committee on Armed Forces Law*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/committees/armed_forces_law.html (last visited November 11, 2015). There is wide-spread comity between the federal military's legal department and the American Bar Association, a mutually beneficial relationship. The Judge Advocate General of the federal Army, for instance, delivers a comprehensive report each year to the ABA, describing the current state of the federal Army's legal department. *See* REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE AMERICAN BAR ASSOCIATION, U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS (2014). The ABA's role in aiding the federal military with its enduring legal challenges is long-standing, with the national legal organization playing a critical role in the development of the Uniform Code of Military Justice in 1950. *See* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980 (2001).

including the failure to deploy the judicially-crafted preventative measures that ameliorate the worst by-products of shifting loyalties. Professional responsibility is the last place for carelessness; missteps there carry the potential for permanent exclusion from the legal profession and irreparable harm to innocent parties.

The State Bar should proactively and aggressively aid the CNG's legal department in getting its house in order. Possessing an outsider's eye, singular expertise, and a legislative mandate to protect the public, the State Bar is uniquely situated to marshal sunlight into the legal department's shadowy recesses, sanitizing the strange mutations which have formed. A meaningful, multi-dimensional relationship must be forged, along with the initiation of an ongoing colloquy between California attorneys both in and out of uniform. Waiting for the militia's invitation to render assistance is no longer an option; civilian initiative is required. In an ironic twist of fate, the militia is the one immobilized by emergency this time around, the proverbial frog in the pot of boiling water, unobservant of the fact that its ethical imbroglio reached the crisis point some time ago.