Michigan Law Review

Volume 58 | Issue 3

1960

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A RECENT decision of the United States Court of Military Appeals barring the use of non-lawyers as defense counsel before courts-martial even at the accused's request[1] is symptomatic of the increasing professionalization of military law practice. This is a matter of interest not only to reserve officers who are lawyers, but also to the civilian bar generally and especially to recent law school graduates who will, in fulfilling their military obligations, constitute the quarter to half of military lawyers on active duty. Especially for these neophytes whose first legal experience will be in forums dissimilar from those they have studied, a review of the professional standards required for military courts should be of assistance.

Civilian lawyers entering the military justice system in a steady stream since the country was founded and attorneys coming in during wartime have brought with them their basic attitudes toward criminal law administration and have gradually woven these standards into the warp and woof of the military law, so that today civilian criminal law administration standards have been almost completely assimilated into the military justice system. This assimilation is of particular significance in attorney-client relationships and the duty of a defense counsel toward an accused whom he represents, because so many beginning judge advocates serve in this capacity.

Since the time defense counsel formally represented accused before them, military courts have required that counsel govern their relationship to the accused according to the Canons of Professional Ethics.[2] Today, "the substance of these Canons is found also in the Manual for Courts-Martial, wherein it is stated that the defense counsel is charged with the duty 'to represent the accused

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1 United States v. Kraskouskas, 9 U.S.C.M.A. 607, 26 C.M.R. 387 (1958).

2 See C.M.O. 7-1928, p. 9; and C.M.O. 2-1944, p. 251, in which counsel for accused were censured for violation of the Canons of Ethics of the American Bar Association. See the recent citation to the Canons of Ethics in United States v. Harris, 24 C.M.R. 698 (A.C.M. 1957), wherein the board dealt with attorney-client relationships. In LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 1951, at p. 27, ¶42, it is stated, of the manual: "Paragraph 42 provides generally for conduct of counsel. Appropriate portions of the canons of ethics of the American Bar Association, some of which are set out in Naval Courts and Boards, are included. The paragraph sets up standards for a military bar."

with undivided fidelity, and not to divulge his secrets or confidence' (MCM, 1951, par. 48c). A violation of these Canons may be ground for reversal or other corrective action. . . ."[3]

This article is designed to study the manner in which those Canons of Professional Ethics have been assimilated into the administration of military justice and made the standards for the duty of a military defense counsel.

I. THE HISTORICAL DEVELOPMENT OF DEFENSE COUNSEL'S DUTIES

Professionalization of military justice administration was not always the rule. Following the criminal court practice during the latter half of the eighteenth century that a defendant was not permitted to defend by counsel in felony cases because the court itself was supposed to be counsel for the prisoner,[4] English courts-martial would not permit the accused's legal adviser to address the court or examine witnesses.[5] Instead, the judge advocate was supposed to consider himself as counsel for the accused in addition to his duties as crown prosecutor and impartial legal adviser to the court.[6] Exclusion of counsel's participation was also justified on alleged ignorance of military law[7] on the part of barristers, and it was "an admitted maxim on all courts-martial that counsel are not to interfere in the proceedings, or to offer the slightest remark, much less to plead or argue."[8] Although in 1836 Parliament abolished the rule prohibiting counsel in felony cases, the analogous military practice persisted until World War I,[9] and it is only in recent times that English military prisoners have had the right to counsel.[10]

Although the English rule that a defendant in a felony case was not allowed counsel had been expressly rejected in the United

[3] United States v. Reynolds, (A.C.M. 1955) 19 C.M.R. 850 at 852.

[4] Powell v. Alabama, 287 U.S. 45 at 61 (1932). See also Becker and Heidlebaugh, "The Right to Counsel in Criminal Cases," 28 NOTRE DAME LAWYER 351 (1953).

[5] 2 MCARTHUR, NAVAL AND MILITARY COURTS-MARTIAL, 4th ed., 46 (1813); DELAFONS, A TREATISE ON NAVAL COURTS-MARTIAL 165 (1805). Cf. ADYE, A TREATISE ON COURTS-MARTIAL, 4th ed., 194 (1797); KENNEDY, GENERAL COURTS-MARTIAL 259 (1825). This was adhered to even in the most important cases. See TRIAL OF HON. AUGUSTUS KEPPEL, ADMIRAL OF THE BLUE (1779); COURT-MARTIAL OF ADMIRAL LORD GAMBIER (1810).

[6] BENET, MILITARY LAW, 6th ed., 242-257 (1866), indicates his anomalous function. See also KENNEDY, GENERAL COURTS-MARTIAL 259 (1825).

[7] TYTLER, AN ESSAY ON MILITARY LAW, 2d ed., 250 (1806).

[8] SIMMONS, COURTS-MARTIAL, 4th ed., 183 (1852).

[9] HICKMAN, NAVAL COURTS-MARTIAL 74 (1851); STEPHENS, GIFFORD AND SMITH, MANUAL OF NAVAL LAW, 3d ed., 80 (1901), 4th ed., 70 (1912). See also LEWIS, AUSTRALIAN MILITARY LAW 195 (1936).

[10] Rule 79 (2) of the Army Rules of Procedure for Courts-Martial provides for his duties. See MANUAL OF MILITARY LAW, Rules and Procedure (1956). And see Griffith, "Report of the Army and Air Force Courts-Martial Committee," 12 MOD. L. REV. 223 at 226 (1949).

States at the time of the Revolution,[11] this anachronism was retained in American court-martial procedure.[12] The resulting divergence between courts-martial practice and the notion of due process as exemplified by the Sixth Amendment[13] caused sharp criticism of military court procedure. As early as the War of 1812, one military textwriter noted that "the people of this country are very tenacious of the privilege of employing attorneys to plead on their behalf; and the refusal of courts martial to grant this indulgence, has sometimes excited no small degree of sensibility. . . ."[14]

Shortly thereafter, some courts-martial began to exhibit a measure of recognition to Sixth Amendment requirements, and in trials of importance between the War of 1812 and the Civil War limited use of counsel was occasionally permitted with the court's permission.[15] The influx of civilian lawyers into the military service during the Civil War further tended to erode the old prohibitions against appearance of counsel for accused in court-martial cases. Indeed, while standard textwriters still adhered to the rule forbidding counsel to address the court or examine witnesses, they noted that by then it had become customary to permit an attorney to read the accused's defense or summation to the court-martial.[16]

The assimilation of rules of general criminal law practice into the court-martial system was aided by the establishment of the Bureau of Military Justice in 1864[17] and the opinion of General

[11] Powell v. Alabama, 287 U.S. 45 at 61 (1932).

[12] MACOMB, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL 93-96 (1809); O'BRIEN, AMERICAN MILITARY LAWS 223, 224 (1846); MILITIA REPORTER 253, 284 (1810). A full review of the earliest post-Revolution cases is contained in Wiener, "Courts-Martial and the Bill of Rights: The Original Practice: I," 72 HARV. L. REV. 1 at 27-36 (1958).

[13] Compare Wiener, "Courts-Martial and the Bill of Rights: The Original Practice: I," 72 HARV. L. REV. 1 (1958), with Henderson, "Courts-Martial and the Constitution: The Original Understanding," 71 HARV. L. REV. 293 (1957). Tending to support Col. Wiener's view, but not mentioned by him, is Col. Henley's Case, 3 AM. ST. TR. 806 at 840 (1778), where Lt. Col. William Tudor, first Judge Advocate of the Continental Army under George Washington, stated that an accused was not permitted to have defense counsel in courts-martial.

[14] MALTBY, A TREATISE ON COURTS MARTIAL 75 (1813).

[15] TRIAL OF LT. J. ABBOTT 3, 128 (1822); NAVAL COURT MARTIAL OF COMMANDER ALEXANDER S. MACKENZIE AND REVIEW BY JAMES FENIMORE COOPER 8, 228 (1844); Rear Admiral Charles Wilkes' Court-Martial, June 30, 1864, 38th Cong., 1st sess., H.R. Ex. Doc. 102, p. 4. Mackenzie's attorneys before the court-martial later represented him in the civil courts in related proceedings. See Wilson v. Mackenzie, 7 Hill (N.Y.) 95, 42 Am. Dec. 51 (1845); United States v. Mackenzie, (S.D. N.Y. 1843) 30 Fed. Cas. 1160, #18,313.

[16] DE HART, COURTS-MARTIAL 132 (1859); BENET, A TREATISE ON MILITARY LAW, 6th ed., 75, 133 (1866); HARWOOD, UNITED STATES NAVAL COURTS-MARTIAL 113 (1867).

[17] See Prugh, "Colonel William Winthrop: The Tradition of the Military Lawyers," 42 A.B.A.J. 126 (1956).

Holt, the first Judge Advocate General, that "the accused is entitled to counsel upon his trial as a *right.*"[18] Holt, a distinguished lawyer and former Secretary of War, further declared:

> "In this country no such view as that advanced by Napier, of a separation between the general rules of practice on military trials and those prevailing in the courts of law, is known to have been entertained. Such rules are indeed, in our procedure, as far as possible assimilated."[19]

The close of the Civil War lessened public interest in military justice and retarded the liberal trend.[20] However, Civil War gains were not obliterated. In 1873, the New York Court of Appeals held that an accused before a national guard court-martial had a right to counsel,[21] and six years later a standard textwriter advanced the same view.[22] Nevertheless, Winthrop as late as 1895 declares that the employment of defense counsel is a "privilege only,"[23] although he noted that objections to the participation of counsel were rare.

For the first time in 1890, Army Regulations provided for the appointment of defense counsel.[24] Five years later, the first *Manual for Courts-Martial* set forth in rudimentary fashion the duties of counsel toward the accused as follows:

> "An officer detailed as counsel for a soldier before a general court-martial should guard the interests of the accused by all honorable and legitimate means known to the law. . . . He should not obstruct the proceedings with frivolous or manifestly useless objections."[25]

The 1905 Army manual added the qualification that the means employed to protect the accused should be "not inconsistent with military relations,"[26] a provision apparently inhibiting counsel

18 WINTHROP, DIGEST OPINIONS JAG 1862-1868, 3d ed., 127, #1 (1868).

19 Id. at 336.

20 See HOWLAND, DIGEST OPINIONS JAG 1862-1912, 509, July 1874 (1912).

21 People ex rel. Garling v. Van Allen, 55 N.Y. 31 (1873). This case overruled an earlier trend against the right to counsel. See Rathbun v. Sawyer, 15 Wend. (N.Y.) 451 (1836); People ex rel. Underwood v. Daniell, 6 Lans. (N.Y.) 44 (1871), affirmed without discussion of this point in 50 N.Y. 274 (1872). See subsequent developments on the state level in comment, 41 CORN. L.Q. 457 (1956).

22 IVES, MILITARY LAW 125, 127 (1879).

23 WINTHROP, MILITARY LAW AND PRECEDENTS, 2d ed., 166 (1895; 1920 reprint). See also United States v. Mathis, (A.C.M.S. 1952) 6 C.M.R. 661 at 667.

24 Ibid.

25 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1895, p. 25.

26 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1905, p. 26.

from raising defenses reflecting on the accused's superiors.[27] However, this manual did strengthen the accused's privilege of employing counsel,[28] and when in 1916 the Articles of War were revised, Article 17 provided that "The accused shall have the right to be represented before the court by counsel of his own selection for his defense." This provision was carried forward in amplified form in the 1920 Articles of War, which in Article 11 also required the convening authority to appoint counsel for the accused before general and special courts-martial. Thus, it was not until the end of World War I that military courts were required to concern themselves with the duties of counsel toward the accused.

The 1917 manual thus described counsel's duty toward an accused:

> "An officer acting as counsel before a general or special court-martial should perform such duties as usually devolve upon the counsel for a defendant before civil courts in criminal cases. He should guard the interests of the accused by all honorable and legitimate means known to the law."[29]

The above provision was carried over into the 1921 manual,[30] and, in addition, the duty was imposed upon him that "in case of personal interest in the trial or of personal hostility toward the accused or toward the accuser he should apply to the convening authority to be relieved."[31] These provisions were carried forward into the 1928 manual,[32] and, in addition, for the first time, paraphrasing from the Canons of Ethics, it was specifically set forth: "It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused; to disclose to the accused any interest he may have in or in connection with the case which might influence the accused in the selection of counsel; to represent the accused with undivided fidelity, and not to divulge his secrets or confidence."[33] The 1949 manual incorporated these

27 Cf. C.M.O. 6-1938, p. 7, interpreting a similar policy.

28 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1905, p. 25. But see HOWLAND, DIGEST OPINIONS JAG 1862-1912, 267 (1912), containing an 1899 opinion that a claim made against the United States by an attorney for services rendered as counsel for an accused officer in a court-martial trial was without merit. See also DIGEST OPINIONS JAG 1912-1940, §374, Feb. 2, 1915 (1942).

29 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1917, ¶109, p. 52.

30 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1921, ¶107b, p. 92.

31 Id. at ¶107f, p. 93.

32 MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1928, ¶¶43, 45, pp. 33, 35.

33 Id. at 35.

provisions in substantially unchanged form.[34] Likewise, these requirements were further carried into and amplified in the present manual,[35] so that it can be said that "The duties of any counsel for the defense parallel closely the duties of any lawyer to his client and the matters set out in the manual are similar to those in previous service manuals."[36]

Naval law had a parallel development in regard to the right to counsel. By the turn of the century, the application of the Sixth Amendment to courts-martial was recognized in official orders,[37] and it was held that "the accused is entitled to counsel as a right, and the court cannot properly deny him the assistance of a professional or other advisor."[38] So it was further held that denial of counsel is a "fatal irregularity,"[39] and the court is obliged to make an effort to provide counsel for the accused.[40] The old rule was, however, that accused had no choice in the matter of defense counsel, "and his wishes even are not to be consulted as to the individual who shall be designated to defend him,"[41] but this rule was subsequently changed to conform to army practice.[42]

With the advent of right to counsel in the naval service, it became necessary to outline the duties of such counsel. One order declared:

> "An officer so detailed shall perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. As such counsel he should guard the interests of the accused by all honorable means known to the law, so far as they are not inconsistent with military relations."[43]

The above language, with the exception of the clause relating to military relations, was copied almost verbatim into the naval

34 MANUAL FOR COURTS-MARTIAL, U.S. ARMY AND U.S.A.F., 1949, ¶¶43, 45, pp. 40-43.

35 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶¶46, 48, pp. 66-71.

36 LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 1951, p. 28, ¶48.

37 MCCLELLAN, DIGEST OF DECISIONS OF THE SECRETARIES OF THE NAVY AND JUDGE ADVOCATES GENERAL OF THE NAVY, 1862-1916 (NAVAL DIGEST) p. 118, No. 19 (1916), C.M.O. 49-1910, p. 14; C.M.O. 55-1910, p. 8. In LAUCHHEIMER, FORMS OF PROCEDURE (NAVY COURTS-MARTIAL), 1896, the form at pp. 9-10 provides for the manner in which accused introduces his counsel.

38 NAVAL DIGEST, p. 118, No. 6, C.M.O. 78-1905; C.M.O. 6-1909, p. 3. This is reprinted in NAVAL COURTS AND BOARDS, 1917, ¶265, p. 192, and in NAVAL COURTS AND BOARDS, 1937, §356, p. 200.

39 NAVAL DIGEST, p. 119, No. 31, C.M.O. 49-1910, p. 14.

40 Id. at 119, No. 22, C.M.O. 78-1905.

41 Id. at 118, No. 14, July 7, 1913.

42 NAVAL COURTS AND BOARDS, 1937, §§356, 358, pp. 200-201.

43 NAVAL DIGEST, p. 117, No. 4, C.M.O. 75-1898; C.M.O. 78-1905, p. 1; C.M.O. 55-1910, p. 8.

court-martial manual.[44] In addition, the 1937 edition contains extracts from the Canons of Ethics.[45] Thus, prior to the Uniform Code, naval law too followed the general law in the determination of a defense counsel's duties toward the accused. Thus, the imposition by law of service-wide uniformity followed service-wide uniformity in practice.

II. UNDERTAKING THE DEFENSE

A. *Duty To Undertake Defense of Accused*

Canon 4:

"A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf."

Canon 5:

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused. . . ."

Upon receiving an assignment as defense counsel or assistant defense counsel before a court-martial, the military lawyer will receive, in effect, an assignment to defend the several accused who are brought before the court. An initial question presented is whether the attorney has to defend all of the accused he is assigned to represent or may decline to enter into a professional relationship with such of them as he desires not to represent.

The general rule in civilian practice is that an attorney takes such cases as he pleases and may decline a retainer for any reason or none at all.[46] To this rule the obligation to represent indigent defendants forms an exception,[47] for the primary considerations of assuring every person accused of crime a full defense and of equitably distributing the burden of representing indigent defendants among members of the bar take precedence over an attorney's individual desires as to whom he shall represent.

In this respect, it would appear that the status of every defendant before a court-martial, regardless of his actual financial

44 NAVAL COURTS AND BOARDS, 1917, ¶266, p. 192; NAVAL COURTS AND BOARDS, 1937, §357, p. 201. Substantially similar language is found in FORMS OF PROCEDURE FOR COURTS AND BOARDS IN THE UNITED STATES COAST GUARD, 1916, p. 17.

45 NAVAL COURTS AND BOARDS, 1937, §360, p. 202. The Canons reprinted are nos. 3, 5, 6, 8, 9, 15, 16, 17, 18, 22, 37, and 44.

46 Canon 31, Canons of Professional Ethics, American Bar Association; DRINKER, LEGAL ETHICS 139 (1953).

47 Id. at 62.

status, is similar to that of an indigent defendant. While the *Manual for Courts-Martial* does not *in haec verba* require that a military attorney defend an accused, regardless of the attorney's personal wishes, it seems that this is the clear implication from its provisions. Thus, the Manual provides that "The accused shall have the right to be represented . . . by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to Article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel . . . shall, if the accused so desires, act as his associate counsel."[48] The Manual further provides for the detail of specific persons as accused's individual counsel by the convening authority,[49] and declares that "it is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused."[50] (Note here the change of the word "right" in Canon 5 to the word "duty.")

In addition to these provisions in the Manual, there is some case law which indicates that a military attorney must accept all cases to which he is detailed. In *Weintraub's Case*,[51] the Board of Review declared:

> "Accused in acting as Assistant Defense Counsel was unlike a private attorney in that he was carrying out the orders of superior military authority. His duty with respect to that order, as with any lawful order, was to execute it as faithfully and efficiently as he could. . . . This duty was to be performed not for his own private advantage, financial or otherwise, but simply because he was an officer of the United States Army."[52]

It would thus appear that absent statutory[53] or other specific disqualification[54] an order to a military attorney to act as counsel

48 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48a, p. 67.

49 Id. at ¶48b, p. 68.

50 Id. at ¶48c, p. 68. Cf. C.M. 243542, Blank, 28 B.R. 11 (1943), wherein accused was convicted of being drunk "while on duty" as a defense counsel before a special court-martial.

51 C.M. 313891, Weintraub, 63 B.R. 317 (1946).

52 Id. at p. 331. See also C.M. 343792, Krivoski, 12 J.C. 81, 93 (1950). And in HOUGH, PRECEDENTS IN MILITARY LAW, Case 2, pp. 272, 274 (July 17, 1830) (1855), where a surgeon acted "as if he were a medical practitioner, quite free and independent . . . to attend a sick officer of his regiment or not, at his own discretion," it was held that "his position is quite different," and "that he had no more right" to refuse medical services "than he had to discharge any other point of duty." But see WINTHROP, DIGEST OPINIONS JAG 1862-1868, 3d ed., 127, No. 4 (1868); HOWLAND, DIGEST OPINIONS JAG 1862-1912, p. 509, July 1874 (1912).

53 See, for example, U.C.M.J., art. 27 (a) and MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶6a, p. 9, and ¶48b, p. 68.

54 For example, the appointment of enlisted men, non-commissioned officers, or warrant officers as defense counsel has been held to be contrary to custom. Sp.C.M. 1770, Ness,

for an accused would be a lawful order[55] with which the lawyer would be required to comply.

This is not to say that a military attorney may not express his desire to be relieved from defending a particular accused. The Manual specifically requires the defense counsel to report to the convening authority any facts showing that he "is for any reason . . . unable . . . to perform his duties in any case."[56] An unwilling attorney is often an ineffective advocate, and since the enumeration of the specific reasons for disqualification therein stated, e.g., bias, prejudice, hostility toward the accused, are not intended to be all inclusive, it would appear that such a report could properly be made if for any reason the attorney desires to decline the accused's defense.

Furthermore, defense counsel is required to disclose to the accused "any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel."[57] This would certainly encompass his own desire to be excused from the case.[58] The accused may then excuse the defense counsel from the case and request another (as he probably will), since he has the right to object to a defense counsel regardless of the merit of his objections.[59]

The rule requiring defense counsel to take all cases is a salutary one. In civilian practice, a defendant is almost always able, if turned down by one attorney, to secure the services of another. However, with today's shortage of JAG officers, especially at

6 J.C. 345 (1950) (CWO); United States v. Kolbert, (A.C.M.S. 1950) 3 (A.F.) C.M.R. 326 (WO); United States v. Nichols, (A.C.M.S. 1950) 3 (A.F.) C.M.R. 462 (WO); United States v. Goodson, 1 U.S.C.M.A. 298, 3 C.M.R. 32 (1952) (WO); United States v. Zilnick, (N.C.M. 1954) 14 C.M.R. 527 (WO); United States v. Long, 5 U.S.C.M.A. 572, 18 C.M.R. 196 (1955) (NCO). But see HARWOOD, UNITED STATES NAVAL COURTS-MARTIAL 174 (1867), referring to summary (now special) courts-martial: "The court, if requested by the accused, may allow a commissioned, warrant, or petty officer to appear as counsel."

55 The usual cliches on this subject are collected in AVINS, THE LAW OF AWOL 207 et seq. (1957), and in Avins, "The Joker in Jester, The Parris Island Death March Case," 53 N.W. UNIV. L. REV. 33 at 35 (1958).

56 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶46b, p. 66. Final determination of disqualification rests with the attorney's superior, except insofar as the accused objects. Cf. E.T.O. 7270, McDonald, 18 E.T.O. 73 (1945).

57 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48c, p. 68.

58 If such desire stems from matter going to the merits of the case, the attorney would be required to reveal this to the accused under MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48f, p. 69, providing, substantially as Canon 8 does, that "he is bound to give the accused his candid opinion of the merits of the case."

59 C.M. 323234, Mead, 72 B.R. 165 at 172 (1947). Permitting an officer to serve as defense counsel over the accused's objections is reversible error regardless of his guilt or how well counsel conducted the case. C.M.O. 3-1931, p. 14.

isolated installations,[60] it would play havoc with the congressional scheme of providing every defendant with competent counsel to allow military attorneys to pick and choose cases at will. Hence, to assure that all defendants are adequately represented, the apportionment of professional services must be left to the attorney's superior. This is not to say that such superior should, or even may, capriciously refuse the request of an attorney to be excused from a case if the needs of the accused can otherwise be satisfied. Indeed, such an attitude would probably violate the superior's duty of protection to the lawyer as well as the client.[61] Legal representation is not a mere mechanical service which can be performed just as well regardless of the lawyer's personal feelings about the case. Whether to excuse an attorney from a case is a matter requiring the exercise of a sound judicial discretion, similar to that exercised by a judge in excusing an attorney from representing an indigent defendant. Thus, the requirements of Canon 4 should be integrated into this branch of the relationship between a military attorney and his client.

B. *Acceptance of Fees*

Canon 12:

> *"... A client's ability to pay ... may require a less charge, or even none at all. ..."*

The general rule in civilian practice is that an attorney is permitted to charge his client a reasonable fee for his services,[62] but cases of indigent defendants form an exception to this rule.[63] Here, again, the military justice system is geared to the defense of non-affluent defendants, who constitute the major portion of accused before courts-martial. In effect, defense counsel constitute a public defender system, and since they are paid by the government for the services that they render to the accused, they are not permitted to charge the accused fees for these services and thus collect double compensation. One Board of Review has held: "Military counsel, in any event, from the nature of their office which precludes any financial gain for their defense of an accused

60 See "Report of the Committee on the Status of the Lawyer in the Armed Services," 23 J.A.G.J. 17 (1956); "Senator Thurmond Introduces ABA President at Hearings on Incentive Pay Bill," 26 J.A.G.J. 5 (1958).

61 See Avins, "The Joker in Jester, The Parris Island Death March Case," 53 N.W. UNIV. L. REV. 33 at 41 (1958).

62 DRINKER, LEGAL ETHICS 170 (1953).

63 Id. at 172, n. 30; 62, n. 13.

person, are free from imputations of disloyalty which may attach to counsel for hire in similar circumstances."[64]

As early as World War I, it was held that naval officers may not receive fees as counsel before courts-martial.[65] The receipt, or even solicitation, of such fees, was later held to constitute conduct unbecoming an officer and gentleman.[66]

Undoubtedly, the leading case in this area is *Weintraub's Case,*[67] in which the accused was tried and convicted under AW 95 and AW 96 for asking for and receiving money from a defendant before a general court-martial for defending him, although he had been appointed as regular assistant defense counsel of the court.[68] This case is of particular interest because it constitutes the only reported military case wherein an attorney was court-martialed for professional misconduct before a military tribunal.[69] It might also be noted that it has been held in New York that similar activities constitute professional misconduct warranting disciplinary action.[70]

The rule in *Weintraub's Case* has been codified in the *Manual for Courts-Martial,* which now provides: "Military personnel on

[64] C.M. 343792, Krivoski, 12 J.C. 81 at 85 (1950).

[65] NAVAL DIGEST, p. 118, No. 17, Sec. Navy, Feb. 26, 1915; C.M.O. 10-1915, p. 13. See also 18 U.S.C. (1958) §281, forbidding government officers from receiving compensation for services rendered before courts-martial.

[66] C.M. 334866, Schultz, 1 J.C. 321 (1949), application for relief denied, Memo. Op. J.A.G.A. (1949-1950), p. 308 (1950).

[67] C.M. 313891, Weintraub, 63 B.R. 317 (1946).

[68] Id. at 332. "The military duty which he was required to perform was turned by him into an occasion of personal profit. His conduct was in every way comparable to that of a medical officer of the Army who conditioned his treatment of a soldier on the payment of a fee, and just as reprehensible. The fairness and efficiency of the court-martial system is dependent to a large extent on the competency and integrity of the counsel appointed to defend persons accused of violations of the Articles of War. While the latter have the right to retain military or civilian counsel (par. 45, MCM, 1928), in the great majority of cases the counsel appointed by the convening authority is the counsel whose services are utilized. Nothing could dissipate confidence in the impartiality of the system more than a belief among accused that the vigor of their defense was proportionate to the amount of money they could pay their counsel."

[69] See also HOUGH, PRECEDENTS IN MILITARY LAW, Case 2 (July 17, 1830) (1855), wherein a surgeon was court-martialed for demanding a fee for professional services.

[70] See In re Dresnick, 2 App. Div. (2d) 521, 157 N.Y.S. (2d) 23 (1956). Frank H. Gordon, Chief Attorney, Committee on Grievances, Association of the Bar of the City of New York, who handled Weintraub's subsequent disbarment, declared in a letter of August 1, 1958 to this author that the committee "did consider the court martial conviction in taking the action that we did, and we certainly considered that his conduct in the court martial case was professionally improper. Indeed, it is my view that such conduct would justify an order of disbarment provided it was proved in an appropriate hearing." Cited by him to this author as analogous was Matter of Greenberg, 267 App. Div. 530, 47 N.Y.S. (2d) 249 (1944), and Matter of Popper, 193 App. Div. 505, 184 N.Y.S. 406 (1920).

active duty or persons employed by the armed forces shall not solicit or accept fees of any kind from an accused as reimbursement for acting as his counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the code."[71] There has been only one reported case wherein this rule was violated since the uniform code went into effect.[72]

III. DUTY OF ADEQUATE REPRESENTATION

Canon 15:

"... The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. . . ."

The military attorney owes to his serviceman-client the duty of adequate representation.[73] Thus, a number of specific duties are required of him by the *Manual for Courts-Martial*.[74] These will not be taken up specifically, for they are clear and have rarely been the subject of litigation, even indirectly. It is sufficient to say that should any of these duties specifically enjoined be omitted, and should such omission materially and adversely affect the accused's rights in any way, such neglect would probably constitute inadequate representation per se,[75] and might well be reversible error.

A. *The Plight of the Indignant Indigent*

"It has been said," a Judge Advocate General of the Army once remarked, "that it is a favorite game of those convicted of offenses to criticize their counsel. 'The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner.' "[76]

71 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48a, p. 67.

72 United States v. White, (A.C.M. 1953) 7 C.M.R. 764.

73 United States v. Williams, 8 U.S.C.M.A. 552, 25 C.M.R. 56 (1957).

74 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶46d, p. 66; ¶48 (d-j), pp. 69-71.

75 See C.M. 323234, Mead, 72 B.R. 165 at 171 (1947), where the regularly appointed defense counsel was criticized for failing to assist accused in getting civilian individual counsel, as required by the Manual, although accused, by reason of his confinement, required such assistance.

76 C.M. 282005, Wincelowicz, Memo. Op. J.A.G.A. (1949-1950), p. 232 (1950). This author once received a request for representation in which letter the military prisoner declared that the brief of army appellate defense counsel before the Court of Military Appeals was "not worth its weight in Apache currency."

This observation is particularly apposite in our system of military justice, where, because most counsel are appointed for the accused, failure of counsel to represent an accused adequately constitutes a denial of military due process and is reversible error.[77] Hence, when an accused runs short of other reversible errors, he is apt to rely on his counsel's alleged shortcomings for his appeal.[78] This incentive to try one's former counsel has not escaped the attention of the appellate military tribunals, and they are loathe to allow appellate counsel to re-fight lost battles on appellate fields.[79]

Appellate military tribunals have firmly adhered to the rule that mere differences of opinion as to trial tactics or allegations of errors by counsel induced by hindsight do not amount to inadequate representation.[80] The defense counsel is presumed to have performed his duty, [81] and the burden on accused of showing the contrary is not sustained by "the mere fact that his present counsel, upon an analysis in retrospect of the cold record, believes he would either have asked or refrained from asking some question, or would have made some objection differently."[82] To show reversible error, the accused must demonstrate "that the alleged errors on the part of the defense counsel reduced the latter's 'batting average' 'so low' as to make his representation ineffective,"[83] and this may not be

77 Hiatt v. Brown, (5th Cir. 1949) 175 F. (2d) 273, revd. on other grounds 339 U.S. 103 (1950). See AYCOCK AND WURFEL, MILITARY JUSTICE UNDER THE UNIFORM CODE OF MILITARY JUSTICE 133, 193 (1955). Cf. United States v. Smith, 10 U.S.C.M.A. 31, 27 C.M.R. 105 (1958).

78 In United States v. Bigger, 2 U.S.C.M.A. 297, 8 C.M.R. 97 (1953), Judge Latimer said at p. 101: "It is not unusual for losing litigants to lay the blame for their conviction on the doorstep of those who represent them and this case varies little from the usual pattern. The charges are sweeping, but there is no evidence to sustain them."

79 See United States v. Soukup, 2 U.S.C.M.A. 141, 7 C.M.R. 17 (1953) at p. 20.

80 United States v. Hopwood, (A.C.M. 1957), 23 C.M.R. 937; United States v. Bigger, 2 U.S.C.M.A. 297, 8 C.M.R. 97 (1953). In United States v. Day, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953) at p. 57, Judge Latimer held that an accused is not denied the effective assistance of counsel "merely because appellate counsel could suggest different trial tactics than those used by trial counsel." Likewise, in C.M. 337951, Lawrence, 5 J.C. 397 (1950), at p. 420, it was held: "The fact that counsel on appeal do not agree with the tactics employed at the trial affords no ground for invalidating the proceedings." And in C.M. 307465, Danker, Memo. Op. J.A.G.A. (1949-1950), p. 184 (1950) at p. 189, the Judge Advocate General held: "The fact that later counsel, with the benefit of the entire written record before him, might discover some points upon which his defense would differ from that of counsel at the trial, does not necessarily indicate that trial counsel's methods are to be criticized." Cf. C.M.O. 4-1937, p. 16, holding that accused's testimony may not be stricken merely because his new counsel thinks that his former counsel employed bad strategy in putting accused on the stand.

81 C.M.O. 9-1936, p. 24.

82 Ex parte Steele, (M.D. Pa. 1948) 79 F. Supp. 428 at 431.

83 United States v. Nicholson, (A.C.M. 1952) 4 C.M.R. 519 at 531. And in C.M. 296129, Stevenson, Memo. Op. J.A.G.A. (1949-1950), p. 408 (1950) at p. 411, the Judge Advocate General declared that an accused "is entitled only to a fair trial and not to a perfect trial."

done by charting a new route for counsel below which shows how pitfalls could have been avoided, obstacles overcome, and the accused extricated from his predicament.

It would appear that the error which will overthrow a conviction must be different in kind, rather than degree, from those which all counsel are wont to make on trial. The appellate military tribunals adhere to what may be termed the "shocking error" rule.[84] While counsel must endeavor to keep the accused's defense as watertight as possible, he cannot be condemned for not doing a perfect job. Only when counsel has committed a gross error has the accused been inadequately represented. A federal district court has observed:

> "Nor does the Constitution guarantee the assistance of the most brilliant counsel. To entitle petitioner to relief on this ground there must be such a neglect of duty '. . . as to make the trial itself "offend those canons of decency" which constitute due process of law,' or an extreme case which would make the proceedings 'a farce and a mockery of justice.' "[85]

In spite of the above admonitions to appellate counsel, military appellate tribunals do from time to time reverse cases because of the unskillfulness of trial counsel below, following the old and oft-quoted statement of the Acting Judge Advocate General in *Osman's Case*[86] that "the rule of the courts of common law, both civil and criminal, that a party has no relief against errors, omissions, or poor judgment of his counsel, can have but a limited application in court-martial practice, where the majority of counsel are not learned in the law, and where it is the duty of everyone connected with the administration of military justice, and not least my own, to see that the rights of every accused are adequately protected."[87] Since, therefore, failure of trial counsel to represent an accused adequately is reversible error on appeal, it becomes the duty of defense counsel to his serviceman-client on appeal to urge this point as error in proper cases, and failure to urge this where

[84] In United States v. Hunter, 2 U.S.C.M.A. 37, 6 C.M.R. 37 (1952), the court, at p. 41, held: "After appointment of counsel, as required by the Code, an accused, if he contends his rights have not been fully protected, must reasonably show that the proceedings by which he was convicted were so erroneous as to constitute a ridiculous and empty gesture, or were so tainted with negligence or wrongful motives on the part of his counsel as to manifest a complete absence of judicial character. . . . Many records reflect examples of doubtful trial tactics but counsel cannot be censored for not adopting the best."

[85] Ex parte Smith, (M.D. Pa. 1947) 72 F. Supp. 935 at 939-940.

[86] C.M. 200989, Osman, 5 B.R. 11 (1933).

[87] Id. at 39. See also C.M. 210404, Cameron, 9 B.R. 265 at 270 (1938).

warranted would constitute inadequate representation of the accused on appeal. The question then becomes, in what types of cases is giving vent to the indignant feelings of the client warranted?

B. *The Self-Appointed Prosecutor*

Canon 15:

> *"... In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. . . ."*

Probably the oldest and best-settled type of inadequate representation which can be rendered by defense counsel is that performed by the self-appointed prosecutor. The earliest cases of this kind which are reported are a line of naval cases, in which the prosecution rested without having introduced any evidence or sufficient evidence to make out a prima facie case, and in which, therefore, a defense motion to dismiss the case would have to have been granted at the close of the prosecution's case. At that point, however, the defense counsel, instead of making such motion, proceeded to put the accused [88] or another witness[89] on the stand, and elicit from such witness or the accused enough testimony to make out a prima facie case for the prosecution. Indeed, in several of these cases, conviction rested upon the accused's judicial admissions alone.[90]

Cases of the above type have been consistently reversed. Labeling this manner of establishing a prima facie case "very irregular," an early case declared that it "points towards a careless performance of duty on the part of . . . the counsel for the accused."[91] A later case warned that "at no time should the counsel for the accused attempt to establish elements of the offense which the prosecution is required to prove in order to support its case,"[92] for, as another

88 C.M.O. 1-1931, p. 31; C.M.O. 7-1931, p. 18; C.M.O. 1-1932, p. 12; C.M.O. 1-1942, p. 157; C.M.O. 1-1944, p. 52; C.M.O. 3-1944, p. 432.

89 C.M.O. 12-1922, p. 7. See also Letter of Gen. S. T. Ansell to Senator Chamberlain, 66th Cong., 1st sess., 58 CONG. REC. 3943 (1919): "A second lieutenant as counsel made no effort to assist. That they were hindered rather than helped in their defense by counsel is demonstrated by the fact that in the case where a plea of guilty was entered the sole effort of counsel consisted of his calling a witness and asking him this question: 'Q. Was the accused's record good up to this time?—A. It was not. It was one of the worst in the company.'"

90 C.M.O. 1-1931, p. 31; C.M.O. 7-1931, p. 18; C.M.O. 1-1942, p. 157.

91 C.M.O. 12-1922, p. 7.

92 C.M.O. 1-1932, p. 12.

case noted, this would result "in the accused being deprived of the defense he was entitled to have and, in effect, being opposed by two prosecutors."[93] The Judge Advocate General of the Navy has held:

> "Counsel, by attempting to prove as facts allegations of the specification which it was the recorder's duty to prove, failed in his duty to protect the accused's interests. If the procedure followed in this case were allowed to pass unnoticed it would tend to destroy the confidence which an enlisted man should feel in the competency of an officer to represent him as counsel before a court-martial."[94]

A closing statement by defense counsel containing similar error was handled in a like manner.[95]

The first army case of this kind is not in reality a self-appointed prosecutor case, but rather a court-appointed prosecutor case, for counsel, representing four co-defendants, was forced to abandon the interests of one to save the other three. The Board of Review, however, in reversing the conviction of the defendant whose interests were sacrificed, properly treated the situation as similar to those noted above. It declared:

> "It is thus clear that the defense counsel was nothing other than a self-imposed prosecutor as far as the rights and privileges of accused Kozo were concerned and that the latter was deprived of counsel. . . . Obviously it would be prejudicial error to try an accused under military law without a defense counsel; hence, all the more reason for error when it is clearly shown that the appointed defense counsel acted as a prosecutor in fact. Failure on the part of the court to grant a severance, when it became apparent that the defense counsel planned to convict Kozo in order to acquit the other accused, resulted in fatal error."[96]

In the next case, however, counsel's "helpfulness" was purely of his own making. In *Gardner's Case*,[97] the accused was charged with desertion, which was terminated by apprehension. After proving only the initiation and termination of the AWOL, the prosecution rested, whereupon defense counsel pointed out that the prosecution had failed to prove that the accused was appre-

[93] C.M.O. 1-1944, p. 52. See also C.M.O. 3-1944, p. 432.

[94] C.M.O. 1-1931, p. 31.

[95] C.M.O. 8-1921, p. 10 (a hair-raising case).

[96] C.M. 194997, Elberson, 2 B.R. 173 at 178 (1931). To the same effect, see United States v. Pawlik, (C.M. 1951) 2 C.M.R. 248.

[97] C.M. 320618, Gardner, 70 B.R. 71 (1947).

hended. He offered to stipulate that the facts contained in the delinquency report were true, although it contained not only a report of apprehension but also the other incriminating facts that accused had committed other crimes, had held a civilian job, and used an alias. The stipulation was agreed to between the prosecution and defense. The report would have been inadmissible in the absence of stipulation, and the facts therein could probably not have otherwise been proved. The Board held that this performance constituted reversible error.[98]

The Board further held that although the evidence of desertion was strong, it was not conclusive, and defense counsel's conduct in introducing otherwise incompetent incriminating evidence shut the door on any possibility of a finding of the lesser included offense of AWOL, and thus directly aided the prosecution. Finding no excuse for this action, it characterized counsel's conduct as bordering on a "lack of good faith." It further stated:

> "It can not be implied from the foregoing authorities that a conviction should be set aside in every case where the record discloses mistakes or lack of skill on the part of the defense counsel. . . . But where the *disloyalty* or *gross carelessness* of defense counsel *directly aids* the prosecution, the conviction should be set aside."[99]

Another example of a "well intentioned act . . . incompatible with [defense counsel's] duty to protect the accused"[100] by assisting the prosecution "in curing an oversight" is found in a pre-code case wherein the prosecution, after a finding of guilty, offered evidence of only four previous convictions. The defense counsel volunteered that he thought "the prosecution intended to submit evidence of five previous convictions," whereupon the court ordered the trial judge advocate to add the fifth conviction, and gave the accused a stiffer penalty based thereon. The Board found no difficulty in reducing the penalty and holding that counsel had failed in his duty. The advent of the uniform code has not completely done away with this. In *United States v. Boese*,[101] after the trial counsel announced that there was no evidence of previous convictions, defense counsel suggested that records on previous

98 The Board, in a very considerable understatement, noted, "It is apparent that there was nothing in the Report of Arrest which could possibly be considered as beneficial to the accused in any way." Id. at 74.

99 Id. at 78. This was quoted with approval in C.M. 341604, Tilley, 7 J.C. 171 at 181 (1950).

100 C.M. 328104, Best, 76 B.R. 281 at 283 (1948).

101 (A.C.M.S. 1952) 6 C.M.R. 608.

convictions should be checked. The court had this done and awarded a bad conduct discharge based on the two convictions thereby unearthed. The fruits of this search, too, were held to be not properly before the court, and the discharge was set aside.

The doctrine of the self-appointed prosecutor cases applies also to a special situation where the defense counsel is actually trying to defend the accused by proving the commission of the offense. In such a case, the appellate military tribunal will search the record to determine that such a plan remained within the bounds of plausible trial tactics and did not unjustifiably risk the accused's position. A good example of such unwarranted risk is *United States v. Fenoff*.[102] In this case, on the basis of a misapprehension as to the effect of an Executive Order on the statute of limitations, the inexperienced defense counsel (not a lawyer) attempted to prove the date of the accused's AWOL to sustain a plea in bar. His overzealous action, while the law member neglected to rule on the point, resulted in his presentation of evidence of the accused's commission of AWOL, "thereby gratuitously becoming the accused's prosecutor,"[103] and for this the case was reversed.

C. *Prejudicial Admissions*

A second category of cases in which representation is held to be inadequate is that wherein the defense unjustifiably makes prejudicial admissions.

The earliest prejudicial admission case is also a naval one, in which a judgment was held to be void because of extensive and material admissions made by defense counsel which constituted a confession of the facts of the case equivalent to a plea of guilty.[104] But in one of the first army cases reported, the fact of the "rejection by defense counsel of accused's explanation on the witness stand to the effect that he went absent without leave in order to avoid transfer to Fort Kamehameha, by saying in his closing argument 'Sanderson got scared and went absent,' thus in effect suggesting that he went away because of a guilty conscience" was

[102] (A.C.M. 1950) 2 (A.F.) C.M.R. 574.

[103] Id. at 580. See also C.M.O. 1-1932, p. 12; United States v. Gardner, 9 U.S.C.M.A. 48, 25 C.M.R. 310 (1958).

[104] C.M.O. 30-1918, p. 17. See also C.M. 332704, Bilbo, 81 B.R. 185 at 190 (1948), where "the only competent evidence adduced during the trial showing accused's initial absence without leave was through admissions of his defense counsel." But cf. C.M.O. 8-1929, p. 8, holding that immaterial admissions by counsel subsequently confirmed in accused's testimony did not invalidate the proceedings.

merely termed a "noteworthy irregularity" which had to be considered with other similar defects and a weak case against the accused to justify reversal.[105]

The first well-known prejudicial admission situation is found in *Howard's Case*,[106] in which the accused was charged with murder. During the course of the trial, counsel moved to stop the trial on the grounds that the defendant was mentally incapable of assisting in his own defense. To support this assertion, counsel made an argument to the court which included the statement that "He told me two or three stories, none of which agree with one another. I can't even say that they are plausible." In predicating a reversal on this ill-advised advocacy, the Board of Review held:

> "It is difficult to conceive of anything more nearly fatal to the rights of an accused than for the court to hear from his defense counsel, who has received the confidences of accused, a statement to the effect that he had no plausible or consistent defense. This was little short of pleading guilty to a capital charge over the protests of the accused he was appointed to represent, who had previously entered a plea of not guilty."[107]

The tendency of this statement to undermine the entire defense of the accused was also noted by the Board, for it declared that although the evidence of murder was strong, accused might have explained it had he testified. However, he remained silent after these remarks, a fact which the Board attributed to the above statement. Thus the Board concluded:

> "Here, while accused was given the opportunity to testify, his counsel had already 'put two strikes against him' and virtually admitted to the court that accused had no plausible defense. This error on counsel's part is so grave that it stains the entire record and trial and it cannot be wiped out by a mere weighing of the evidence admitted."[108]

The rationale of *Howard's Case* has been followed in more recent cases decided under the code. Thus, where counsel conceded knowledge of a regulation although the accused had pleaded not guilty to a charge of failure to obey it and testified in support of such plea, the Court of Military Appeals reversed the convic-

[105] C.M. 194200, Sanderson, 2 B.R. 125 (1931).
[106] E.T.O. 13222, Howard, 26 E.T.O. 197 (1945), approved, E.T.O. 18250, Spain, 33 E.T.O. 305 (1946).
[107] Howard, id. at 203.
[108] Id. at 205.

tion.[109] Likewise, a statement by defense counsel that accused should be given a bad conduct discharge because he needed more money than he was getting from the service and hence would steal again was held to be reversible error.[110] And the Court of Military Appeals has also held that after civilian counsel conducts a vigorous defense on the merits, a gratuitous concession of guilt, although coupled with a plea for clemency, by the defense counsel is error prejudicial to the accused's rights.[111] In all of these cases, the statement of defense counsel tended to undermine the accused's position, and hence was inconsistent in fact with counsel's duty of adequate representation.

However, the statement complained of must be actually, and not just possibly, inconsistent with advocacy of the accused's overall position. Like any good strategist, defense counsel may give ground in particular sectors to advance the accused's cause as a whole. Counsel's battle plans must be looked at in their entirety. What may look like an unjustified retreat in isolation may in fact be a soundly planned strategic withdrawal from an untenable position.

Because of the above considerations, there is an exception to the prejudicial admissions rule, that counsel may admit damaging material where the totality of the effect is not harmful to the accused's case taken as a whole. For example, in *United States v. Gagnon,*[112] defense counsel admitted that accused was drunk, one of the offenses charged. However, his line of attack was to use the accused's condition to refute the much more serious charge of disrespect to a superior officer. In addition, drunkenness was not refuted, and even the accused himself admitted heavy drinking. The Board of Review held that the risk taken was not inconsistent with effective advocacy of accused's position. A like result was reached where counsel made an attempt, apparently successful, to get a short term of confinement for the accused by picturing him as a weak character.[113]

Counsel is also permitted to make admissions where a denial would be in reality wholly untenable. In thus conceding what cannot fairly be denied, he establishes his candor before the court,

[109] United States v. Smith, 8 U.S.C.M.A. 582, 25 C.M.R. 86 (1958).
[110] United States v. Lam, (A.C.M.S. 1954) 17 C.M.R. 697.
[111] United States v. Walker, 3 U.S.C.M.A. 355, 12 C.M.R. 111 (1953).
[112] (A.C.M.S. 1952) 6 C.M.R. 778.
[113] United States v. Malanaply, (A.C.M.S. 1953) 10 C.M.R. 883. Cf. United States v. Harrison, 9 U.S.C.M.A. 731, 26 C.M.R. 511 (1958).

upon which he may then press his really meritorious points. Thus, for example, in one case the defense counsel aggressively and impressively presented the accused's case and, after findings of guilty, also presented mitigating circumstances. It was urged as error that in the course of the latter presentation he stated that the accused should be punished for his offenses, but the representation was nevertheless held adequate.[114] Likewise, where proof of guilt was overwhelming, it was held not improper for the defense counsel, in his closing statement, to concede this and plead for mercy.[115] In both of these cases, had counsel done the vain act of denying the obvious, it could not only not have aided the accused, but also it might have cast doubt on the meritorious aspects of accused's case. By conceding what was already clear, counsel was enabled to focus attention on his really tenable contentions. Such action is permissible.

Finally in two cases, where admissions were made whose damaging effect was problematical, Boards of Review applied the presumption of regularity and the lack of traceable prejudicial effect to find that no error was committed.[116] It thus appears that the making of damaging admissions constitutes inadequate representation per se unless their helpful effect or at least lack of harmful effect can be reasonably demonstrated.

D. *Excessive Stipulations and Inadequate Objections*

Canon 5:

> *"... Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law. . . ."*

Another category of cases in which inadequate representation is often found is that in which the defense counsel has entered into an excessive number of stipulations or failed to make objection to the introduction of objectionable evidence. Often, these defects go hand in hand in the same case, and they tend to deprive the accused of the effective assertion of all of his defenses.

"Defense counsel," one Board of Review has pointed out, "should take care that he does not stipulate his client out of the

114 United States v. Cupp, (A.C.M. 1957) 24 C.M.R. 565.

115 United States v. Otero, (A.C.M. 1953) 8 C.M.R. 795.

116 United States v. Patrick, (C.M. 1952) 7 C.M.R. 278; United States v. McCune, (A.C.M. 1955) 18 C.M.R. 798.

service with a bad conduct discharge or into confinement."[117] Thus, the making of improvident stipulations[118] and a failure to withdraw a stipulation as to an essential element of an offense although accused denied the facts therein in his testimony,[119] along with other evidence of inadequate representation, has been held to be grounds for reversal.

A good example of excessive stipulation is contained in *United States v. Branigan*.[120] In this trial for missing movement, the prosecution introduced purported depositions of two enlisted men concerning knowledge of the estimated sailing time of the accused's vessel. Both depositions were unsigned, not under oath, and otherwise so lacking in official character as to amount to "merely unsigned pieces of paper." However, not only did defense counsel fail to object to the admission of these pseudo-depositions, he apparently stipulated that had the alleged deponents been present in court they would have testified substantially as these documents set forth. In the same case defense counsel not only failed to object to a Duty Schedule on hearsay grounds, but also stipulated this in. Thus, all the evidence on this charge was either adduced or stipulated by the defense. In reversing as to this part, the Board declared:

> "Military defense counsel who fails to exert every lawful effort in furtherance of his client's rights and privileges, technical or otherwise, is himself flaunting the will of Congress and the order of his Commander-in-Chief. . . . In the instant case, military defense counsel handled his client's interests badly."[121]

Likewise, failure to make proper and timely objections has been held by several army cases to show inadequate representation.[122] Thus, when counsel failed to object to incompetent evidence,[123] or failed to object to an inadmissible confession,[124] or did not persist in a valid objection and obtain a ruling from the

[117] United States v. Branigan, (C.G.C.M.S. 1952) 3 C.M.R. 515 at 518.

[118] E.T.O. 4756, Carmisciano, 13 E.T.O. 263 (1945).

[119] E.T.O. 4564, Woods, 13 E.T.O. 37 (1945).

[120] United States v. Branigan, (C.G.C.M.S. 1952) 3 C.M.R. 515.

[121] Id. at p. 519. But see United States v. Colbert, (A.C.M. 1951) 1 C.M.R. 811, where it was held that entering into stipulations does not constitute inadequate representation when the matters are easy to prove and when an intelligent accused (a sergeant) consents.

[122] C.M. 325107, Shatzer, 74 B.R. 83 (1947).

[123] C.M. 332704, Bilbo, 81 B.R. 185 (1948); E.T.O. 4756, Carmisciano, 13 E.T.O. 263 (1945).

[124] C.M. 317691, Plummer, 67 B.R. 41 (1946).

law member,[125] he "failed in his duty of protecting the accused from the admission of incompetent evidence against him."[126] So also a naval case determined that where counsel for the accused failed to exclude a considerable volume of hearsay, biased opinions of obviously prejudiced witnesses, and evidence of circumstances of doubtful relevance, the conviction would be reversed and a new trial ordered although there was sufficient evidence in the record to sustain the findings.[127] A federal court has also concurred in the view that a repeated and unjustified failure to take timely objections tends to show that defense counsel is "ineffective" and "inept," and hence has failed in his duty to represent the accused adequately.[128]

In addition to a failure to object to evidence adduced by the prosecution, representation may be inadequate for failure to protect the accused from convicting himself.[129] Thus, in a World War II case from the China Theater of Operations, the accused, although not on the stand, was examined by the law member and forced to give evidence against himself, an interrogation invited by the defense counsel. The Assistant Judge Advocate General, in holding that the privilege of self-incrimination was not waived, declared:

> "The fact that defense counsel joined in the proceedings and helped to develop this inadmissible testimony only further serves to show the lack of proper defense. It has been held more than once that accused will not be made to suffer for the incompetence and unskillfulness of defense counsel."[130]

So important have military courts considered the making of proper objections in the effective representation of the accused that they frown upon having defense counsel used as a witness for

125 C.M. 200989, Osman, 5 B.R. 11 (1933).

126 Id. at 39.

127 C.M.O. 2-1939, p. 205. See also C.M.O. 5-1949, p. 110: "On cross-examination the accused was asked approximately 27 questions which could have been challenged as either double, harassing and difficult to understand, or repetitious and argumentative. No objection whatsoever was taken, and there is no explanation in the record of counsel's failure to protect the accused."

128 Hayes v. Hunter, (D.C. Kan. 1948) 83 F. Supp. 940. But see ex parte Smith, (M.D. Pa. 1947) 72 F. Supp. 935.

129 See C.M.O. 3-1944, p. 432. And in United States v. Branigan, (C.G.C.M.S. 1952) 3 C.M.R. 515, the Board said at p. 519: "Prior to this, defense counsel had set the stage for the Court's examination by his examination of accused on matters which he argued bore on the intent required to be shown. The irony of this becomes more apparent when it is recognized that defense counsel opened this door over vigorous objection of trial counsel that the line of examination had no bearing on the elements of the offense."

130 C.M. I.B.T. 622 (C.T. 37) Shim, 3 C.B.I.-I.B.T. 111 (1945) at 131.

the prosecution even in formal matters where no question of attorney-client privilege is involved.[131] The principal reason for this is that the lawyer's testimony could be objectionable, and yet counsel, being on the stand, might be precluded from properly safeguarding accused's rights.[132] An excellent illustration of this danger is contained in an old naval case wherein the only evidence against the accused was that given by his counsel as a witness for the prosecution in response to two leading questions asked by the judge advocate which amounted to nothing more than his telling the witness what to say concerning the same conclusion of fact contained in the specification. It was held that the duty of adequate representation had not been discharged, as counsel had failed to exclude his own objectionable testimony.[133] Thus, a finding that accused was not adequately represented may be based on unjustified failure to object to incompetent evidence or entering into unwarranted stipulations.

E. *Cumulative Ineptness*

Aside from the above specific actions which demonstrate that the representation below was inadequate, military appellate tribunals, in testing for inadequacy of representation, appear to follow the rule of cumulative ineptness or ineffectiveness. Thus, although one slip is not generally enough to show inadequacy, a number of them, added together, may be sufficient to require reversal.

Some slips are such egregious errors as to make the entire performance of counsel suspect. Thus, where counsel entered a plea of guilty to AWOL on accused's behalf and in the very next breath moved for a continuance on the ground that accused was not in fact absent without leave during the period charged to which he had just pleaded the accused guilty, it was held that "this demonstration of inaptness and disregard for detail related directly to the substantive issues before the court for adjudication and at the outset manifestly denied to the accused his right to a fair and intelligent presentation of his defense."[134] A similar conclusion was reached where counsel allowed the accused to plead not guilty to a specification and yet guilty to the charge of the

131 United States v. Thomas, (A.C.M.S. 1954) 18 C.M.R. 610.
132 C.M.O. 3-1943, p. 22.
133 C.M.O. 12-1923, p. 6.
134 C.M. 332704, Bilbo, 81 B.R. 185 (1948).

same offense.[135] And where the non-lawyer defense counsel objected to trial counsel's reading a definition from *Black's Law Dictionary* on the ground that trial counsel was not a lawyer "in the sense of Article 27, and in my opinion he cannot quote law," this indicated a complete lack of familiarity with court-martial procedure and tended to show a lack of effective representation.[136]

Aside from such patent errors, an appellate tribunal will consider the whole record made below to determine whether representation, taken as a whole, is inadequate. In such a search, there are a number of factors which will weigh in the balance.

For example, lack of preparation of the case will be considered as an indicia of the failure of counsel to perform his duty toward the accused.[137] Thus, in *United States v. McFarlane*,[138] Chief Judge Quinn, concurring in a reversal, noted that "defense counsel here conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had."[139]

Failure to challenge a member of the court who is subject to challenge, when sound trial tactics would indicate doing so, is evidence of deficient representation.[140] Thus, failure to examine members of a court specially appointed for the case on voir dire was criticized where there were areas worth probing.[141]

Probably the most popular ground for urging on appeal that representation below was inadequate is alleged deficiencies in cross-examination, and it is probably the least persuasive, for nothing is more likely to create differences of opinion among even experienced trial lawyers in the same case as when, where, and how to cross-examine. Thus, while a patently unjustified failure

135 C.M. 315877, Ellis, 65 B.R. 151 (1946). See also Letter of Gen. S. T. Ansell to Senator Chamberlain, 66th Cong., 1st sess., 58 CONG. REC. 3944 (1919): "This accused was also defended by worse than no counsel. . . . [H]e pleaded 'to the specification, not guilty; to the charge, guilty.'" And see p. 3943, where accused pleaded guilty and then made a statement completely inconsistent with his plea, but counsel failed to move to have his plea changed. It was held, "This is an excellent example of a meaningless trial. The accused had no counsel worthy of the name."

136 United States v. Wallace, (A.C.M.S. 1953) 10 C.M.R. 937.

137 Hiatt v. Brown, (5th Cir. 1949) 175 F. (2d) 273, revd. on other grounds 339 U.S. 103 (1950); Sp.C.M. 716, Aaron, 4 J.C. 461 at 463 (1949); United States v. Wallace, (A.C.M.S. 1953) 10 C.M.R. 937; United States v. Parker, 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955). But see United States v Wilson, 2 U.S.C.M.A. 248, 8 C.M.R. 48 (1953), holding that the mere fact that counsel consulted with the accused only once prior to trial for ten minutes did not show inadequate representation as accused may be able to contribute little and counsel may have otherwise prepared the case.

138 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957).

139 Id. at 324.

140 C.M.O. 5-1949, p. 110.

141 United States v. Parker, 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955).

to cross-examine will subject counsel to criticism,[142] appellate courts are slow to referee this aspect of trial tactics and require a very strong showing indeed before they will hold that counsel was deficient in this respect.[143] Appellate courts are not insensible to the fact that there are many quite hostile witnesses whom it is better not to cross-examine at all and others against whom only limited cross-examination will be fruitful.[144] Nothing could be more erroneous than to think that the effectiveness of counsel is directly proportional to the number of questions he asks,[145] and hence an allegation of error based on failure to cross-examine is likely to succeed only in extreme cases.

While appellate counsel is unlikely to get much mileage out of an attack on the adequacy of cross-examination below, he will generally fare much better upon a showing that the trial attorney failed to present a defense which the accused had, or neglected to offer available matter in mitigation, for it seems that appellate military courts are quite receptive to this type of argument.[146] Thus, where accused was tried for desertion, counsel not only failed on direct examination of the accused to rebut an inference of intent to desert, but after a vigorous cross-examination failed to conduct a redirect examination to clarify the confused picture then existing. The Judge Advocate General of the Navy, in ordering a new trial for this and other errors, declared that "it is the duty of the naval counsel to present to the court every lawful defense available to the accused . . . [and here it] is clear that counsel did not appreciate his duties, and . . . there is a grievous departure

142 United States v. Wallace, (A.C.M.S. 1953) 10 C.M.R. 937; C.M. 194200, Sanderson, 2 B.R. 125 (1931) ("failure of counsel to cross-examine this sole prosecution witness on the vital matter of identification as to which the proof was not satisfactory").

143 United States v. Nelson, (A.C.M.S. 1953) 9 C.M.R. 736; Ex parte Smith, (M.D. Pa. 1947) 72 F. Supp. 935.

144 See: Von Moschzisker, "Some Maxims for Cross-Examination," 3 PRACTICAL LAWYER 78 (Dec. 1957); Popham, "The Art of Cross-Examination and Trial Strategy," 22 UNIV. KAN. CITY L. REV. 217 (1954); Stryker, "Cross-Examination," 2 BUFFALO L. REV. 45 (1952); McCormick, "Scope and Art of Cross-Examination," 47 N.W. UNIV. L. REV. 177 (1952).

145 United States v. Soukup, 2 U.S.C.M.A. 141, 7 C.M.R. 17 (1953).

146 Hiatt v. Brown, (5th Cir. 1949) 175 F. (2d) 273 (token defense); E.T.O. 4564, Woods, 13 E.T.O. 37 (1945) (no defense or mitigation); United States v. Parker, 6 U.S.C.M.A. 75, 19 C.M.R. 201 (1955) (no defense on merits or as to involuntary nature of confession and no attempt to avoid death penalty); United States v. McFarlane, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957) (no defense, little mitigation); United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957) (no mitigation); United States v. Armell, 8 U.S.C.M.A. 513, 25 C.M.R. 17 (1957) (same); United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958) (defense not presented). But see United States v. Friborg, 8 U.S.C.M.A. 515, 25 C.M.R. 19 (1957) (representation adequate); United States v. Beddingfield, (A.C.M. 1956) 22 C.M.R. 840 (defense not sustained by the facts); United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956) (no mitigation).

from the standards required of counsel to the manifest detriment of the accused."[147] Likewise, failure of defense counsel to introduce corroborative evidence of alibi, which accused informed him was available, and which would have constituted a complete defense, in one case,[148] and failure to make any effort to procure the testimony of the only defense witness, or to assert a plea in bar in another,[149] was characterized as inadequate representation by Army Boards of Review.

Of course, this is not to say that every failure of counsel to put a potential defense witness, and especially the accused, on the stand to testify, or otherwise to present unlikely but possible defenses, will constitute inadequate representation.[150] The question is one of effect upon the case as a whole, and unless the counsel during trial was so wrong that the deficiency was crystal-clear, his determination may not be criticized.

One particular facet of counsel's duty to present all of the accused's defenses remains to be noted. While military law does not permit, much less require, the defense counsel to violate accepted standards of the civilian bar in presenting the accused's case,[151] counsel is required to urge every point which may be fairly urged in accused's behalf, although such action brings him into disfavor with his military superiors.[152] Thus, the Court of Military Appeals has declared that a defense counsel who fails to urge as a defense

147 C.M.O. 5-1949, p. 110.

148 C.M. 194200, Sanderson, 2 B.R. 125 (1931).

149 C.M. 315877, Ellis, 65 B.R. 151 (1946). See also United States v. Marshall, 2 U.S.C.M.A. 54, 6 C.M.R. 54 at 58 (1952): "The brief, almost summary, record of trial resulting in conviction and imposition of the death sentence indicates a lack of effort on the part of defense counsel, and a lack of appreciation of the rights of these accused."

150 See United States v. Castillo-Acevedo, (C.M. 1953) 12 C.M.R. 318 at 324.

151 C.M. 240753, Shapiro, 26 B.R. 107 (1943), approved on the merits, Shapiro v. United States, 107 Ct. Cl. 650, 69 F. Supp. 205 at 207, n. 1 (1947) (putting impostor in accused's place); C.M.O. 10-1936, p. 3 (fabrication of evidence).

152 See C.M.O. 6-1946, p. 218, where it was held that when defense counsel's superiors discouraged him from too vigorously defending the accused, the proceedings would be reversed regardless of accused's guilt. And in United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956), Judge Latimer declared at p. 39: "Because of the emphasis placed by military commanders on the desirability of speedy trials in homicide cases, appointed defenders are placed in an awkward and sometimes embarrassing position. Many times a request for a continuance is frowned upon by military commanders as being merely delaying tactics. Some convening authorities give too little thought to the basic requirements of preparation, particularly of capital cases, and defending counsel by seeking time to prepare his defense may incur the disapprobation of his command superior. However, he has a solemn duty to defend unreservedly the interests of the accused he has sworn to protect, and fear of disfavor should not deter him from using all honorable means to protect his client's cause. No system of justice can flourish if the representation afforded an accused person is to be neglected because of fear of reprisal. Nor can military justice succeed if those officers who must defend an accused inadequately protect him because they dare not assert every right guaranteed him by the Code."

command control about which he knows clearly violates his duty as a defense counsel.[153]

This present rule represents a distinct departure from the rule formerly in effect in the armed services that defense counsel's presentation of accused's case was limited by the admonition that it be "not inconsistent with military relations."[154] The only case found which follows the spirit of this proviso is a naval case of pre-World War II vintage.[155] Here, an enlisted man was tried by order of the Secretary of the Navy upon three specifications under the general article. Counsel objected to the charge at the opening of the trial and again at the close of the case on the ground that the accused had been deprived of his rights to a speedy trial, and the court acquitted the accused. The Judge Advocate General remarked that he considered as improper that part of the argument by counsel for the accused relative to the merits of the case and delay in bringing the accused to trial. Concurring, the Chief of the Bureau of Navigation declared:

> "It is understood that the counsel owes to the accused warm zeal in the maintenance and defense of his rights, and also owes to the accused the exertion of his utmost learning and ability, but it is the opinion of this Bureau that you have gone beyond the bounds of what is expected in behalf of the accused in that you have severely criticized those persons in the service upon whom devolved the duty of preparing the specifications and in expediting the Government's business in the preparation of the case for trial. You have been severely critical not only of the speed with which the accused was brought to trial and you have gone so far as to attack the fairness of the trial in view of the delay.
>
> "The Bureau cannot condone your conduct, and you are cautioned to exercise more care and to use better judgment in the future.
>
> "Acknowledge the receipt of this letter, a copy having been placed with your official record."

It appears clear that in light of developments since the code was passed, the above case is not only no longer the law but that today counsel would be praised for and required to present to the

153 United States v. Borner, 3 U.S.C.M.A. 313, 12 C.M.R. 69 at 71 (1953). While such neglect must certainly damage counsel's reputation as a lawyer, it is startling doctrine that it affects his credibility as a witness.

154 Notes 26 and 43 supra.

155 C.M.O. 6-1938, p. 7. But see C.M.O. 101-1903, p. 6, referring to the "commendable zeal of counsel."

court evidence that accused's constitutional rights to a speedy trial were violated, although such violation had the sanction of superior officers. Indeed, the very highest traditions of the bar, as embodied and expressed in those cases which form the cornerstone of the Anglo-American concept of liberty under law, is the fearless protection by a lawyer of his client who is the victim of oppression by people in power. Such protection, if anything, is even more necessary in the military, where traditional safeguards of representative government against official oppression are lacking. In thus assimilating the duties of defense counsel in this area to those of civilian attorneys, recent legislative and judicial pronouncements made more useful the function of the military attorney, for while instances of official oppression will be few in America's modern armed services, with their democratic traditions, they are made rarer still by the vigilance of an alert military bar.

Of course, this is not to say that counsel's duty to the accused requires him to give vent to all of accused's grievances, real or fancied, against his superiors. A court-martial is not a grievance committee, and any attempt to make it into a forum for general criticism of accused's superiors or the service as a whole is bound to boomerang. Indeed, counsel's duty of adequate representation requires him to admonish the accused to stick to the case at hand while on the stand. It is only where criticism of superiors is an unavoidable part of the full presentation of accused's defense or case in mitigation that it should be indulged in.

Finally, the duty of adequate representation may not be discharged when counsel fails to present to the court a closing argument, analyzing and summing up the evidence, especially in an important and complex case.[156] Thus, in a capital case, after trial counsel, "in a lengthy and able closing argument, drummed into the minds of the fact-finders many of the inferences which could be drawn from the Government evidence," the defense counsel failed to present any closing argument at all. Noting that, except in unusual circumstances, failure to argue "is for all practical purposes an admission of guilt," Judge Latimer declared that "the presentation of a 'jury argument' is a virtual cornerstone of the universal right to assistance of counsel,"[157] and for this, coupled with other deficiencies in counsel's performance, reversed the conviction.

[156] C.M. 200989, Osman, 5 B.R. 11 at 39 (1933). See also United States v. Wallace, (A.C.M.S. 1953) 10 C.M.R. 937.

[157] United States v. McMahan, 6 U.S.C.M.A. 709, 21 C.M.R. 31 at 43 (1956).

F. *The Test of Adequacy*

From the cases which have been discussed above, it can be seen that there is no hard and fast test for adequacy of representation. Whether representation of the accused was adequate or not depends upon the performance of counsel as a whole. Individual tidbits in the record may not be extracted, sampled, and used as the basis for judgment of the performance of the trial attorney below.

An accused is entitled to have his case, such as it may be, presented to the court in the best light possible. Some cases are hopeless from the start, and counsel cannot be condemned for not pulling rabbits out of a hat and inventing defenses which do not exist. What he has, he must put to advantage; more than that he cannot do.

Of course, cases may be hopeless in some respects and not in others. A crime may have been committed, but it may be a lesser included one in the one charged. A penalty may be certain to be assessed, but reduction of the contemplated one may be possible. No accused can expect counsel to deliver the moon, but he may be expected to reach for such fruits of the accused's case as are reasonably within grasp.

The fact that counsel loses does not show inadequacy, as there are some cases which the most brilliant counsel could not win; just as the fact that he wins also is not conclusive of competency, since there are cases which the poorest attorney cannot lose. The mettle of a lawyer is shown in the in-between cases, and here the accused may expect only professional competency and nothing more. All competent lawyers are adequate, but some are more adequate than others. For this special gift which marks an attorney as an outstanding member of the bar, a defendant pays a special premium. An accused before a court-martial cannot expect such talent in his assigned counsel.

A word may be said as to the duty of adequate representation by appellate counsel, on which there have been no cases. Here, too, such duty exists and, although there is much less scope for counsel's work, since the record is already made, nevertheless there are areas for the operation of appellate tactics which mark some appellate lawyers off from others. Shall every possible error be assigned, and risk the important getting lost in the trivial, or shall only the major points be noted, and risk neglecting to raise a point which may be the only reversible error in the case, although it does

not seem significant at first?[158] Shall many cases be cited, and risk overloading the brief, or shall only a few be included, and risk the possibility that the court will conclude that counsel lacks authority for his statements? These, and many other problems of research, writing, and preparation of argument must be coped with by the appellate defense lawyer.[159] His duty to the accused is the same, in its final analysis, as that of trial counsel—to put the accused's case before the court in the best possible form he is able.[160]

IV. CONFLICTING INTERESTS

Canon 6:

"It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. . . ."

A. *Representation of Co-Accused*

1. *During the Same Trial.* The prohibition against representing conflicting interests, so tenaciously maintained in civilian law practice, is upheld with equal vigor in military law. The duty of military counsel to represent the accused "with undivided fidelity" is one of the oldest duties of military counsel to a defendant before a court-martial.

The earliest situation to arise where representation of conflicting interests was condemned is found in a pre-World War II army case. Those were the days when the reform wave right after World

158 In Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), eminent counsel for appellants did not raise the issue on which the court decided the case. See Shulman, "The Demise of Swift v. Tyson," 47 YALE L.J. 1336 at 1338, 1342 (1938).

159 See, generally, Avins, "Military Law Brief Writing," 4 THE PRACTICAL LAWYER 77 (April 1958).

160 See Krivoski v. United States, 136 Ct. Cl. 451, 145 F. Supp. 239 at 243 (1956): "Plaintiff's case was briefed and argued by plaintiff's counsel in the present case before the Judicial Council. . . . No doubt the present counsel, who is skilled in such matters, fully presented all the facts of the case before the Judicial Council." See also C.M. 200989, Osman, 5 B.R. 11 at 20 (1933).

War I had receded, and Boards of Review were not especially known for their solicitude toward defendants. Nevertheless, so deep-rooted was this doctrine that it blossomed even in such unlikely soil. In this case, four co-accused were tried for larceny of an automobile. Three of them maintained that the fourth accused, Kozo, invited them for a drive and that they knew nothing about who owned the car until they were arrested. Counsel for the four defendants requested a severance on the grounds that the defense of the three would be antagonistic to Kozo's interests, but this was denied. Thereafter, the defense counsel not only attempted to prove on direct examination of the other three accused that Kozo was the only thief, but in his argument to the court stated that the person who drove the car was alone guilty of larceny. It was held that fatal error resulted from this representation of conflicting interests.[161]

The next condemnation of the representation of conflicting interests came during World War II.[162] Here, the doctrine was extended to include situations which did not result in the defense counsel actually prosecuting the accused, as the above case had. Counsel represented two accused, McRae and White. White pleaded guilty, having confessed to the crime. He was then called by the prosecution and testified as to his own guilt, implicating McRae as his accomplice, so that McRae was convicted solely on his testimony. Noting that "there was nothing in his testimony relating to any extenuating circumstances," the Board of Review concluded that "the purpose in permitting White, who could become a competent witness only upon his own request . . . to testify for the prosecution was to obtain for him . . . a milder punishment than that imposed upon his accomplice." The Board soundly reasoned that to "turn state's evidence" to obtain leniency is not "a defensive strategy ordinarily planned and executed without the suggestion and advice of counsel." Furthermore, since defense counsel in this case made no objection or any effort to prevent White from testifying, the Board argued that he "participated in the effort to obtain a lighter sentence for White . . . [and] did not abandon the defense of White and devote his efforts exclusively to the defense of McRae." The Board concluded that "since he made no attempt of any kind to protect McRae from the damaging testimony of White . . . his undivided efforts cannot be said to

161 C.M. 194997, Elberson, 2 B.R. 173 (1931).
162 C.M. P.O.A. 283, McRae, 1 P.O.A. 153 (1945).

have been given to McRae." As a result of this representation of conflicting interests, the final sentence of McRae, as approved by the reviewing authority, was twice that of White, although the latter was the instigator. The Board, in reversing for this representation of conflicting interests, declared:

> "The authorities, heretofore cited, entitle every accused to have counsel devote his undivided attention and efforts on his own behalf. When the defense is forced by the conflicting interests of two accused to cross-examine one of them and to state to the court in effect that one of the two accused whom he represents is lying (it is significant that in his argument in the present case defense counsel did not indicate which one), he is admittedly not giving to each of them that unswerving loyalty required by the existing relationship."[163]

The prohibition against representation of conflicting interests on trial has been carried over and broadened since the adoption of the code. Thus, in two cases which are not dissimilar to the first case noted above the same result was reached. In one, a trial for murder, after the law officer denied a severance, requested on the grounds of inconsistent defense, two co-accused took the stand and under guidance of their common defense counsel each blamed the other. Conflicting testimony by witnesses for the prosecution as to who fired the fatal shot was also given but in cross-examination counsel refrained from resolving this. The conviction here was reversed.[164] Likewise, in a similar situation, the same result was reached, and it was further noted that the law officer must refrain from suggesting, let alone insisting, that counsel should undertake to represent conflicting interests.[165]

Of course, there is nothing wrong with one lawyer representing co-accused if their defenses are not inconsistent, and this may even be advantageous.[166] Nor does representation of one accused make the attorney a lawyer, ipso facto, for all.[167] However, a military attorney must refrain from representing defendants with conflict-

163 Id. at 157. And to the same effect are the remarks of the theater Assistant Judge Advocate General at p. 159. See also United States v. Faylor, 9 U.S.C.M.A. 547, 26 C.M.R. 327 (1958).

164 United States v. Self, (C.M. 1953) 13 C.M.R. 227. See also MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48c, p. 68, requiring counsel to advise co-accused of conflicting interests.

165 United States v. King, (C.M. 1954) 17 C.M.R. 423.

166 United States v. Evans, 1 U.S.C.M.A. 541, 4 C.M.R. 133 (1952); United States v. Young, 10 U.S.C.M.A. 97, 27 C.M.R. 171 (1959).

167 United States v. Brown, (A.C.M. 1955) 20 C.M.R. 823. But it does if he has participated in a common defense with the co-accused or his counsel.

ing defenses at the same trial: an entire conviction will be reversed if there are conflicting defenses to only part of the offenses charged, if the charges arose from one transaction.[168] Thus it is that the military law, like civilian law, seeks to insure that the defendant's lawyer devotes his full efforts and energies to the defendant's interests alone.

2. *At Different Trials.* The doctrine that counsel must not represent defendants with conflicting interests at the same trial has recently been expanded by the Court of Military Appeals to ban a military lawyer from defending co-actors in the same crime who are tried separately, where their interests are antagonistic. In the first such case, *United States v. Lovett,*[169] the two defendants were charged with assault, the major issue being identity. One of them, represented by counsel, pleaded guilty at his trial in accordance with a pre-trial agreement. He then became the "star" prosecution witness at accused's trial in which accused's counsel was the same lawyer who had previously represented the witness, and gave the only testimony linking accused with the offense. It thus can be seen that this case is on all fours with *McRae,* except for the fact of separate trials. Without, however, giving the slightest sign of the awareness of the existence of *McRae,* the court reversed, declaring that "counsel must . . . represent his client with undivided loyalty," citing Canon 6.

The rule of the above case, banning a lawyer from representing an accused when he has previously represented a prosecution witness, has been applied in several later cases, and now may be said to be settled law.[170] The major area of disagreement within the court seems to revolve around the question, not of whether this is error, but whether, in particular cases, it was prejudicial to the accused. Thus, in *United States v. Thornton,*[171] the majority of the court, stressing the fact that the attorney failed to cross-examine his erstwhile client sufficiently and the possibility that the court may have disbelieved that part of the witness' testimony favorable to accused because of his prior relationship to counsel, felt that the duty to preserve the witness' confidences was a virtual albatross

168 United States v. Best, 6 U.S.C.M.A. 39, 19 C.M.R. 165 (1955).

169 7 U.S.C.M.A. 704, 23 C.M.R. 168 at 171 (1957).

170 United States v. Eskridge, 8 U.S.C.M.A. 261, 24 C.M.R. 71 (1957); United States v. Grzegorczyk, 8 U.S.C.M.A. 571, 25 C.M.R. 75 (1958); United States v. Moore, 9 U.S.C.M.A. 284, 26 C.M.R. 64 (1958).

171 8 U.S.C.M.A. 57, 23 C.M.R. 281 (1957).

around the neck of counsel.[172] Judge Latimer, dissenting in part, was unwilling to find prejudice from the situation alone, and would have required a showing of specific prejudice.[173] It would appear, however, that the majority view has more to commend it in terms of the over-all picture of judicial administration. Counsel who has previously represented a witness now hostile to his present client's interests carries a burden of protection of the witness which may severely limit his maneuverability. Counsel should be free to strike at the witness from any angle. A previous relationship forecloses some of those angles. It would appear that Judge Latimer's views are that accused must make a showing that counsel would otherwise have explored these angles, but the very prior relationship which prevents attack in this direction also prevents revelation that attack in this direction was feasible. Thus, if prejudice exists, the very relationship which creates it operates to conceal it. Hence, the majority approach of casting on counsel the duty to show freedom from error appears more sound.

Since an attorney may not be a trial counsel in accused's case if he has represented accused's accomplice at a previous trial,[174] it would appear that the accomplice who turns "state's evidence" is in effect assimilated to a third party in interest, whose position differs from both the accused and the prosecution, and hence his counsel should represent neither at the second trial. However, should such co-actor not take the stand for the prosecution, or otherwise have a defense antagonistic to accused, representation by the same lawyer is perfectly proper.[175]

An interesting twist to the normal pattern is found in a late pre-code case, where the accused himself was the accomplice who turned state's evidence against the principal in a prior trial.[176] In his trial, the regularly appointed defense counsel who aided the counsel hired by accused was the attorney for the principal in the previous case. On appeal, the Judicial Council disagreed with accused's contentions that counsel's prior connection with the case disabled him from effectively representing the accused. It concluded that counsel had no more reason to protect the principal

172 Id. at 283.

173 Id. at 289.

174 United States v. Homan, (A.C.M. 1952) 6 C.M.R. 504; United States v. Kelsey, (A.C.M. 1952) 6 C.M.R. 522.

175 United States v. Hopwood, (A.C.M. 1957) 23 C.M.R. 937.

176 C.M. 343792, Krivoski, 12 J.C. 81 (1950). See also Krivoski v. United States, 136 Ct. Cl. 451, 145 F. Supp. 239 (1956).

because his trial was over, and there was little likelihood that evidence elicited at accused's trial would be used against the principal. In addition, emphasis was placed on accused's consent with knowledge of the facts, and the possibility that counsel was chosen because of his very knowledge of the case. It might also be noted that accused's co-actor was not a witness, thus materially lessening any possibility of actual conflict of interests.

B. *Taking Inconsistent Positions*

1. *Accuser and Investigating Officer as Defense Counsel.* In addition to the actual representation of conflicting interests military law forbids the defense counsel to take inconsistent positions. The first application of this duty of loyalty toward the accused occurs when counsel has previously compromised his effectiveness by taking a position inconsistent with his subsequent duties.

The earliest application of this rule referred to accusers. Thus, the fact that counsel was the accuser, as well as a witness for the prosecution and accused's commander, began as a "noteworthy irregularity,"[177] but after World War II became a fatal error. In the first case so holding, the Board of Review stressed the fact that defense counsel had previously asserted under oath that the charges were true and declared that he was therefore disabled from providing the accused with effective representation.[178] While the accused may waive the defect, if he has full knowledge of the facts,[179] in view of the "glaringly apparent" inconsistency between the two positions, every presumption is indulged against waiver, and it has been held that a statement by counsel that accused agreed to have him represent accused is not the equivalent of the requisite specific request for the accuser's services in preference to other counsel.[180] To constitute a waiver, it must be demonstrated that accused was "advised of the exact nature of the situation" and "particularly desired to be defended by the accuser" as distinguished from a

177 C.M. 194200, Sanderson, 2 B.R. 125 (1931); E.T.O. 4155, Broadus, 12 E.T.O. 33 at 38 (1945).

178 C.M. 284066, Mejie, 55 B.R. 241 (1945). The Board declared at p. 244: "Thus military law forbids the accuser to sit in judgment upon the man he has accused. For equally good reasons, the law forbids an accuser to purport to defend the man he has accused. For an accuser to serve in such inconsistent capacities is unfair to himself, unfair to the court, and a mockery of the requirement that he must serve the accused with 'undivided fidelity' and by all 'honorable and legitimate means known to the law.' Observance of these simple principles compels the conclusion that the record of trial is legally insufficient to sustain the findings of guilty and the sentence."

179 C.M. 320233, Fleming, 69 B.R. 271 (1947).

180 C.M. 320391, McDonald, 69 B.R. 337 (1947).

mere passive acceptance of his services.[181] Hence, in a case where the accuser stated that defendant deserted, that he completely disregarded military discipline, that he would be "a definite detriment to the service if retained," and that he should be eliminated from the service, recommending trial by general court-martial for this purpose, it was held that to assign accused's commander to defend accused against the charges which he himself had initiated without the most express request of accused after a full disclosure of the above facts constituted fatal error.[182]

The above rule, soon after its formulation, was extended to include cases wherein investigating officers served as defense counsel. The first such case was one in which counsel had failed to protect the rights of the accused adequately.[183] The Board of Review found that it was "impossible to ignore" counsel's dual role because of "the grossly perfunctory manner in which the defense of the accused in the instant case was conducted." Noting that, as investigating officer, his report is regarded as an official statement that he believes the charges recommended for trial are true, and that he had recommended trial by general court-martial, the Board declared, "This record eloquently proclaims the grave dangers inherent in placing an officer in the compromising position of acting as investigating officer and defense counsel in the same case."

As with accusers, this too was originally only a "bad practice" which "should be condemned," and not fatal to the legal sufficiency of the case.[184] Its elevation to the status of fatal error occurred through the recognition that the investigating officer is on the prosecution's side, practically speaking, that "their positions are compatible," and therefore "when the investigating officer then takes up the side of the defense he has placed himself in an inconsistent position which is incompatible with his prior view of the matter as investigating officer."

Of course, the accused may waive the defect; otherwise it might constitute an abridgment of his right to counsel of his own choosing.[185] Such waiver must be, however, with full knowledge of the

181 Sp.C.M. 2236, Smith, 7 J.C. 281 at 283 (1950).

182 C.M. 324883, Ewing, 73 B.R. 383 (1947).

183 C.M. 315877, Ellis, 65 B.R. 151 at 156 (1946).

184 Id. at 156; C.M. 211878, Mitchell; C.M. 211941, McMullen, otherwise unreported. "In the *McMullen* case the Chief of the Military Justice Section stated: 'True again he pleaded guilty, but if anything this makes the case worse. Interested to have his official recommendation already made in the case sustained he might well have endorsed the plea of guilty. Certainly, if he did anything for accused it does not appear in the record.'"

185 C.M. 315877, Ellis, 65 B.R. 151 (1946); C.M. 324701, Stevenson, 75 B.R. 399 (1948); E.T.O. 1100, Simmons, 4 E.T.O. 1 (1944).

facts and attendant inconsistency, and a mere formalized statement accepting the previously appointed defense counsel will not meet the required standard.[186]

The prohibition against an investigating officer acting as defense counsel unless expressly requested by accused has now been codified.[187] The accuser is also, by the manual, disqualified from acting as defense counsel unless the accused expressly requests his services.[188]

2. *Counsel Switching Sides.* The duty of loyalty to an accused on the part of the military lawyer and his corollary duty not to represent interests which conflict with those of his serviceman-client ban a military attorney from switching sides in the same case, and thereby taking inconsistent positions. A switch either way, whether from prosecution to defense or from defense to prosecution, is equally forbidden.

In the earliest pre-code case, it was the assistant trial judge advocate who, after working on the case for the prosecution, showed up at trial as assistant defense counsel. The trial judge advocate strenuously objected to his participation on the ground that it "would not be ethical," and the court sustained the objection. The Board of Review labeled this an "unauthorized and unheard-of challenge," castigated the proceedings as "a wanton abridgment of his (accused's) constitutional rights and a flagrant denial of due process of law" and reversed the conviction.[189] Here, of course, it was beneficial to the accused to have as his attorney one who had already become privy to the prosecution's secrets, and the Board of Review saw nothing unethical in this. The drafters of the Uniform Code[190] and the *Manual for Courts-Martial*[191] disagreed, however, and made members of the prosecution staff ineligible to serve as accused's counsel, a step fully in keeping with the obligations of prosecuting attorneys in criminal practice generally.[192]

Oddly enough, the only reported occasion for the application of this ban on switching from prosecution to defense was in a

186 C.M. 316898, Mesquite, 66 B.R. 107 (1946); C.M. 318975, Thomas, 68 B.R. 109 (1947); C.M. 319176, Henry, 68 B.R. 181 (1947).

187 U.C.M.J., art. 27 (a). United States v. Smith, (A.C.M. 1957) 24 C.M.R. 578.

188 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶6a, p. 10, ¶61f(4), p. 88.

189 C.M. 313118, Brown, 63 B.R. 13 at 17 (1946).

190 U.C.M.J., art. 27 (a).

191 Members of the prosecution's staff are not even available for service as individual counsel. MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶48b, p. 68.

192 DRINKER, LEGAL ETHICS 118 (1953).

situation where such dual status operated to the detriment of the defense. In *United States v. Benge*,[193] accused were tried by juvenile court proceedings. Later, deeming its sentence too lenient, their commander discussed his desire to prosecute them further with a JAG lieutenant, who suggested appropriate charges for trial by court-martial. Subsequently, the lieutenant acted as defense counsel during trial without disclosing his prior participation in the case. Noting the possibility that some of the specifications failed to state an offense in this case, the Board declared, "It requires, we think, no very acute perception to see that a legal advisor who recommends or participates in the drafting of court-martial specifications is not well qualified or likely thereafter to urge, on behalf of an accused, errors or deficiencies therein."[194] Then, turning on its head the policy basis for the Article 27 (a) ban on members of the prosecution subsequently acting for the defense, the Board reads Congress' intent as one to preserve "counsel's undivided loyalty to the accused," and not to cure the rule of the case above noted. While it is clear beyond dispute that the lieutenant's action herein violated the terms of the statutory ban, and it is also probable that his action in switching sides under the peculiar facts of this case operated to accused's detriment, instead of to his benefit, as it normally would, it does not follow that the unusual injury herein suffered was the object of congressional solicitude in this aspect of the statute, for while the accused may waive all other disqualifications of his attorney, this one he may not waive. Therefore, counsel's action may be condemned as a violation of his statutory duty to the government, or criticized as representation of the accused without disclosure of a bias which would reduce his effectiveness, but it cannot be decried as a violation of loyalty to the accused. Thus the Board came to the right result via the wrong road.

It is, however, with the problem of ex-defense counsel appearing as prosecutors in the same case that military courts have been most concerned. In the earliest such reported case,[195] decided before the code, the accused was prosecuted for assault. There was highly contradictory evidence as to who the assailant was, and a key witness testified that accused was not the assailant. The trial judge advocate, who had been accused's counsel in pre-trial in-

193 (C.M. 1957) 24 C.M.R. 458.
194 Id. at 460.
195 C.M. 333433, Alvaro-Rodriguez, 81 B.R. 359 (1949).

vestigation and as such had interviewed the witness, attempted to impeach her testimony. The Board, in reversing, first noted the civilian rule that such "inconsistent relationship" was banned, citing several civilian cases[196] and the Canons of Ethics. It then refused "to speculate as to the reasons for the Trial Judge Advocate's persistent efforts to 'break' this witness," hypothesizing the possibility that he "could have entertained a feeling of moral certainty that Miss Gonzalez was committing perjury and therefore most vulnerable because of what accused had told him in confidence during their attorney-client relationship." Unwilling to resolve this doubt against accused, the Board not only applied the civilian rule but went farther and stated that "the fact that the defender-prosecutor was an officer in the Army of the United States, and the accused was a soldier, would seemingly magnify the gravity of the error and add to the vulnerability of the record."[197] Thus the Board correctly gave weight to the possibility that the soldier would rely on the officer for advice and protection even absent this professional relationship,[198] and soundly reasoned that such likelihood, stemming from military relations, would compound the error.

The rule of the above case was codified in 1951,[199] and military appellate tribunals have assiduously applied it to all aspects of court-martial work. The most common type of situation in which this rule operates is where accused's counsel during a pre-trial investigation later acts for the prosecution. This is invariably held to be fatal error.[200]

196 The Board quoted two pages from People v. Gerold, 265 Ill. 448, 107 N.E. 165 (1914) alone.

197 C.M. 333433, Alvaro-Rodriguez, 81 B.R. 359 at 366-367 (1949).

198 See discussion in Avins, "The Joker in Jester—The Parris Island Death March Case," 53 N.W. UNIV. L. REV. 33 at 41 (1958).

199 U.C.M.J., art. 27 (a); MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶6a, pp. 9-10. In United States v. Stringer, 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954), Judge Brosman declared at p. 75: "The principles underlying the relevant portion of Article 27 (a) are fundamental in the law and have been discussed frequently by courts and other authorities. The exclusion predicated in the Article adopts for the military establishment those basic precepts of the civilian law to the effect that a lawyer must not represent conflicting interests, nor permit himself to be placed in such a position that he may be required to choose between such interests. . . . In both civil and criminal cases the civilian courts have been concerned primarily with preserving the confidential relationship between attorney and client and avoiding all possibility that counsel may utilize against former clients privileged information received by reason of this relationship." To the same effect, see United States v. Bell, (A.C.M. 1955) 20 C.M.R. 804.

200 United States v. Bishop, (A.C.M. 1952) 6 C.M.R. 719 (assistant trial counsel); United States v. Danilson, (A.C.M. 1953) 11 C.M.R. 692 (same); United States v. Duston, (C.M. 1955) 19 C.M.R. 537 (preparation of SJA's advice as "administrative officer").

A good example of this situation is *United States v. Green,*[201] where accused's pre-trial counsel later prepared a memorandum of testimony, which would probably be offered against the accused on trial, which was forwarded through the staff judge advocate to the trial counsel. It was held that although the aid given to the trial counsel was indirect and slight, this was enough to constitute a breach of professional duty requiring reversal.[202]

The above rule has also been applied where accused's defense counsel at his original trial became trial counsel at his rehearing,[203] and where trial counsel had been the defense counsel for accused's accomplice at a previous trial.[204]

The prohibition against switching sides has also been extended to cover one situation indigenous to military service. This occurs when a serviceman desires legal advice and assistance in respect to a situation in which he is involved, and which later becomes the subject of court-martial action. His natural and logical inclination leads him to the base legal office to consult an attorney there, and in doing so he establishes an attorney-client relationship with the legal assistance officer, precluding that officer from later acting for the prosecution in a trial involving charges related to the subject of the conversation.[205] Nor does it matter that the filing of charges was not necessarily contemplated at the time. Indeed, in one case where the conference was held only after both accused and the lawyer knew that charges might be filed, the Court of Military Appeals held that an attorney-client relationship was established notwithstanding the express prohibition of paragraph 10b, AR 600-13, against giving advice where the subject matter is, or will be, the subject of court-martial action.[206]

The small size of legal staffs on even the largest bases, compared to the number of lawyers in any fair-sized city, makes it impossible for military attorneys to be as selective about legal duties as their civilian counterparts are. When the current shortage of

201 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955).

202 Id. at 238. Canons 6 and 37 were cited as authority in this case.

203 United States v. Mace, (A.C.M. 1952) 5 C.M.R. 610.

204 United States v. Homan, (A.C.M. 1952) 6 C.M.R. 504. The Board noted at p. 507, "Precedents, legion in number, condemn and decry any relaxation of the basic doctrine that counsel must not represent conflicting interests." *Accord,* United States v. Kelsey, (A.C.M. 1952) 6 C.M.R. 522.

205 United States v. Brownell, (A.C.M. 1954) 17 C.M.R. 741; United States v. Kellum, (A.C.M. 1957) 23 C.M.R. 882.

206 United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955). The court was unimpressed by the argument that the drafting of a request for a deposition to establish an essential element of an offense was merely an "administrative" task.

military lawyers is added to this fact, it can readily be seen that the performance of various tasks, including acting sometimes as prosecutor and sometimes as defense counsel, is made necessary. This switching of roles makes all the more necessary the exercise of vigilance to insure that it does not occur in the handling of the same case, even though no element of personal gain or other improper motive is involved.[207] The assimilation of civilian standards into military law makes clear that the expeditious dispatch of business can never serve as an excuse for inadequate attention to a defendant's rights.

3. *Post-Trial Inconsistency.* Military defense counsel is not only forbidden to take an inconsistent position with respect to his client before or during trial, but he may not do so after trial, or even after his attorney-client relationship has formally ended. While in civilian practice, this type of conflict would most often occur by representing a client with adverse interests,[208] such an occurrence is relatively rare in the military. More frequently, the conflict arises when the defense lawyer attempts to cast off his partisan character and assume the role of impartial judge after trial and pass on his case upon initial review in his office. A recent line of cases dealing with the post-trial clemency report and convening authority's review, practices peculiar to the military justice system, holds that this may not be done.

In the first such case,[209] accused's pre-trial counsel assumed the role of "Assistant Staff Judge Advocate" and interviewed the accused after trial to prepare a "Post-Trial Clemency Interview" report. Accused told his ex-counsel that he would meet any probationary period that might be imposed in a suspension of the dishonorable discharge to which he was sentenced, but the attorney recommended approval of the sentence as adjudged and against suspending the discharge. Such report and recommendation were adopted by the convening authority's staff judge advocate. The Board, presuming that the attorney performed duties as counsel before trial, reasoned that his recommendations adverse to the accused's desires may have been based upon confidential informa-

207 In United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), Judge Brosman declared at p. 240: "Since the rigid responsibility imposed on attorneys is applied with full vigor in the military establishment, we experience no difficulty in condemning the *performance* of the two officers in the instant case—however much it may have been due to nothing more reprehensible than thoughtlessness."

208 DRINKER, LEGAL ETHICS 103, 109, 111, 115 (1953).

209 United States v. Bryant, (A.C.M. 1954) 16 C.M.R. 747.

tion obtained from accused. This possibility alone was enough to compromise the relationship and to so taint the report as to require a reversal. Citing Canons 6 and 37 of the ABA Canons of Professional Ethics, the Board declared:

> "The termination of the attorney-client relationship does not terminate the attorney's obligation to the client to preserve the privilege implicit in the confidential communications and to abstain from taking any part in the proceedings contrary to the client's interest. The privilege in pertinent respects might well be classified as eternal because it is, with certain exceptions not applicable here, not limited to the duration of the litigation."[210]

While it can thus be seen that the compelling factor in the above case was the attorney-client privilege,[211] the Board also adverted to the duty of defense counsel not to take any position contrary to his former client's interests. This subordinate ground for the decision in *Bryant* soon became the principal ground on which this line of cases rests.

In *United States v. Vinson*,[212] accused's erstwhile attorney conducted the post-trial clemency interview with accused, and in his report stated that the accused could not give him a concrete answer to whether he desired to stay in the service and make it a career or get out, and that at one time he expressed a desire to stay in, while at another he preferred to complete his enlistment and return to civilian life. The attorney's recommendation, in which the staff judge advocate concurred, was that the dishonorable discharge be reduced to a bad conduct discharge and ordered executed. In reversing, the Board of Review held that it is not necessary for a defense counsel to switch sides and actively aid the prosecution in order to take a position adverse to his former client. "It is enough," they declared, "if he takes any position in the proceeding which is substantially adverse to an active advocacy in *favor* of his former client."[213] In this case, the Board noted that the attorney's remarks, although not totally antagonistic to the accused, were adverse to his best interests. Thus, it may be laid down as a rule in military courts that if an erstwhile defense counsel recommends accused's elimination from the service, he violates his duty

210 Id. at 751.
211 Note also United States v. Quindana, (A.C.M. 1953) 12 C.M.R. 790 at 794.
212 (A.C.M. 1955) 19 C.M.R. 919.
213 Id. at 922.

to his former client by the assumption of an adverse position to his client's interests, and any review predicated on such violation of duty is fatally tainted.[214]

The military adoption of the civilian rule that an attorney's future faithfulness in the same transaction will be enforced regardless of whether the attorney has received privileged confidences[215] is most clearly illustrated by a decision in which the convening authority's staff judge advocate recommended that accused receive no clemency. One of the reasons for the recommendation was stated to be that the accused never cooperated with his defense counsel. The appointed counsel also informed the staff judge advocate that accused had been a belligerent source of trouble to him, and counsel stated that accused had been most uncooperative and that the accused had been caught time and again in obvious inconsistencies most of which were insignificant. This information was forwarded to the staff judge advocate at general court-martial level who referred to it in his review. The Board of Review reasoned that the disclosure about accused's inconsistencies classified him as a liar, unworthy of clemency. They further noted that activity so diametrically opposed to defense advocacy made the other statements suspect. The sum total of these revelations, they held, were so inconsistent with advocacy in the accused's favor in any form that the several reviews based thereon could not stand.[216]

The risk of having an uncooperative client is one of the hazards of a military law practice. In civilian practice if the situation becomes intolerable the attorney may always ask to be replaced.[217] In military practice, neither the safety valve of relief from duty nor the hope of reward is present to mitigate the lawyer's annoyance. Moreover, the military attorney still has the duty to carry on as best he can. A defendant has no duty to cooperate with counsel and, although he takes the risk of lessening the effectiveness of his defense, counsel may not add to that risk by airing his grievances, especially to one, such as the staff judge advocate, who is acting in a quasi-judicial capacity in accused's case.

Counsel's duty to his erstwhile client goes so far as not even to assume the position of an impartial commentator on the defend-

214 United States v. Marquez, (A.C.M.S. 1955) 20 C.M.R. 736. Cf. United States v. Darring, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958).

215 United States v. Brown, (A.C.M. 1955) 20 C.M.R. 823.

216 United States v. Casey, (A.C.M.S. 1955) 20 C.M.R. 853.

217 DRINKER, LEGAL ETHICS 140 (1953).

ant's case. Thus, in one case, counsel acted in a dual capacity as both defense counsel and staff judge advocate to the convening authority. It was held that in his role as staff judge advocate, he was under a duty to base his recommendations upon the best interests of the military service; but as defense counsel, he was under a duty to base his recommendations on accused's best interests. For thus assuming potentially inconsistent positions, the action based on his review was reversed.[216] Hence, it is now settled that defense counsel may take no post-trial position other than that of continuing to urge the accused's interests.

C. *The Duty of Loyalty*

No man can serve two masters well, and lawyers constitute no exception to this rule. The military law is firm in the requirement that military attorneys make no attempt to try.[219]

A civilian attorney owes an obligation of loyalty to his client which prevents him from representing interests which might conflict with those of the client.[220] This obligation has no less of a binding force in the armed services. Even doubtful conduct on the part of the lawyer must be resolved against him, not only to circumvent the dishonest practitioner's malfeasance, but also to prevent the upright lawyer from placing himself in such a position as to require him to choose between conflicting duties.[221] Of course, in the armed services, while there is no monetary inducement to breach the bonds of loyalty which tie a lawyer to an accused, lack of personnel, lack of care, desire to cut corners to dispatch business, and sometimes just plain apathy may result in

218 United States v. Draper, (A.C.M.S. 1955) 20 C.M.R. 743. See also United States v. Brown, (A.C.M. 1955) 20 C.M.R. 823. But cf. United States v. Wilson, (C.M. 1955) 19 C.M.R. 426, where accused's pre-trial counsel acted as law officer. It was held that since accused pleaded guilty, there was no prejudice.

219 See C.M. 204639, McMullen, 8 B.R. 25 (1936). Here accused, a JAGD colonel, who was for some years counsel to the Assistant Secretary of War, always gave advice favorable to a contractor, from whom he was then accused of taking gifts. The Board of Review declared at p. 45: "For a number of years accused advised The Assistant Secretary of War . . . on legal matters pertaining to contracts in which Mr. Silverman was vitally interested. In most instances the legal advice given by accused was erroneous. This fact in itself is significant in view of the service and experience of accused. However, its significance is further emphasized by the consistency of this legal advice [it was never unfavorable to the contractor]. . . . Such consistency . . . in assiduously avoiding passing adversely upon legal matters pertaining to one individual when many of them were obviously contrary to law and the best interests of the Government, is contrary to the rules of human conduct developed as the result of experience—unless self interest dictated the consistency."

220 DRINKER, LEGAL ETHICS 103, 109, 111, 115 (1953).

221 United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

a lowering of standards in base legal offices. Such lapses, at one time winked at, are no longer tolerated.[222] Civilian standards of attorney responsibility have been assimilated into military law, and today they are the norm for all military lawyers.

V. ATTORNEY-CLIENT PRIVILEGE

Canon 6:

"... The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Canon 37:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client...."

The attorney-client privilege is one of the oldest types of privileged communications known to the common law. "This privileged relationship," commented the Judicial Council of the Army, "which according to Wigmore, 'goes back to the reign of Elizabeth, where it already appears as unquestioned,' has been zealously guarded by the courts since the 16th century."[223]

Large amounts of material have been written about this facet of civilian attorney-client relations, and the desirability of the

222 Judge Brosman said in United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 at 242 (1955): "In drafting the provisions of the Uniform Code relating to the appointment and duties of counsel, Congress strove to impress on the military establishment the necessity for the very highest standards of professional conduct on the part of legal officers of the Armed Forces. Implicit in those provisions, we are sure, is the duty of unswerving and undivided loyalty due from defense counsel to an accused person. Indeed the right to be represented by counsel—and of necessity by conscientious and scrupulous counsel—is paramount among the protections granted an accused by the Uniform Code."

223 Sp.C.M. 2932, McGill, 10 J.C. 397 at 400 (1951).

privilege has been both questioned and defended.[224] Regardless, however, of views pro or con, "it is clear that this privileged relationship is equally an integral part of our system of military jurisprudence,"[225] and it constitutes one of the important aspects of the relation between a defense counsel and a serviceman-defendant before a court-martial.

In view of the eminence of the many authorities who have commented on this privilege in civilian practice and in light of the exhaustive treatment which it has already received at their hands, there would be no point in retreading paths so well beaten that they are almost eight-lane highways, as little trailblazing can be done on a turnpike. Hence, this section will be confined to the attorney-client privilege as it affects the military, and as it has been interpreted by military tribunals alone.

A. *Historical Basis*

Throughout the sections above, the statement has been made that military law and practice follows civilian practice in many of its most basic aspects in Anglo-American law, and the attorney-client privilege in military law development is a good example. Such privilege has been as fully honored in military courts as it has been in all others.

The earliest military text-writer to write a substantial book on military law, McArthur, declared that in naval court-martial proceedings "no counsel, or other person intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed to give evidence of such conversation or matter of privacy as have come to his knowledge by virtue of such trust and confidence, but any counsel, attorney, or other person, may be examined, as to mere matters of fact which might have come to his knowledge without being intrusted in the cause."[226] This statement appears in the section on evidence, which section is a virtual pocket-sized summary of the then prevailing English law of evi-

224 For some more recent representative comments, see Simons, "Attorney-Client Privilege as Applied to Corporations," 65 YALE L.J. 953 (1956); comment, 21 UNIV. CHI. L. REV. 752 (1954); note, 88 UNIV. PA. L. REV. 467 (1940); comment, 36 MICH. L. REV. 641 (1938); Radin, "The Privilege of Confidential Communication Between Lawyer and Client," 16 CALIF. L. REV. 487 (1928). For some British and Commonwealth commentary, see Cooke, "Solicitor and Client," 1954 CAMB. L.J. 156; Hammelman, "Professional Privilege: A Comparative Study," 28 CAN. B. REV. 750 (1950); note, 72 S.A.L.J. 15 (1955). And see, generally, 8 WIGMORE, EVIDENCE, 3d ed., §2290 et seq. (1940).

225 C.M. 333433, Alvaro-Rodriguez, 81 B.R. 359 at 363 (1949).

226 MCARTHUR, NAVAL COURTS-MARTIAL 119 (1792). This is repeated in 2 MCARTHUR, NAVAL AND MILITARY COURTS-MARTIAL, 4th ed., 89 (1813).

dence before common-law courts. As McArthur was a highly respected military law author, both in England and in the United States,[227] his statement that the attorney-client privilege was allowed before courts-martial at least as early as the close of the American Revolution may be taken as authoritative.

It can thus be seen that the attorney-client privilege found its way into military jurisprudence not as an outgrowth of the regulation of the duty of a military defense counsel to his client, for, as has been pointed out above, at this time courts-martial on neither side of the Atlantic allowed counsel to represent an accused before them, but rather as a part of the common-law rules of evidence adopted almost in toto by military courts. This view is fortified by the numerous references in McArthur as well as in other military texts to civilian cases and textbooks without any qualification of their authoritative status for use in military trials, and by the examples of the application of these evidentiary principles in early military texts so largely drawn from criminal law fact patterns. Therefore, the application of this privilege was of minor importance in early military cases.

The attorney-client privilege, transplanted across the Atlantic into American common law, took root also in court-martial practice as a rule of evidence. Here again, we find military law textwriters citing civilian sources for their statements of the attorney-client privilege and applying these statements indiscriminately to court-martial practice.[228] For example, Harwood, the first American naval law textwriter, relied on *Greenleaf on Evidence*, the standard work of the early nineteenth century in the United States, for his statements of this privilege.[229] These early writers, it should be noted, were making reference to civilian lawyers called as witnesses before courts-martial, and hence the occasion for the application of the rule remained rare.

As the practice of allowing defendants before courts-martial to defend by counsel became more frequent, however, the attorney-

227 This author was cited, for example, in Grant v. Gould, 2 H. Bl. 69, 126 Eng. Rep. 434 at 444, 454 (1792); Warden v. Bailey, 4 Taunt. 67, 128 Eng. Rep. 253 at 254, 256, 257, 261 (1811); Wilkes v. Dinsman, 7 How. (48 U.S.) 89 at 124 (1849); Dynes v. Hoover, 20 How. (61 U.S.) 65 at 67, 70 (1857); Ex parte Milligan, 4 Wall. (71 U.S.) 2 at 45 (1866); 1 Op. Atty. Gen. 166 (Rodney, 1811); 3 Op. Atty. Gen. 714 (Legare, 1841).

228 See BENET, A TREATISE ON MILITARY LAW, 6th ed., 301-303 (1866).

229 HARWOOD, U.S. NAVAL COURTS-MARTIAL 216 (1867): "Counselors, attorneys or solicitors are neither obliged nor permitted to disclose information, or produce papers, received in their professional capacity from their clients. . . . The protection given by the law to confidential communications, is not affected by any change of relations between the attorney and his client; but remains forever, unless removed by the consent of the client."

client privilege became more meaningful in military trials. Thus Ives, the first standard textwriter to contend that accused is entitled to counsel as of right, after describing the attorney-client privilege in respect to civilian practitioners, also argued that "In courts-martial, where officers and soldiers are often employed as counsel, the privilege of not testifying should be extended to them."[230]

By the time of the first World War, the application of the attorney-client privilege to military counsel had become firmly fixed. Thus naval practice manuals made reference to it,[231] and the first full-blown naval equivalent of the manual for courts-martial specifically referred to military defense counsel.[232] The scope of the privilege followed the civilian law closely.[233]

The first major army manual for courts-martial also incorporated the attorney-client privilege into its evidence section, much as it is found in civilian practice.[234] This is not surprising, for Dean John H. Wigmore wrote this section of that manual while on active duty with the Judge Advocate General's Department.[235] With the advent of both right to counsel and the duty of the convening authority to appoint counsel, such section, of course, also applied to military defense counsel.

The attorney-client privilege, as now defined in the *Manual for Courts-Martial,* applies alike to both military as well as civilian counsel.[236] It is likewise found in British military law, but in a less developed form.[237] Thus, this privilege has historically been

230 IVES, MILITARY LAW 332 (1879).

231 See FORMS OF PROCEDURE FOR COURTS AND BOARDS IN THE NAVY 143 (1910); FORMS OF PROCEDURE FOR COURTS AND BOARDS IN THE UNITED STATES COAST GUARD 107 (1916).

232 NAVAL COURTS AND BOARDS, ¶157, p. 162 (1917).

233 NAVAL COURTS AND BOARDS, §239, p. 162 (1937), declares: "Testimony of counsel as to matters communicated to him by the accused will not be heard. It does not matter that the counsel does not act as such at the trial; it is enough that he has been consulted as a tentative counsel. If the accused personally agree that such testimony be competent, it becomes so."

234 MANUAL FOR COURTS-MARTIAL, 1917, ¶227, p. 113. See also MANUAL FOR COURTS-MARTIAL, 1921, ¶227, p. 191.

235 Introduction to the MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1917, p. XIV; Brown, "Administration of Justice in the Army," 3 CORN. L.Q. 178 at 202 (1918).

236 MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶102b, 151b(2), pp. 173, 285.

237 The 1956 MANUAL OF MILITARY LAW, Part I, ¶111, p. 97 declares: "A legal adviser is not permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client during, in the course of, and for the purpose of his employment. . . . The expression 'legal adviser' includes barristers and solicitors, their clerks, and interpreters between them and their clients. Justice would seem to require that this expression should also include 'defending officers.' This privilege can be waived by the accused." See also 1956 MANUAL OF AIR FORCE LAW 112.

a rule of evidence before military courts. It remained for recent decisions to enlarge its scope and policy basis so that it became a significant part of the relation and duty of the military attorney to his serviceman-client.

B. *Relation and Communication Protected*

In determining the scope and function of the attorney-client privilege as it applies to military jurisprudence, the first proper subject of inquiry is what relations and communications the military law protects under the cover of this privilege. As noted above, the *Manual for Courts-Martial* mentions specifically only trial and appellate defense counsel.

While only defense counsel as such are mentioned, it is clear that this term includes all assistant defense counsel and other persons acting for or in behalf of accused's defense at any stage of court-martial proceedings. In one pre-code case, for example, accused's company commander, who was the assistant defense counsel during the pre-trial investigation of accused's case, went down to the stockade and interviewed accused. At trial, he testified for the prosecution as to what accused had said. In predicating a reversal on the receipt in evidence of what amounted to a complete confession by accused, the Board rejected the argument that this officer did not come within the scope of the privileged relationship.[238]

From the case above, it can be seen that the scope of the privilege is somewhat broader in military law than it is in civilian practice, where it is confined in general to members of the bar,[239] in respect to who may act as legal adviser. This is brought out even more clearly in *United States v. Jenkins*.[240] Here, accused "retained" a certain officer as his "defense counsel," who acted in this capacity until accused engaged a civilian attorney several weeks later. It was held that in military service there are instances, as here, where the law imputes the relationship of attorney and client

238 C.M. 331574, Lloren, 80 B.R. 61 at 64 (1948), where the Board declared: "The great weight of judicial authority, founded upon reasons of public policy, has determined the settled doctrine to be that an inviolate privilege attaches to communications between attorney and client. . . . Here, it appears, an officer had approached an accused soldier in the role of advisor and thus obtained his confidence. To thereafter deny an implied relationship of attorney and client permits a destruction of a delicate and sacred relationship which the courts have zealously guarded since the 16th Century."

239 8 WIGMORE, EVIDENCE, 3d ed., §2300 (1940).

240 (A.C.M. 1950) 4 (A.F.)C.M.R. 160.

notwithstanding the fact that the officer assumes the "role of advisor" without having been appointed as counsel.

When these cases are synthesized with *United States v. McCluskey*,[241] which struggles to hold that the presence of the adjutant of accused's battalion during part of a conference between accused and his ad hoc legal adviser, the legal assistance officer, did not remove the protection of the attorney-client privilege, it can be seen that the scope of the attorney-client privilege takes on new dimensions in military service.

In viewing that scope, we start out with the general duty of protection which a superior owes to a subordinate.[242] Reinforcing such duty is the specific military policy of encouraging military subordinates to confide their problems, even of a personal nature, to their superiors.[243] Also to be considered are several factors indigenous to military service. For example, attorneys, either civilian or military, are not as available in military service as they are in civilian life. Even if there are attorneys in a neighboring town, leave must be obtained to see them, and often permission has to be obtained to see the legal assistance officer as well. To secure such leave, a serviceman frequently must give the reason for his visit and thereby divulge the nature of his problem. In addition, he may turn to a superior because he is unaware of the installation's legal facilities. And it may also be that the superior will desire to accompany the subordinate to the legal office after hearing about the problem as in the *McCluskey* case, and it is much more difficult for a subordinate to refuse a military superior than it is for one civilian to refuse another. In all of these situations, it would seem that the general rule of military law casting a veil of privacy over information of a personal nature coming to a superior from a subordinate in the course of the former's duties should apply here.[244]

241 Note 206 supra.

242 See Avins, "The Joker in Jester—The Parris Island Death March Case," 53 N.W. UNIV. L. REV. 33 (1958).

243 C.M. 277458, Patnode, 51 B.R. 131 (1945). And in United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953), Chief Judge Quinn observed at p. 26: "We agree, with the board of review below, that there is even more reason in the military than in the civil sphere to encourage complete disclosure to his attorney by an individual in the armed forces accused of crime. There is a natural reluctance on the part of an enlisted man to supply details of possible wrongdoing to a superior officer. Without full knowledge of all the facts, an officer selected or appointed as counsel cannot adequately prepare a proper defense. It is, therefore, our view that the rule, grounded as it is in policy reasons even more sound in the military than in the civilian community, should be strictly enforced and not relaxed."

244 See E.T.O. 9542, Isenberg, 21 E.T.O. 73 (1945).

There is civilian precedent for the above view. In *Bowers v. State*,[245] it was held that the presence of the mother of the young prosecutrix in a rape case, during the consultation, did not destroy the privilege. As subordinates are often as much in the legal power of their superiors as wards are of their guardians, it should be held that where a superior who would normally have a significant influence over the conduct of a subordinate's affairs accompanies such subordinate to a legal adviser, that the superior acts as agent of or co-adviser to the subordinate, and the attorney-client privilege arises. Likewise, it should also be held that where a subordinate asks advice of a legal or quasi-legal nature from a superior to whom he would normally turn for such advice, or reveals information to enable him to procure advice elsewhere, the attorney-client privilege should protect the information.

Aside from the broadening of the attorney-client privilege made necessary to secure the benefit of legal services to members of the armed forces, the military rule regarding what relations and communications are protected follows the civilian pattern closely. Thus, it has been held that where the employment of an attorney has not been specifically contracted, the revelation of confidences from an accused to the attorney and his reception thereof with full understanding by both that these matters are confidential will bring them within the privilege.[246] Moreover, it has been held that the communications protected include documents necessarily transmitted to the attorney by the client to complete his picture of the case.[247] But an old naval case notes that letters from an officer to his attorney-in-fact do not come within the privilege.[248] Thus, the few cases in the military dealing with the initiation of the relationship and the communications protected follow civilian law closely.

C. *Types of Leakage Prohibited*

1. *Before and During Trial.* The protection encompassed in the attorney-client privilege in civilian practice is mainly concerned with preventing the attorney from taking the witness stand and divulging the contents of confidential communications.[249] While the military attorney is equally forbidden to divulge the

245 29 Ohio St. 542 (1876).
246 United States v. Brown, (A.C.M. 1955) 20 C.M.R. 823.
247 United States v. Marrelli, 4 U.S.C.M.A. 276, 15 C.M.R. 276 at 287 (1954).
248 C.M.O. 5-1917, p. 1.
249 8 WIGMORE, EVIDENCE, 3d ed., §2324 (1940).

accused's confidences in court, either on or off the stand,[250] the privilege has wider application because of the sometimes differing roles which a military lawyer is required to play.

For example, indirect disclosure of accused's confidences is also prohibited. Thus, where accused's pre-trial counsel sat as a member of the court trying accused, the Board of Review postulated that he "discussed the charges with accused, considered the accused's explanation . . . and undoubtedly became aware of facts and acquired information from the accused which were in the nature of privileged communications." Noting that his testimony in court as to these facts for the prosecution would have resulted in prejudicial error, the Board declared that there was "no real distinction" between receiving his testimony and placing him on the court and reversed the conviction.[251] Here, the danger of leakage was great, because not only would the officer be influenced by confidential information in making up his own mind, but he might well disclose it in discussion while the court was deliberating.

Indirect disclosure may also result from subsequent activities of accused's former defense counsel in aid of the prosecution. Thus, the action of a lawyer who had formerly given accused legal assistance in procuring depositions for the prosecution which supplied proof of an offense revealed to such officer by the accused in his consultations constituted prohibited indirect leakage.[252] Likewise, accused's pre-trial counsel was held to have improperly written a memorandum of testimony which would probably be offered against him.[253] In both of these cases, a reversal followed notwithstanding the contention that counsel were engaged in administrative tasks, and hence the leakage would be, presumably, de minimis.

Of course, the clearest example of indirect leakage occurs when the accused's ex-counsel uses the fruits of his confidences on trial. Thus, in *United States v. Fair,*[254] an important prosecution witness in a murder case had been a suspect in pre-trial investigation but was granted full immunity. During cross-examination, the defense

250 E.T.O. 13222, Howard, 26 E.T.O. 197 (1945).

251 Sp.C.M. 2932, McGill, 10 J.C. 397 (1951).

252 United States v. McCluskey, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

253 United States v. Green, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955). The court declared at p. 241 that "if a military accused person is to rely on the professional responsibility and integrity of counsel, the confidence reposed in the latter must not be shattered by the fear that the confidant may be assigned subsequently to duties involving adversity to the interests of his one-time client."

254 United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).

counsel, who was the witness's pre-trial counsel, asked the witness if he had not told him that he, the witness, had fired the fatal shot. The law officer precluded this line of inquiry by permitting the witness to rely on the attorney-client privilege, and this was upheld on appeal. The Court of Military Appeals held:

> "It is our opinion that any forced admission of statements made under a belief of security from subsequent disclosure is certain to damage the sound policy which dictates enforcement of the attorney-client privilege. We are not persuaded that immunity from prosecution removes the reason for enforcing the privilege. In our opinion, the injury that would inure to the attorney-client relation by the disclosure of the thought-to-be-privileged communication is greater than the benefit thereby gained for the correct disposal of litigation."[255]

Hence, it would appear that military law prohibits indirect leakage of a serviceman's confidences before or during trial on the widest possible front.

2. *Post-Trial Revelations.* The one area where military decisions have most expanded the attorney-client privilege has been in the case of post-trial revelations. Here again, the privilege's increase in scope is due to the multi-functioned role of a military lawyer.

The expansion of this privilege by a series of recent cases has been most pronounced in respect to the post-trial clemency report, used by the convening authority to determine what sentence shall finally be approved. At first, several cases merely held that where accused's former defense counsel conducts the post-trial interview and makes recommendations unfavorable to the accused's interests, since it is possible that these recommendations are based on information which accused revealed to the attorney in confidence during their prior relationship, such recommendation might constitute indirect leakage of confidential information.[256] Hence, as one Board noted, "we are so impressed with the necessity that the attorney-client relationship and the privileges attendant on it remain immaculate, we are convinced that any review at convening authority level which is predicated in whole or in part upon a

255 Id. at 26.

256 United States v. Bryant, (A.C.M. 1954) 16 C.M.R. 747; United States v. Marquez, (A.C.M.S. 1955) 20 C.M.R. 736.

fundamental violation of that privilege must likewise be blemished."[257]

The rule of the above case was soon broadened, however, to encompass any case where counsel conducts the post-trial interview, the rationale being that accused may not realize that his former counsel has switched roles and may therefore reveal to such interviewer additional confidential facts.[258] In order to protect the accused from this further possibility of post-trial indirect leakage, military law will trace the infected information into all possible channels and pronounce such channels of information polluted. Hence, reports which draw any information from such channels will likewise be blemished, and fresh proceedings will have to be initiated at that point.[259]

Since post-trial indirect leakage is banned, a fortiori post-trial direct leakage is also forbidden.[260] Thus, the military law seeks to insulate the serviceman-client's confidences from revelation at any time by a military lawyer. In doing so, it carries out both the letter and spirit of the Canons of Ethics which make the preservation of confidences a duty incumbent on a lawyer at all times.

D. *Exceptions to the Privilege*

In defining what situations will create exceptions to the attorney-client privilege, military jurisprudence follows the civilian practice quite closely without significant difference.

The first exception to the rule of the attorney-client privilege, or, more properly, situation outside of the rule completely, occurs where the attorney testifies to knowledge which he gained independently of any communications to him from the accused. Thus, where the prosecution calls counsel as a witness, he may relate events which occurred prior to his acting as counsel and which he

257 United States v. Bryant, (A.C.M. 1954) 16 C.M.R. 747 at 753.

258 United States v. Brown, (A.C.M. 1955) 20 C.M.R. 823; United States v. Vinson, (A.C.M. 1955) 19 C.M.R. 919. In the latter case, the Board declared at p. 923: "As accused may have considered Major S still acting as his counsel during the post trial interview, it is possible that accused related material which he, accused, would have told only to his counsel. Consequently in accused's eyes the information would have been privileged. Hence while not sure whether S received privileged communications during the interview—at least privileged in accused's mind—we hold that the appearance of evil is independently sufficient in this factual pattern to require remedial action."

259 United States v. Draper, (A.C.M.S. 1955) 20 C.M.R. 743 at 747.

260 United States v. Casey, (A.C.M.S. 1955) 20 C.M.R. 853; United States v. Quindana, (A.C.M. 1953) 12 C.M.R. 790 at 794.

did not obtain knowledge of from the accused.[261] For example, certification of accused's records by defense counsel is not error because this is a matter of official record.[262] Likewise, no error is committed if accused's former defense counsel swears to charges against accused based on official reports of investigation coming to him by virtue of his official position.[263] And the Court of Military Appeals has held that there was no breach of the attorney-client privilege in a worthless check case where the accused gave his attorney money to buy back the checks which antedated the relationship, and the attorney acted as agent in buying up the checks, because he later delivered them to the prosecution at its request. The court reasoned that there was no confidentiality since the checks came from independent sources.[264]

Another exception to the attorney-client privilege occurs when the defendant accuses his counsel of wrongdoing or negligence.[265] Counsel may then defend himself, and in so doing reveal confidences, for the accused is, by his own action, held to have impliedly waived the privilege. Thus, in one case where the defense offered no evidence on trial, after trial the accused made a statement to the chaplain which indicated a defense. This was related to the staff judge advocate, who questioned the defense counsel about it. Counsel replied that he attempted to verify the statement, but was forced to discard it as a defense. The Board held, in accordance with civilian precedents, that since the accused had imputed a breach of duty to raise the defense at trial to his counsel, he was permitted to reply and thus refute the assertion.[266]

Finally, accused may waive the privilege by putting his counsel on the stand as a witness.[267] This, too, is the civilian rule. Hence, it can be seen that the few military cases dealing with exceptions to the attorney-client privilege, like most of those which deal with the privilege itself, do not differ materially from the pattern laid down in civilian precedents.

261 C.M. 327221, McGuire, 76 B.R. 59 (1948); C.M. 341018, Melton, 7 J.C. 1 (1950); United States v. Gandy, 9 U.S.C.M.A. 355, 26 C.M.R. 135 (1958).

262 United States v. Quincy, (A.C.M. 1954) 18 C.M.R. 694; United States v. Thomas, (A.C.M.S. 1954) 18 C.M.R. 610.

263 United States v. Jenkins, (A.C.M. 1950) 4 (A.F.)C.M.R. 160.

264 United States v. Marrelli, 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954). See also United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

265 United States v. Harris, (A.C.M. 1957) 24 C.M.R. 698, citing Canon 37.

266 United States v. Reynolds, (A.C.M. 1955) 19 C.M.R. 850.

267 C.M.O. 10-1930, p. 17; C.M.O. 4-1943, p. 36.

E. *The Privilege as Enforcement of Counsel's Duty*

The practice of a military attorney and that of the typical civilian attorney differ greatly. The average civilian lawyer, be he in a law firm or in individual practice, is much like the family doctor: he ministers to the legal ills of his individual or corporate clients year in and year out, living on the fees from his practice. Many lawyers have retainers from their clients, and do legal work for them all year round; others get repeat business, either from the client previously served or from people he recommends. In either case, the success, and even the very livelihood of the attorney, depends on the goodwill of his clients. Since the disclosure of confidential information, however innocently, would tend to shatter such personal ties, and thus deprive the lawyer of both clients and income, he has a powerful incentive to obey scrupulously the injunctions in Canon 37.[268]

The military attorney has a much different practice. His salary is not related to his success on trial or to the number of servicemen who come to consult him. Furthermore, the frequent rotation of personnel, both legal as well as non-legal, means that his cases are basically "one-shot deals." More often than not he will never see his client again, and referrals constitute a minute portion of his practice. He renders a single service only; there is no personal tie between him and the accused as there is between a family lawyer and his client or even a firm and the executives of a corporation retaining it.

And yet the military lawyer can sometimes cause a serviceman much more harm than a civilian practitioner can to his clients. A serviceman's superiors determine his duties, his location, where he lives, when he gets leave, how fast he is promoted, and many more things which can make military life either pleasant or intolerable. A confidence carelessly related by the attorney to one of the man's superiors may block a promotion, better duty assignment, or other advancement desired by his erstwhile client, and the client will never know what hit him. A loose-tongued attorney who serves tidbits of gossip containing confidences of servicemen in the chatter of the officers' club may wound his client just as severely as if he spread it forth in the post general orders or shouted it in a courtroom. And the seal of secrecy is not preserved from breaking by a little indiscretion through the knowledge that the morrow will find terrible retribution when a long-valued and well-

268 For a general discussion of bar association opinions on the attorney-client privilege, see DRINKER, LEGAL ETHICS 131 (1953).

paying client takes his business to a lawyer who can keep his lips sealed.

True it is that the attorney-client privilege, even in its most expanded form, cannot guard against such tongue-wagging, but its recent expansion in the military to cover all types of leakage which operate to the detriment of an accused serves as a constant reminder to the attorney of his obligation of secrecy. Today, the privilege rightly goes beyond a mere rule of evidence in the military. Rather, it constitutes the living and practical embodiment of the duty of counsel to a serviceman to preserve his confidences. In thus elevating the standards of the military bar, it keeps those standards in line with the best thinking in the legal profession as a whole.

VI. CONCLUSION

Military law, like the criminal law generally, seeks to deter members of the service from committing acts which are detrimental to a military organization. Unlike the general administration of criminal justice, however, it is geared to a speedier pace. Moreover, there is no figure in a court-martial with quite the prestige and power of a judge to assure an accused of all of his rights which the law guarantees to him. The keystone, therefore, upon which the vindication of accused's rights rests is his defense counsel. A military attorney in such a role has a vital part to play in the administration of military justice. It is often his activities which spell the difference between equal justice under law and the exercise of arbitrary power.

To insure the proper performance of that role, the military law has assimilated civilian concepts of attorney-client relationships. More specifically, it has adopted the rules of the Canons of Professional Ethics and applied them as the yardsticks by which the duty of a military attorney to his client may be measured. The various aspects of that duty each serve a useful purpose in civilian practice and in military practice as well. Indeed, because of the lack of other ties to his client, the strict fulfillment of the requirement of these Canons is, if anything, even more necessary in the military than it is in civilian practice. These several obligations define the duty of a military attorney toward his client. Their performance will result in that satisfaction which an attorney gets in doing his duty with "professional skill and moderation."[269]

269 Rex ex rel. Peters v. Harrison, [1944] 1 W.W.R. 353, 52 Man. R. 28, 81 C.C.C. 215, [1944] 2 D.L.R. 597.