mander of a joint command or task force who has been expressly authorized by the President or Secretary of Defense to do so may appoint courts to try an accused from another service.[33] Whenever possible, at least a majority of the members should be of the same armed force as the accused.[34]

6. Rank of members. While not mandatory, the senior member of a court-martial or the summary court officer should be at least an Army captain or his equivalent in the other armed services.[35]

Illustrative Case

CM 349258, *Branford*, 2 CMR 489 (1951)

Where, in the general court-martial of a captain, a member of the court was a lieutenant, it must be assumed in the absence of a contrary indication that the convening authority properly exercised his discretion in this matter, and there is no error, particularly where the accused declined to challenge the lieutenant after being given the opportunity to do so.

7. Enlisted members. *a. General.* If an enlisted accused has so requested, the special or general court-martial which tries him shall, if at all possible, be composed of at least one-third of enlisted members from a unit other than accused's.[36] While Article 25(c)(1), UCMJ, states that an enlisted member of the court shall not be a "member" of the accused's unit, the Manual provides that he cannot be "assigned" to the same unit. Under the law in effect prior to the Code of Military Justice there was a similar limitation as to enlisted men "assigned" to the same unit.[37] Although the purpose of the limitation was to prevent ill feeling in units, the word "assigned" was at that time restricted to its technical meaning and was thus held not to apply to attachments or presence on special or temporary duty.[38]

b. Definition of "unit."

> The word "unit" . . . shall mean any regularly organized body as defined by the Secretary of a Department, but in no case shall it be a body larger than a company of the Army, a squadron of the Air Force, or a ship's crew, or a body corresponding to one of them (Art. 25c(2)).[39]

In the Army a distinction is made between regularly organized "TOE" units assigned primary tactical missions and "TD" units, concerned principally with administrative duties. While the former can be designated only by authority of the Secretary of the Army, the latter, according to regulations, can be designated by the head of a Department of the Army agency, or by a commander of any Army field command.[40]

The numerical strength of unit is not controlling, provided it falls within the official definition of a "unit."[41] Despite the large size of a particular organization, enlisted members of it are disqualified from sitting on the court-martial of an accused who belongs to the same unit. For instance, in one case, two enlisted members of the court were assigned to the same administrative company, composed of over 1,000 men and officers, as was the accused. The accused, however, for all duty purposes was "assigned" to a separate provisional company. Nevertheless it was held that the two enlisted members were disqualified for the reason that an individual cannot be "assigned" to a "provisional" unit. Nor did the fact of the large size of the company to which the accused and the members were assigned make it any less the "same unit":

> . . . With respect to the second contention, as the size of the Army units is no longer regulated by statute, we do not attribute to the Congress an intent to apply the terms "unit" or "company" to military bodies of any particular strength or composition. Obviously, as it appears here, companies as now organized in our service may vary widely in their authorized strengths, and their actual strength can fluctuate from less than that considered

[33] MCM, 1951, para. 4*g*.
[34] MCM, 1951, para. 4*g*(1).
[35] MCM, 1951, para. 4*c*.
[36] See chapter II, *supra*, concerning the appointment of enlisted men to the court.
[37] AW 16, as amended, 41 Stat. 787 (1920).
[38] CM 385865, Quimbo, 2 BR-JC 297 (1949).
[39] MCM, 1951, para. 4*a*.
[40] AR 220-5, 10 Jul 58.
[41] CM 398316, Scott, 25 CMR 636 (1958) (dismissed for insufficiency of the evidence).

normal for a squad or platoon to more than battalion size, depending on operational exigencies, and the desires of a commander.

Where, however, the accused is temporarily attached to a unit for administrative convenience during the trial only, it has been stated that enlisted members of that unit are not disqualified from being members at his trial.[42]

8. Number of members. General courts-martial shall consist of a law officer and not less than five members, special courts-martial, of at least three members, and a summary court-martial, of one officer.[43]

Section III. PARAGRAPH 41, MCM, 1951, DUTIES AND CONDUCT OF MEMBERS OF THE COURT

1. General. The president of the court functions essentially as the foreman of the jury and other members act as jurors. Consequently, with the exceptions spelled out in the Manual and Code, which are discussed elsewhere in this text, their duties and conduct are regulated by the same standards applied to civilian jurors.

2. Duties.[44]

3. Conduct. As in the case of the president of the court, a member may not become a "champion of the prosecution" for the reason that such partisan behavior casts substantial doubt upon the fairness of the trial.[45] Private communications between a member and a witness during the trial are unauthorized because an accused may thereby be deprived of his rights of confrontation and cross-examination. Whenever such communications concern material aspects of the case, a rebuttable presumption of prejudice is created. Likewise personnel officially concerned with the case should hold no off-the-record conversation with court members. In one case while the court was recessed for an out-of-court hearing on a motion for a finding of not guilty, the staff judge advocate furnished the president of the court with a legal authority germane to the motion and discussed the principal of law involved; thereafter the members used this information to overrule the law officer's grant of the motion. It was held that the conduct of both the staff judge advocate and the president violated Article 37, UCMJ, prohibiting unauthorized influence of a court-martial:[46]

> . . . [T]he accused is entitled to a fair and impartial trial by a court uninfluenced from outside sources. Every officer serving on a court should know that it is not in keeping with the spirit of the Uniform Code of Military Justice for a member of a court-martial to discuss with unauthorized persons a case which is pending and which he must decide. His sources of information are those which are recognized as part of the military judicial system and his decisions should be predicated upon information obtained in the courtroom.

For the same reason, trial counsel should not hold an unrecorded conference with a member of the court out of the hearing of accused and his counsel.[47]

Illustrative Case

United States v. Adamik, 4 USCMA 412, 15 CMR 412 (1954)

The accused was charged with dishonorably failing to maintain funds in his bank to honor checks uttered by him. Some of the checks were presented for payment very quickly after being uttered. A bank cashier, who had testified for the prosecution, during a recess conversed with two members of the court concerning the time required for and the practise of clearing checks. The details of this conversation were disclosed for the record of trial and on *voir dire* exam-

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[42] NCM 329, Cook, 16 CMR 404 (1954). ". . . Article 25c is not exact as to the time when membership in the same unit is disqualifying. Is it (1) at the time of commission of the offense, or (2) at the time of trial, or (3) both times? Quite clearly, the Article provides at least that membership in the same unit at the time of trial is not permitted."

[43] UCMJ, Art. 16.

[44] See MCM, 1951, para. 41c. For duties on the findings and sentence, see chapters XVIII, XIX, *infra*.

[45] See United States v. Lowe, 11 USCMA 515, 29 CMR 331 (1960).

[46] United States v. Guest, 3 USCMA 147, 11 CMR 147 (1953).

[47] ACM S-3713, Franklin, 9 CMR 741 (1953). See also MCM, 1951, para. 49b, 56d.

nation of the members, following the recess. No defense evidence on the merits was produced.

Opinion: The action of the members of the court in conversing with the witness was improper.

> . . . The Uniform Code requires that all court-martial proceedings "shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer." Article 39, 50 USC § 614.
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> It is obvious that the right of confrontation and the right to appellate review will become valueless if witnesses may communicate with court members or jurors outside the presence of the accused and "off the record." Rules of evidence fly out the window during such private consultations. Of course, the impartiality of court members or of jurors becomes justly subject to suspicion if they are permitted to consult extensively with the witnesses of one party or the other. And—as courts have often emphasized—not only must wrong be avoided, if public confidence in the judicial process is to be maintained, but the appearance of wrong as well.

CHAPTER VI

REQUIREMENT OF REPRESENTATION BY COUNSEL

References: Arts. 27, 35, 38, 46, 47, UCMJ; para. 6, 42–51, 61(*f*), 115, 116, MCM 1961; DA Pam 27–10, Trial Counsel and Defense Counsel; 27–172, Evidence.

Section I. INTRODUCTION

This chapter will treat the selection of appointed counsel for both sides, and their required qualifications, as well as the right to representation by individual counsel. Generally speaking, the discussion in this chapter is limited to the right to counsel from the time charges have been referred for trial until the completion of the posttrial interview by the staff judge advocate or legal officer. The law relating to the retention of counsel before the referral of charges to trial is discussed in more detail elsewhere.[1]

Section II. PARAGRAPHS 44*a*, 46*a*, 61*f*, MCM, 1951, APPOINTMENT OF COUNSEL PARAGRAPH 6*a*, MCM, 1951, QUALIFICATIONS

1. Requirement. The convening authority must appoint military counsel for special and general courts-martial. For a general court-martial, the appointed counsel must be a judge advocate or law specialist who has qualified as a civilian lawyer—or has been graduated from an accredited law school—and has been certified as competent by The Judge Advocate General of his respective service. A member of the service who is not a judge advocate or law specialist must be qualified as a civilian lawyer (member of a bar).[2] Although these provisions of the Code require higher legal qualifications of the nonjudge advocate, Army regulations relating to appointment in The Judge Advocate General's Corps require the applicant to be a qualified lawyer.[3] For *special* courts-martial, counsel need possess no legal qualifications; but if the prosecution is legally qualified, then the defense counsel of the special court-martial must possess the equivalent qualifications.[4]

2. Effect of nonappointment. "For each general . . . court-martial, the authority convening the court shall appoint a trial counsel and a defense counsel, together with such assistants as he deems necessary or appropriate." [5] The Manual adds that these Codal requirements, with respect to defense counsel, are "jurisdictional," and states that a "general court-martial is *not legally constituted* unless the appointed defense counsel has been certified. . . ." [6] The Air Force and the Army differ, however, on the effect of failing to appoint an existing qualified defense counsel at the time the court convenes; the Air Force according this a "jurisdictional" effect voiding the entire

[1] DA Pam 27–172, Evidence, (1962), pp. 102–118.

[2] UCMJ, Art. 27.

[3] See AR 601–125, (20 Mar 58); AR 140–100 (6 Apr 61).

[4] UCMJ, Art. 27, *But see infra* notes 15, 16, and accompanying text.

[5] UCMJ, Art. 27(a).

[6] MCM, 1951, para. 61*f*(1) (emphasis added).

proceedings,[7] and the Army, on the other hand, treating the omission as an error of procedure which may or may not prejudice the accused's right to adequate representation.[8] In view of the pronounced reluctance of the United States Court of Military Appeals to deprive the accused of the many protections afforded by rehearing, as distinguished from "another trial," it is almost unthinkable that the Court will adopt the Air Force view.[9] This may be so especially when the question of former jeopardy, sentence limitation, or sufficiency of evidence to authorize a second proceeding is asserted as a defense by the accused at any second proceeding for the same offense.

Whether the Court will view the error as involving a question of specific rather than general prejudice is unclear, however. In *Kraskouskas, supra,* the Court viewed the representation by *selected* nonlawyer counsel as one of *general* prejudice—automatically reversible error. That was a ground-breaking decision, however—an example of the Court's "rule-making" power—and the general-prejudice approach may thus have been intended only to stabilize the new interpretation. When, upon the relief of appointed defense counsel, accused has consented to be represented by certified appointed *assistant* defense counsel (absent any indication of possible command influence through manipulating the timing of relief or appointment)[10] the Court may well approach the more familiar area of deficiencies in appointment of counsel as one involving specific prejudice only.

The accused's right to be represented by certified military counsel is important, however. Although he may make an informed waiver of this right, his excusal of appointed certified counsel without being advised of his rights by the law officer[11] might well give rise to general prejudice.[12]

Rank of certified counsel as such is not by itself an overriding factor in legal qualification. All certified counsel are presumed competent, and accused has no right to appointed defense counsel of particular rank or experience.[13] Moreover, when accused is represented by individual civilian counsel, it is permissible for appointed defense counsel to be junior to and the staff subordinate of trial counsel.[14] Under other circumstances, however, the official relationship between such officers might affect the freedom of action of the subordinate, and seriously circumscribe his professional judgment.

8. Qualifications of appointed counsel of a special court-martial. Unlike the requirements for counsel of a general court-martial, neither counsel for a special court-martial need be a lawyer, or certified. The Supreme Court has held that in all criminal prosecutions" in state courts, *indigent* accused have a constitutional right to counsel appointed by the state.[15] One Navy board of review concluded that there is no reason why the VIth Amendment to the Constitution, as so interpreted by the Supreme Court, should not equally apply to special courts-martial, and it therefore held that *indigent* military accused have a right to be represented by counsel who is a lawyer.[16] The Court of Military Appeals affirmed on other grounds, three divergent opinions being filed by the Judges.[17]

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[7] See ACM 6164, *Butler*, 8 CMR 692 (1953) (appointed defense counsel decertified prior to trial, accused excused assistant defense counsel and was represented by certified individual military counsel whom he had requested). A majority of the board found this "jurisdictional error." The dissenter thought it was only "general prejudice."

[8] See CM 357972, *McCarthy*, 7 CMR 329 (1953) (appointed defense counsel separated from service before trial, accused consented to representation by certified, appointed assistant defense counsel). The board thought this only a matter of form, no actual prejudice being shown under the circumstances. It was noted that UCMJ, Art. 38d, authorizes assistant defense counsel to perform any of the duties of defense counsel and the accused still had a right to be represented by counsel of his own choice.

[9] Compare United States v. Kraskouskas, 9 USMCA 607, 26 CMR 387 (1958) (accused represented by nonlawyer individual military counsel whom he had requested—acquitted on two of the specifications but convicted on the other two). The Court held that such counsel at a general court-martial must be a qualified lawyer, but instead of finding the proceedings void, it reversed only the convictions, and authorized a rehearing on those specifications.

[10] See United States v. Tellier, 13 USMCA 323, 32 CMR 323 (1962).

[11] See MCM, 1951, para. 61*f*, and *id.*, app. 8a at 508.

[12] See ACM 13585, Johnson, 24 CMR 678, *pet. denied*, 24 CMR 319 (1957); ACM 11220, Gudobba, 20 CMR 864 (1955).

[13] *Cf.* United States v. Tellier, 13 USCMA 323, 32 CMR 323 (1962).

[14] See United States v. Haynes, 7 USCMA 477, 22 CMR 267 (1957).

[15] Gideon v. Wainwright, 372 U.S. 335 (1963). This case did not indicate if the right to assigned counsel depended on whether the offense charged was misdemeanor or a felony.

[16] NCM 63 00442, Culp, 31 May 1963 (unpublished).

[17] United States v. Culp, 14 USCMA 199, 33 CMR 411 (1963). Chief Judge Kilday reasoned that the 6th Amendment did not apply; Judge Quinn thought it *did* apply, but that Congress' Codal provisions concerning counsel before special courts-martial were a reasonable compliance with the Amendment. Judge Ferguson indicated that the Amendment applied, and the Codal provisions were invalid thereunder, but that the accused had consented to representation by nonlawyer counsel and had thereby waived the issue in this case.

Under the requirements of the Code and Manual, however, if the trial counsel of a special court-martial is a judge advocate or a lawyer, the defense counsel must possess at least equivalent legal qualifications. Where defense counsel does not possess such qualifications, the Manual states that the jurisdictional requirements have not been satisfied. With respect to this equalization of counsel, the Court of Military Appeals has expressed its desire for compliance with the spirit, as well as the literal meaning, of the Code.

For instance, the Code does not expressly require that counsel be an officer,[18] although the Manual does.[19] The Court has held that this requirement is consistent with the spirit of the Code, expresses the clear intent of Congress, and should be complied with.[20] Moreover, when trial counsel was a certified lawyer, and appointed defense counsel a lawyer but not certified, an Air Force board held the court not legally constituted within the letter and spirit of Article 27, UCMJ, and the conviction subject to automatic reversal.[21]

In one case, however, both trial and appointed defense counsel were noncommissioned warrant officers, but before trial, the defense counsel was commissioned. The Court held that although the appointment violated paragraph 6, MCM, 1951, under the circumstances the error was technical only, and did not prejudice the accused.[22]

4. Appointment of assistant counsel. The Code does not require the appointment of assistant trial and defense counsel, but merely states that the convening authority may appoint "such assistants as he deems necessary or appropriate." [23] The Manual contains a permissive provision that:

> . . . . It is desirable that as many assistant defense counsel as assistant trial counsel be appointed, and that officers be appointed as assistant defense counsel and assistant trial counsel who have comparable military experience and legal qualifications.[24]

If the assistant trial or defense counsel conducts the case, his qualifications must be the same as if he were appointed counsel. However, the assistant is not considered to "conduct" a case if the appointed counsel is also present during the open session of court.[25]

Section III. PARAGRAPH 37*a*, MCM, 1951, APPOINTMENT OF NEW COUNSEL

Subparagraph 37*a* of the Manual indicates that the convening authority may change appointed counsel at any time during the trial. Unlike the restriction on appointment of new members to the court, paragraph 37 does not require a showing of good cause for relief of counsel after arraignment.

To the extent this implies that good cause need not be shown for relief of counsel after arraignment it is erroneous.[26] The convening authority must show good cause for the relief of defense counsel at any time after appointment and acceptance thereof by the accused.[27]

The reasons for this are manifest. Article 38, UCMJ, and paragraph 61*f* of the Manual imply that the appointed counsel shall continue to represent the accused throughout the proceedings should the latter so desire.[28] The attorney-

[18] See UCMJ, Art. 27.

[19] MCM, 1951, para. 6*a*.

[20] See United States v. Long, 5 USCMA 572, 18 CMR 196 (1955). Accused had requested enlisted individual counsel whom the convening authority then designated as *appointed* defense counsel. The Court found that failure to appoint officer counsel, coupled with accused's representation by enlisted counsel was reversible error.

[21] ACM-S2019, Lamar, 2 CMR 781 (1951).

[22] United States v. Goodson, 1 USCMA 298, 3 CMR 82 (1952).

[23] UCMJ, Art. 27(*a*).

[24] MCM, 1951, para. 6*d*.

[25] *Ibid.* See also Art. 38 (*b*), UCMJ. This requirement as to qualification was found inapplicable in the case in which accused was represented by assistant defense counsel during a 45 minute absence from trial of appointed defense counsel. The facts of the case showed that although assistant defense counsel was not certified he was a qualified lawyer, and although he had been appointed assistant defense counsel he was actually *individual* counsel requested by the accused, who had acted as chief counsel throughout the trial, with the accused's apparent consent. ACM 13535, *Johnson*, 24 CMR 678 (1957). Form had been satisfied in the appointment of the court, and on the particular facts, counsel was not bound by the Manual prohibition against assistant defense counsel conducting the case in the absence of appointed defense counsel.

[26] See United States v. Tellier, 13 USCMA 328, 32 CMR 328 (1962); *cf.* United States v. Boysen, 11 USCMA 331, 29 CMR 147 (1960) (relief of law officer during trial).

[27] See United States v. Tellier, *supra*.

[28] See section VI, *infra*.

client relationship between counsel and accused arises upon appointment and acceptance.[29] Preparation for trial is an integral part of representation. Effective representation is one of the keystones of fair court-martial procedure. Once the attorney-client relationship has been established, any military tampering with the relationship will be judicially regarded with a jaundiced eye.

Section IV. PARAGRAPH 6*a*, DISQUALIFICATION OF APPOINTED COUNSEL

1. General. No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel, or, unless expressly requested by the accused, as defense counsel in the same case; nor shall any person act for both the prosecution and the defense in the same case.[30] These last provisions of the Code are undoubtedly based on the ethical prohibitions against a counsel representing conflicting interests, except with the consent of all concerned[31] and against divulging the confidences of a client.[32] Further, the quasi-judicial nature of the office of prosecutor demands that he conduct the prosecution impartially, without possibility of a disqualifying personal interest in the outcome of the case which could arise from his prior representation of the accused's accomplice. In addition to these declarations of ineligibility by the Code, the Manual adds that no person who has acted for the accused at a pretrial investigation or other proceedings involving the same general matter shall act thereafter for the prosecution. Also, an accuser shall not act as defense counsel unless expressly requested by the accused.[33] The ineligibility of counsel resulting from prior activity, as distinguished from his lack of qualification (*i.e.*, no certification), may require reversal, but does not effect the jurisdiction of the court.

Illustrative Case

United States v. *Green*, 5 USCMA 610, 18 CMR 234 (1955)

Captain X, who had represented the accused at the formal pretrial investigation, prepared at the direction of his staff judge advocate a well organized and complete summary of the evidence as ascertained from the pretrial statements of prosecution witnesses, together with comments on how this testimony supported the charges against the accused. The trial counsel consulted this memorandum.

Opinion: There was a fair risk that Captain X's action may have prejudiced the accused's right to the undivided loyalty of his counsel. Although there is no express showing that Captain X revealed the confidences of his client, he may have done so, albeit unconsciously:

> *But the obligations of such an attorney extend even further.* Indeed, and apart from categorical divulgence of any nature —formal or informal, compelled or voluntary, conscious or *unconscious*—it is not permitted that he assist in the prosecution of one whom he represents, or has represented professionally in the same or a related matter at any prior time. [Emphasis supplied.]
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> Not unnaturally, we have been met with a vigorous Government argument to the effect that the X memorandum contributed nothing—and could not possibly have added anything—to the later prosecution of the accused. . . . Captain X was a licensed attorney, and in addition a lawyer certified by The Judge Advocate General of the Army, and serving in a legal assignment in the office of his command's staff judge advocate. He defended the accused, Green, during the pretrial investigation of the latter's case. Thereafter he prepared a *professional* document in which he set out and organized carefully and competently a summary of the testimony—together with its several sources—which would, in his opinion, suffice to establish that his

[29] See United States v. Brady, 8 USCMA 456, 24 CMR 266 (1957).

[30] UCMJ, Art. 27(*a*). However, the mere fact that one who has acted for the prosecution subsequently represents the accused, at the latter's express request, will not in itself give rise to prejudicial error. See ACM 11107, *Bell*, 20 CMR 804 (1955).

[31] See ABA, Canons of Professional Ethics, Canon 6.

[32] See *id.*, Canon 37.

[33] MCM, 1951, para. 6*a*.

client had committed the crimes with which he was charged, the very ones against which he had been defended by the Captain at the pretrial level.

Certainly, the author of the challenged paper was better prepared than any other to perform this prosecution task promptly and efficiently—and it must be apparent that he had acquired this preparation through familiarity with evidence acquired while serving as the accused's lawyer. Certainly too, he performed no mechanical task; what he did he did as a *lawyer*. [Emphasis supplied.]

2. **"Acting" adversely.** *a, General.* Whether the counsel has "acted" for the opposing side appears to depend upon the facts of each case. However, in absence of an affirmative showing to the contrary in the record of trial, it is *presumed* that a counsel has "acted" in the capacity to which he has been appointed after the case has been referred to trial.[84] The procedural guide for trial, in the Manual, suggests counsel affirmatively state their eligibility by announcing that no counsel *then* appointed to the court has acted in a prohibited capacity, or for the other side.[85] Such a statement has generally been held to be sufficient showing on the record of trial to rebut the interference of a previously appointed counsel having also "acted" in that adverse capacity. This is not the case, however, when prior to trial, an ineligible counsel has been succeeded by another appointed counsel, for the reason that the former is not *then* a member of the defense or the prosecution.[86]

[84] MCM, 1951, para. 6*a*. An interesting interpretation of this presumption occurred where the accused's charges were referred for trial by summary court before Captain C. Accused appeared for trial, drunk, and no proceedings were had. The charges were withdrawn and referred for trial to special court-martial, at which Captain C was appointed trial counsel. A Navy board of review, noting the provisions of para. 79, MCM, 1951 (that the summary court officer shall represent both accused and the government), presumed that, absent any showing to the contrary, Captain C by reason of his prior capacity had "acted" for the accused and was therefore disqualified from subsequently acting as trial counsel in the case. WC NCM 6200500, *Johnston*, (18 Sep 62) (unpublished).

[85] MCM, 1951, aph. 6*a*.

[86] CM 403062, *Nunely*, 27 CMR 587 (1959). The board of review refused to consider an affidavit of nonparticipation.

[87] *Accord:* ACM S-18682, *Jourdain*, 22 CMR 860 (1956).

[88] ACM 5777, *Bishop*, 6 CMR 719 (1952).

b. Rebuttal of presumption of adverse representation.

Illustrative Cases

CM 382964, *Betts*, 19 CMR 429 (1955), *pet. denied*, 20 CMR 398

On the day before trial, the case was referred to a new court, whose appointed trial counsel had been the appointed defense counsel of the court to which the case had originally been referred. At the trial this trial counsel stated that he had not acted as a member of the defense in the case.

Opinion: This statement was sufficient to rebut the presumption of paragraph 6*a*, MCM, 1951, that he had acted in an adverse capacity.[87]

ACM 5777, *Bishop*, 6 CMR 719 (1952)

Captain L, who actually represented accused at the formal pretrial investigation, was subsequently appointed as the assistant trial counsel of the court to which accused's case was referred. He was absent from the trial and the trial counsel announced, in accordance with the suggested wording of page 502, appendix 8a, of the Manual, that "No member of the prosecution named in the appointing orders has acted as . . . a member of the defense in this case . . . or as counsel for the accused at a pretrial investigation . . . involving the same general matter."

Opinion: This statement was patently erroneous when applied to Captain L. Further, it was presumed, absent a *record* showing to the contrary, that once having been appointed as an assistant trial counsel Captain L. continued to "act" in that capacity prior to trial. [Emphasis supplied.]

3. **The "same case."** The term "same case," as used in Article 27, includes not only the trial itself but applies to all preliminary proceedings in which counsel acted in an adverse capacity. The officer who represented the accused at the Article 32 investigation is prohibited from subsequently acting as assistant trial counsel prior to the trial.[88]

In one case counsel had been "designated" as defense counsel by the staff judge advocate,

although not yet formally appointed by the convening authority, and had conferred once with the accused, although stating that he could not discuss the case until he had more time. It was held that he had nevertheless "represented" the accused. The attorney-client relationship was formed, for purposes of all policies concerned, when Lieutenant A offered his services as counsel and the accused accepted.[39] The need for public confidence in the integrity of the attorney-client relationship requires that in questions of this sort, even the appearance of evil must be avoided.

When the defense counsel at the original trial was later appointed as trial counsel for the rehearing, it was presumed, absent a contrary showing in the record of trial, that he acted for the prosecution at the rehearing, even though he was absent from the rehearing. The dual participation was held to result in general prejudice.[40]

Giving legal assistance to accused renders counsel ineligible to serve as trial counsel on criminal charges against the accusing arising out of matters discussed even in a remote fashion during their prior relationship.[41]

Acting in dual capacities with respect to two or more accused charged with or suspected of committing joint or related offenses presents a somewhat more elusive problem without any real civilian analogy. When counsel defended one accomplice and then prosecuted the other, an Air Force board held the prosecution improper, since counsel might be improperly motivated as a prosecutor, and it was unconscionable to let the Government—through its power to appoint counsel—get a "pipeline" to the defense's case.[42] Nevertheless, absent any showing of joint action by the two accused (which relationship might enable the government to obtain otherwise privileged matter), the Court of Military Appeals has failed to reverse convictions in which the prosecutor formerly acted as counsel for the accused's "associate" in advising the latter on the advantages of obtaining immunity from prosecution in return for his testimony.[43]

As has been noted above, while general prejudice will result when the prosecutor has previously acted for the defense, the same result does not follow in the converse situation. In the first example there is always the possibility that the prosecutor has violated his privileged relationship with the accused. But where the prosecutor subsequently represents the accused, at the latter's express request, it may be assumed that the Government has thereby waived its privilege relationship with the counsel, who thereafter may represent the accused to the fullest extent, utilizing whatever privileged communications may have come to his attention while acting for the Government.[44]

4. Other acts of prior participation. The preceding paragraphs have discussed the ineligibility of counsel arising from previous adverse representation. In addition, Article 27 prohibits one who has previously acted as investigating officer, law officer, or court member from acting subsequently as trial counsel in the same case; the accused, however, may waive such ineligibility of the defense counsel.[45]

While the Code renders an accuser ineligible to act as a member or law officer of a court-martial,[46] Article 27 contains no such prohibition for counsel. The Manual does provide, however, that an accuser is ineligible as defense counsel, unless requested to so act by the accused.[47] Thus it does not appear error, in itself, to appoint an accuser as trial counsel, although his conduct at the trial might be scrutinized on review for a possible disqualifying overzealousness or personal interest.[48] An early

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[39] ACM 17851, *Chierichetti*, 31 CMR 524 (1962).

[40] ACM 5329, *Mace*, 5 CMR 610 (1952).

[41] Thus, counsel who advised accused concerning his domestic difficulties could not later prosecute him for bigamy and making a false claim, United States v. McCluskey, 6 USCMA 545, 20 CMR 261 (1955). Nor could trial counsel use knowledge he had gained in a prior legal assistance relationship to impeach the accused's credibility on cross-examination. See United States v. Turley, 8 USCMA 262, 24 CMR 72 (1957).

[42] See ACM 4612 *Homan*, 6 CMR 504 (1952).

[43] See United States v. Patrick, 8 USCMA 212, 24 CMR 22 (1957); United States v. Stringer, 4 USCMA 494, 16 CMR 68 (1954).

[44] See ACM 11107, *Bell*, 20 CMR 804 (1955).

[45] In NCM 62 0834, *Musial* (28 Jun 62) (unpublished), a member of a special court-martial who had been challenged peremptorily, with no disclosure of cause on the record of trial, subsequently was appointed defense counsel at a rehearing of the same case, at which the accused pleaded guilty. A divided board upheld the conviction, one member finding no error in that the individual had not previously "acted," and another member finding error but no prejudice under the circumstances.

[46] UCMJ, Arts. 25, 26.

[47] MCM, 1951, para. 6*a*, 61*f*(4), app. 8*a*.

[48] See MCM, 1951, para. 44*b*.

case[49] under the Code involved a trial counsel—in a special court—who was the accuser. The Court held that his investigation of the case as accuser did not render him an "investigating officer" so as to disqualify him from being trial counsel, noting that "while this duality of function does not perhaps reflect the very wisest and best policy . . . it is recognized that a similar practice is often followed in the criminal courts of the civilian community." [50] The Court recognized, however, that in certain cases an accuser should be disqualified as prosecutor, and that in some cases such disqualification could be based on his prior connection with the case.

When examining the alleged ineligibility of a trial counsel because of prior participation as an "investigating officer," the Court of Military Appeals appears inclined to give the meaning of the term "investigating officer" a much narrower interpretation than when it is applied to such prior activity by a court member or the law officer. It is apparent that prior knowledge of the facts or preconceived opinions of the case by these officials would have more damaging impact on the accused's right to a fair trial than would the prior knowledge of preconceived opinion of the trial counsel. Investigation of the facts of a case is a normal incident of the duties of trial counsel. Nor is the situation changed because the officer was directed by his staff judge advocate to conduct such an inquiry in *anticipation* of his appointment as trial counsel.[51] Moreover, it is permissible for trial counsel to appear at the Article 32 investigation either as prosecutor or as an "adviser" to the investigating officer—to assist in examination and cross-examination of witnesses—although it is preferable for him to appear as prosecutor since the investigating officer might otherwise be misled concerning the impartiality of any advice tendered.[52]

Section V. PARAGRAPHS 42*a*, 48*a*, *b*, 61*f*, MCM, 1951, RETENTION OF INDIVIDUAL COUNSEL

1. General. The term "individual counsel" includes counsel, both military and civilian, not "appointed" or "designated" to represent the accused in accordance with such statutory requirements as Article 27 and 49, UCMJ. For instance, Article 27 requires counsel be "appointed" to represent the accused at the trial, and Article 49 calls for the convening authority to "designate" an officer to represent the accused at the taking of a pretrial deposition. In addition to these Government-furnished counsel, Articles 32 and 38 allow the accused to be represented by his personally retained civilian counsel and by particular military counsel requested by the accused, who will be furnished by the Government if reasonably available. These individuals act as "individual counsel."

2. Individual military counsel. *a. At Article 32 investigation.*

(1) *Advice to the accused.* The pretrial investigating officer must advise the accused of his right to be represented at the investigation by "civilian counsel if provided by him, or military counsel of his own selection, if such counsel be reasonably available, or by counsel appointed by the office exercising general court-martial jurisdiction over the accused." [53] Thus, accused must be advised of his right to Government-furnished counsel qualified under Article 27(*b*), UCMJ.[54]

(2) *Processing of request for counsel.* The investigating officer will allow the accused a reasonable time to obtain civilian counsel; if the accused requests individual military counsel, the investigating officer must so advise the commander ordering the investi-

[49] United States v. Lee, 1 USCMA 212, 2 CMR 118 (1952).

[50] 1 USCMA 212, 217, 2 CMR 118, 123.

[51] See United States v. Schreiber, 5 USCMA 602, 18 CMR 226 (1955).

[52] See United States v. Weaver, 13 USCMA 147, 32 CMR 147 (1962); United States v. Young, 13 USCMA 134, 32 CMR 134 (1962).

[53] UCMJ, Art. 32(*b*).

[54] United States v. Tomaszewski, 9 USCMA 266, 24 CMR 76 (1957). *But see* United States v. McFerrin, 11 USCMA 81, 28 CMR 255 (1959).

gation. If such counsel is not available in the latter's command, he will take action to ascertain—from another command—the counsel's availability, and attempt to secure his services without unduly delaying the investigation.[55] If the officer requested as counsel is not available, the commander exercising general court-martial jurisdiction will be requested to furnish counsel, who must be qualified under Article 27(b), UCMJ.[56]

(3) *Appeal from denial of request.* Neither the Manual nor the Code expressly provides an appeal from denial of the accused's request for individual military counsel at the pretrial investigation, although the Manual does state: "The principles stated in . . . 48 apply equally to the counsel at the investigation." Paragraph 48*b* of the Manual provides: "The decision of the convening authority as to the availability of requested counsel is subject to revision by his next superior authority on appeal by . . . the accused." The Court of Military Appeals apparently believes that this Manual provision authorizes an appeal from the denial of requested counsel at the Article 32 investigation. But a deprivation of this right to appeal, although it is error, may be waived by failure to object or move for appropriate relief at the trial.[57]

b. After case referred to trial. In special and general courts-martial, the accused has a right to "military counsel of his own selection if reasonably available." [58] The appointed defense counsel must inform the accused of this right, and of his right to retain civilian counsel.[59]

Any request for individual military counsel is usually forwarded by the appointed defense counsel, through the trial counsel, to the convening authority. The latter, if the requested counsel is reasonably available in his command, details the requested counsel and issues any necessary travel orders. If he is not in the command, the convening authority takes necessary action to obtain his service from the commander of the requested counsel. If the requested counsel is not available, the convening authority must so advise the accused.

The decision on availability of particular military counsel is, of course, a command decision. Absent some showing of abuse of discretion, this decision will not be overturned by the courts.[60] The accused's right to be defended by counsel of his own choice is fundamental, however, and the Manual provides that the "decision of the convening authority as to the availability of requested counsel is subject to revision by his next superior authority on appeal by . . . the accused." [61] Such a review of the decision within command channels and and before the trial might well be broader than that which the courts find feasible after the trial.

If the accused's request for particular counsel is denied, and appointed defense counsel is unacceptable to him, the accused must be given the opportunity to (diligently) exercise his right of appeal in command channels. If the accused appeals, then forcing him through the trial before the decision on this appeal amounts to denial of his right to be defended by counsel of his own choice, and is automatically reversible error.[62] The same result will follow if his request for particular counsel is denied and he is not afforded a reasonable opportunity to obtain another.[63]

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[55] MCM, 1951, para. 34*d*(2).

[56] MCM, 1951, para. 34*d*(3); United States v Tomaszewski, 8 USCMA 266, 24 CMR 76 (1957).

[57] See United States v. Wright, 10 USCMA 36, 27 CMR 110 (1958).

[58] UCMJ, Art. 38(b).

[59] MCM, 1951, para. 46*d*.

[60] See United States v. Vanderpool, 4 USCMA 561, 16 CMR 185 (1954); AGM 14913, Genesee, 26 CMR 845 (1958).

[61] MCM, 1951, para. 48*b* (emphasis added). There is an apparent ambiguity—whether "his" refers to the requested *counsel's* next superior, or the superior of the *convening authority*. It seems unlikely that the appeal was intended to run downward or laterally in command channels. The most reasonable interpretation, therefore, would be that when requested counsel is in the command, the decision on availability is the convening authority's, and the appeal is to the convening authority's next superior. When counsel is in another command, the decision should be made by the commander there who has at least the equivalent command status as the convening authority (where the two commands are in the same vicinity), and the appeal is to *his* next superior. In either case, appointed defense counsel should advise the accused of his right to appeal and inform him to whom the appeal be directed.

[62] See CM 354095, *Fletcher*, 6 CMR 163 (1952).

[63] See CM 358874, *Horsellelo*, 9 CMR 804 (1953).

3. Qualifications of individual military counsel. Article 38(b) of the Code entitles the accused to be represented at the special or general court-martial by "military counsel of his own selection if reasonably available." This article, however, does not define the word "counsel." The Manual, on the other hand, does imply that individual counsel need not have any legal qualifications:

> . . . [B]ut if no member of counsel for the defense present, *including the individual counsel,* has legal qualifications equivalent to those of . . . the prosecution, the law officer . . . will advise the accused of his right to such counsel and will ask him whether he is willing to proceed to trial without counsel so qualified.[64]

This provision of the Manual has been overruled by the Court of Military Appeals in *Kraskouskas,*[65] where the court stated that individual counsel must be a lawyer of a "recognized bar" in order to practice before a general court-martial.

Illustrative Case

United States v. *Kraskouskas,* 9 USCMA 607, 26 CMR 387 (1958)

At the beginning of the trial the accused expressly waived the right to the assistance of the appointed defense counsel, certified under Article 27. The individual military counsel, Captain T, announced that the accused wished to be represented by him; at the accused's request the appointed defense counsel was excused from the proceedings. Captain T managed to obtain an acquittal of two of the four charges. The Court of Military Appeals, Judge Latimer, dissenting ordered a rehearing on the two charges of which accused was convicted:

> The precise issue presented therefore is whether "military counsel" selected by an accused pursuant to Article 38(b) must likewise be a lawyer. Appellate defense counsel forcefully contends that only licensed attorneys who are members of the bar should be permitted to practice before a general court-martial. In support of his contention he argues that the basic policy reasons which underlie the prohibitions against the unauthorized practice of law, i.e., to protect the administration of justice against unethical practitioners and to safeguard an accused against incompetence, are as fully applicable in courts-martial as in civilian courts. There is merit in counsel's argument.
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> Without regard to the situation which existed prior to the Code, we believe that the day in which the nonlawyer may practice law before a general court-martial must draw to an end. . . . Lawyers have always been considered officers of the court. A layman could not be considered such. The code of ethics would not apply to the nonlawyer. A lawyer is held to a high standard of professional capacity and his decisions on law are binding on his client. It is clear that Congress in enacting the Code sought to eliminate many of the objectionable practices which had existed prior thereto—not the least of which was an accused's representation by one unskilled in the practice of law. It is inconceivable that Congress would, on the one hand, prescribe exacting legal qualifications for appointed counsel, while on the other, permit an accused by his own selection to be represented by a nonlawyer. The stakes involved in a general court-martial are too high and the price paid for incompetence and lack of professional ability is too dear to permit an accused's life and liberty to rest in the hands of one untrained in the law. . . .
>
> We are not unmindful that in the past those representing the adversary interest before a military court-martial were often nonlawyers who performed very creditable service on behalf of their clients. Nevertheless, the obvious truth—with which none can quarrel—is that one untrained in the law is seriously handicapped by the lack of professional skill and legal ability which is so necessary in adversary proceedings, especially involving criminal matters. To the nonlawyer rules of evidence mean little

[64] MCM, 1951, para. 61f(8), at 88 (emphasis added); *see also id.* app. 8d, at 508.

[65] 9 USCMA 607, 26 CMR 387 (1958).

and instructions are but unimportant technicalities. To the lawyer, however, they are tools which oftentimes spell the difference between success and failure.

The constitutional right to effective assistance of counsel is not concerned with merely a procedural requirement but also demands a professional and requisite standard of skill. A fair standard of professional competence must be a necessary condition precedent with the professional undertaking of the defense of a person on trial for a crime. United States v. Horne, 9 USCMA 601, 26 CMR 381.

We conclude, therefore, that in order to promote the best interests of military justice, it is imperative that only qualified lawyers be permitted to practice before a general court-martial.

Our holding is not to be construed in any manner as prohibiting an accused from insisting upon the right to conduct his own defense should he so desire without the assistance of counsel. As always, an accused can waive his right to counsel, "if he knows what he is doing and his choice is made with eyes open." Adams v. United States, 317 US 269, 63 S Ct 236, 242, 87 L ed 268, 275. All we now hold is that an accused, even at his own insistence, may not be permitted lay representation before a general court-martial. Of course this does not in any manner infringe upon his right to consult with a nonlawyer, or even to have a nonlawyer present at trial and seated at the counsel table. However, concerning the actual trial proceedings before the general court-martial itself, only lawyers may now participate.

Accordingly, we direct that the practice of permitting nonlawyers to represent persons on trial before general courts-martial be completely discontinued. In view of our holding it is unnecessary to consider the remaining issues raised. The decision of the board of review is reversed. A rehearing may be ordered limited to those offenses of which the accused was convicted. In view of the foregoing action, the petition for new trial is denied.

Judge Latimer dissented on the grounds that (1) the Court's decision ignored the intent of Congress which had been familiar with the long-standing military custom of allowing lay military counsel to represent an accused before a general court-martial; (2) paragraph 61*f* of the Manual is not inconsistent with the Code, and therefore, having been promulgated by the President under his rule-making powers contained in Article 36, has the force of law; (3) although the Court of Military Appeals has the statutory power to prescribe the qualification of individual counsel practicing before that Court, it has no such express right to set the qualifications for practise before courts-martial; (4) the error, if any, was induced by the defense; and (5) it should not be given retrospective effect.

Note. In a subsequent decision,[66] the Court upheld the right of an accused to defend himself, citing *Kraskouskas.*

Section VI. PARAGRAPHS 46*d*, 48*a*, MCM, 1951, RETENTION OF CIVILIAN COUNSEL

1. General. As with individual military counsel, accused is guaranteed a right to representation at the trial by retained counsel.[67] The "availability" of the civilian counsel is, of course, decided by that lawyer; as in the case of individual military counsel, accused cannot complain of being forced to trial without the services of the civilian counsel who is not reasonably "available" at the time of trial, or other stages of the proceedings.

2. "Reasonably" available.

Illustrative Case

CM 376133, *Griffiths*, 18 CMR 354, pet. denied, 19 CMR 413 (1955)[68]

A month after being retained by the accused, his civilian attorney accepted employment to defend a Federal criminal proceeding to begin two months after his retention by the accused.

[66] United States v. Howell, 11 USCMA 712, 29 CMR 528 (1960).
[67] UCMJ, Art. 38 (b).
[68] *Accord*, Griffiths v. United States, 172 F. Supp. 691 (Ct. Cl. 1959).

The accused's court-martial began on 3 May. Although the law officer was then requested by the civilian counsel to grant a continuance until early in July, the estimated date of completion of the Federal court proceeding then underway, the law officer granted a delay only until 7 June. On 7 June the trial proceeded with appointed defense counsel acceptable to the accused, although the law officer denied the latter's objection to the absence of the civilian counsel.

Opinion: The law officer did not abuse his discretion in overruling this objection. The statement of the Court in *United States* v. *Vanderpool,* 4 USCMA 461, 16 CMR 135 (1954) is as equally applicable to civilian counsel, as to individual military counsel:

> Of course, the right to choose counsel in the first instance may not be insisted on in such a manner as to obstruct either other important operations of the service concerned or the orderly administration of military justice. It is also clear that both the Code and the Manual distinctly comprehend the possibility that—if the requested counsel is not reasonably available—the accused will be required to stand his trial represented by counsel appointed by the convening authority, although such counsel may not be the first preference of the accused.[69]

In this case, professional employment elsewhere, from which he could not be excused, rendered accused's civilian counsel "reasonably unavailable." [70]

3. Qualifications of civilian counsel. Neither the Manual nor the Code purport to define the qualifications of counsel, practising before courts-martial, although the Court of Military Appeals has stated that he must be a lawyer of a "recognized bar." [71] In dictum the Court has stated that the Government "can for proper cause disbar the lawyer presented by the accused from practice before courts-martial." [72] This of course presupposes that he is already a member of a "recognized bar." Since *Kraskouskas* there have been no decisions defining what is a "recognized bar," although in the past the Court has expressed no objection to representation by a member of a foreign bar. The Court, for instance, did not disapprove of joint representation by appointed certified counsel and civilian counsel who was " 'a Solicitor in the Supreme Court' of England." [73] Nevertheless, because *Kraskouskas* requires a counsel familiar with the "rules of evidence" and possessing a high professional competence, it is entirely possible that the Court in the future may restrict the definition of "recognized bar" to a State of Federal bar, or, at the very least, to a bar requiring detailed knowledge of the common law rules of evidence and Anglo-Saxon principles of criminal procedure.[74]

4. Relations between individual (military or civilian) and appointed defense counsel. *a. General.* When the accused is represented at the court-martial by counsel of his own selection, his appointed counsel shall be excused by the president from proceedings unless the accused desires that he remain as "associate counsel." [75] It may be presumed, absent contrary indication, that if the appointed counsel does remain as "associate counsel" that he does so as an assistant to the individual counsel who is then the chief counsel in charge of the case.[76] In such a case "the duties of defense counsel as associate counsel are those which the individual counsel may direct." It has been held, however, that the individual counsel need not be in charge of the case, if the accused expresses such a desire, in which situation the "associate" appointed counsel could act as chief counsel.[77] In any event, however, it would seem that in the interest of orderly proceedings and fixing the ultimate responsibility for the conduct of

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[69] United States v. Vanderpool, 4 USCMA 561, 566, 16 CMR 135, 140 (1954).

[70] It should be kept in mind, however, that in *Griffiths,* the accused had indicated a willingness to go to trial with appointed defense counsel, and in *Vanderpool,* the underlying holding was that it was automatically reversible error to refuse accused the opportunity to appeal from the convening authority's denial of requested counsel.

[71] United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958).

[72] United States v. Nichols, 8 USCMA 119, 23 CMR 343, 349 (1957).

[73] United States v. Harris, 9 USCMA 493, 26 CMR 274 (1958).

[74] *But see* the remarks of Chief Judge Quinn in 35 St. John's L. Rev. 225 (1961) at 235, 236 in which he stated that the accused has a right to a foreign lawyer except in cases arising behind the Iron Curtain.

[75] UCMJ, Art. 38 (b).

[76] See ACM 14913, Genesee, 6 CMR 845 (1958).

[77] See ACM 6062, Hanson, 8 CMR 671 (1958).

the case, the law officer (or president of the special court) could require accused to state whom he has selected to act as chief counsel.[78]

b. Disagreement as to tactices. Although the Code requires appointed counsel to remain as "associate" counsel to the individual counsel, when the accused so requests, it contains no express provision authorizing his withdrawal from the case when he opposes the type of defense conducted by individual counsel. Nevertheless it is consistent with both the rights of the accused, and the ethical duty of the appointed counsel, to allow the latter to withdraw. Canon 7, Canons of Professional Ethics, ABA, provides in part:

> When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

While the appointed counsel cannot take affirmative action, on his own initiative, contrary to the direction of individual counsel in charge of the case, he should not be compelled to take action in accordance with individual counsel's (or accused's) desires which he, the appointed counsel, considers ill advised and possibly ethically improper.[79] The intent of the Code that accused have counsel of his own choice should not be interpreted to abolish the professional and ethical concepts of the word "counsel," by requiring appointed counsel to remain as the unwilling servant of the accused, once he can show good cause for withdrawing from the case. Therefore, it would appear entirely proper, once the appointed counsel has shown that he cannot in good conscience continue in the defense, to allow law officer discretion to overrule the accused's objection to his relief. In any event, if accused is aware that his counsel differ on their own views of the defense and still insists on active representation by his appointed counsel, he cannot later complain that appointed counsel's actions were contrary to individual counsel's desires. This presupposes, of course, that appointed counsel's actions constitute an adequate defense, not by itself prejudicial to the accused.[80]

Illustrative Case

CM 399453, *Williams*, 27 CMR 670, pet. denied, 27 CMR 512 (1959)

On a rehearing on the sentence Lieutenant S was appointed to defend the accused who had also retained civilian counsel, Miss D. S did not agree with D on the advisability of introducing certain collateral matters and in his portion of the conduct of the case did not do so, without objection from D.

Opinion: S's conduct of the trial did not deprive the accused of the benefit of counsel:

> . . . It seems clear that in such a situation individual counsel, acting with the consent of the accused, is in a position to take full change of the defense of the case and to act as leading counsel. Individual counsel's assumption of such a position and responsibility, however, cannot affect the appointed defense counsel's professional position by depriving him of or diminishing his status, dignity or responsibilities as an officer and and attorney. He does not thereby become a subordinate or clerk of individual counsel, required as an employee might be to follow instructions and do another's bidding in all things. To the extent that individual defense counsel desires the continued assistance of appointed military counsel, he should be prepared to treat him as an associate, an equal and not as an underling. In this instance, individual counsel could have requested that appointed defense counsel be excused or relieved from further participation in the case when it became apparent that they could not resolve their differences of opinion with regard to trial tactics. If instead of following that course, individual

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[78] But see CM Hanson, *supra* note 77. For an excellent discussion of the relationship between civilian and military defense counsel, see Wilder, *Relationship Between Appointed and Individual Defense Counsel*, 21 Mil. L. Rev. 87 (DA Pam 27-100-21, Jul 63).

[79] CM 399453, *Williams*, 27 CMR 670, *pet. denied*, 27 CMR 512 (1959).

[80] *Cf.*, United States v. Walker, 8 USCMA 355, 12 CMR 111 (1953).

counsel and the accused chose to continue to avail themselves of the services of appointed defense counsel despite obviously divergent views, they should not now be heard to complain that his collaboration was less than satisfactory to all concerned. Also, they are in no position to criticize appointed defense counsel's failure to ask certain questions or to elicit certain testimony during the interrogation of the accused as a witness when they called upon him to assume the burden of actively conducting the examination. We cannot consider that the accused was legally prejudiced because appointed defense counsel acted in accordance with his own professional judgment in determining what was material or relevant instead of adopting the views of individual counsel.[81]

[81] 27 CMR at 678.

CHAPTER VII

CONDUCT AND DUTIES OF TRIAL AND DEFENSE COUNSEL

References: Arts. 27, 35, 38, 46, 47, UCMJ; para. 42–51, 61*f*, 115, 116, MCM, 1951; Canons 1, 3, 5, 6–9, 15–23, 25, 29, 32, 37, 39, 41, American Bar Association, Canons of Professional Ethics; DA Pam 27-10, The Trial Counsel and the Defense Counsel (Nov 62).

Section I. INTRODUCTION

The previous chapter dealt principally with the legal qualifications of counsel, including ineligibility from having previously "acted" in an *adverse* capacity in the "same case." This chapter is concerned more with the general subject of adequate representation of one defendant and the possibility of inadequate representation arising from a conflict of interest in the defense of two or more accused. Also discussed are the legal and ethical duties and relationships—to each other, and to the accused—of both the trial counsel and the defense counsel.

Section II. PARAGRAPHS 42, 43, MCM, 1951, ETHICAL CONSIDERATIONS

1. General. Paragraph 42*b*, MCM, 1951 is but a summary of Canons 1, 17, 18, 20, and 22 of the Canons of Professional Ethics, ABA. It states that counsel should be courteous and respectful to all parties to the trial, avoid wrangling, exhibit candor and fairness, refrain from knowingly misquoting or citing bad law, and refrain from discussing the case with news agencies unless so authorized by the convening authority. Other Canons of Professional Ethics are set forth elsewhere in the Manual: *Canon 5*, primary duty of prosecution to see that justice is done, not solely to convict;[1] *Canon 5*, right to defend guilty client regardless of personal conviction of guilt;[2] *Canon 6*, prohibition against representing conflicting interests;[3] *Canon 8*, duty to obtain full knowledge of the case before giving candid opinion to the client;[4] *Canon 9*, prohibition against dealing with party except through his counsel;[5] *Canon 15*, prohibition against asserting, during argument, personal belief in the client's innocence;[6] *Canon 16*, duty to restrain client from improprieties;[7] *Canon 23*, prohibition against private communications with the jury;[8] *Canon 39*, prohibition against suggesting witness deviate from truth;[9] *Canon 37*, duty to preserve confidences of client.[10]

Other Canons of Professional Ethics, even though not set forth expressly in the Manual have been held equally applicable to counsel before courts-martial: *Canon 3*, prohibited communication with judge,[11] *Canon 19*, duty to avoid testifying in case.[12]

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[1] MCM, 1951, para. 44*g*(1). See also Alcorta v. Texas, 355 U.S. 28 (1957).
[2] *Cf.*, para. 48*c*, *id.* (*duty* of appointed counsel to defend).
[3] UCMJ, Art. 27, MCM, 1951, para. 6, 48*c*.
[4] *Id.*, para. 48*f*.
[5] *Id.*, para. 44*h*. Compare United States v. Massiah 307 F. 2d 62 (2d Cir. 1962) (assumed that prohibition applies only to prosecutor, not to governmental investigating agencies.)
[6] MCM, 1951, para. 44*g*(1), 48*c*.
[7] *Id.*, para. 48*c* (improper to tolerate any chicane or fraud).
[8] *Id.*, para. 53*d*.
[9] *Id.*, para. 42*c*.
[10] *Id.*, para. 151*b*(2).
[11] See CM 391199, Brown, 22 CMR 471 (1956).
[12] See United States v. Stone, 13 USCMA 52, 32 CMR 52 (1962); United States v. McCants, 10 USCMA 346, 27 CMR 240 (1959).

2. Suspension of counsel. *a. General.* The Manual purports to authorize the respective Judge Advocates General of the services to announce in departmental regulations rules defining unprofessional misconduct that may disqualify counsel—military or civilian—from practicing before courts-martial.[13] There is no conflict between this provision of the Manual and Article 37 of the Code, which prohibits a convening authority from censuring court-martial personnel, because Article 37 protects only counsel who perform ethically and legally. In any event, a drastic procedure such as the suspension proceedings authorized by paragraph 43 of the Manual would seldom be taken against military personnel, since military counsel can be decertified at the discretion of The Judge Advocate General and thereby prevented from being appointed to act in general courts-martial.[14] Also, and more important, the convening authority may relieve an appointed counsel, although it would probably be improper for him to declare a requested individual military counsel "unavailable" because of the counsel's prior, and as yet unproven, unprofessional conduct.

b. Grounds. Pursuant to the authority of the Manual, Army regulations have been promulgated announcing the grounds for suspension action.[15] These regulations do not appear to apply to appointed counsel of *special* courts-martial, probably for the reason that these counsel are not usually lawyers, certified as professionally competent. The "grounds" are couched in broad terms based on demonstrated professional or personal misconduct (*e.g.*, conviction of an offense involving moral turpitude), as well as incompetence. The grounds for suspension specified in the regulations *"include, but are not limited to"* those unethical practices proscribed by the Manual.[16] It would seem appropriate, therefore, to set more specific rules of conduct—as have various bar associations—which rules would be peculiarly applicable to military criminal practice.[17]

While the regulations purport to suspend counsel from practice before courts-martial, pretrial practice is not mentioned (nor is it in the Manual), although the regulations do specify that the *grounds* may arise from unprofessional conduct or incompetent performance during the pretrial and post-trial stages.

c. Procedure. Suspension proceedings will be instituted *only* when all other measures, including punitive action against military counsel, have failed to reform the attorney. The general court-martial convening authority concerned may then appoint a board of officers, certified under Articles 26 and 27 of the Code, who may not, over accused's objection, be junior to him. The convening authority, after considering the board's findings and recommendations, may dismiss the charges or forward them to The Judge Advocate General concerned, who will take final appropriate action.[18]

Section III. PARAGRAPHS 44, 45, MCM, 1951, THE TRIAL COUNSEL[19]

1. Required action if ineligible. The trial counsel has a duty to report to the convening authority before trial any disqualification resulting from previous connection with the case.[20] If the grounds are discovered after the court has assembled, the trial counsel will report it to the court and immediate action will be taken to relieve him from any participation in the trial.[21]

2. Duties. *a. General.* The duties of the trial counsel are similar to those of any prosecuting attorney. He prosecutes in the name of the United States, not the convening authority.[22] Nevertheless, when he thinks the trial of a case is inadvisable, he should report the matter to

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[13] MCM, 1951, para. 43.

[14] *But cf. In Re* Taylor, 12 USCMA 427, 31 CMR 13 (1961), in which it was noted that such decertification would not prevent counsel from serving as individual counsel if requested by an accused.

[15] SR 22-130-5 (26 Mar 51).

[16] *Id.*, para. 2 (emphasis added).

[17] See Horton, *Professional Ethics and the Military Defense Counsel*, 5 Mil. L. Rev. 67, at 111, and appendix, "A Proposed Code of Military Trial Conduct" (DA Pam 27-100-5, Jul 59).

[18] See SR 22-130-5 (26 Mar 51).

[19] See generally chs. 1, 2, DA Pam 27-10, "The Trial Counsel and the Defense Counsel" (Nov 62).

[20] See MCM, 1951, para. 44*b*.

[21] See *Id.*, para. 61*e*, and app. 8*a* at 502.

[22] MCM, 1951, para. 44*d*.

the convening authority, since only the latter can withdraw a case from trial. In this respect, trial counsel does not have the *nolle prosequi* powers of a civilian prosecuting attorney.

b. Prepares the record of the proceedings.[23] The trial counsel, under the direction of the court, shall prepare, or supervise the preparation of, a verbatim record of trial of each special court-martial in which a bad-conduct discharge is adjudged, and of each general court-martial.[24] Although he does not authenticate the record, he is required to check it for accuracy and may make appropriate initialled corrections in the record before it is authenticated.[25] Records of trial by special court-martial, in which no bad conduct discharge is adjudged, may be summarized.[26]

c. Reports.

(1) *Status of cases on hand.* The Manual requires trial counsel to make a weekly report of cases on hand to the convening authority, through the law officer (or president of the special court), unless directed otherwise by the convening authority.[27] In this report he must explain the delay in trying cases on hand for more than two weeks.

(2) *Result of trial.* Trial counsel must notify the accused's immediate commanding officer of the result of trial, and send copies of this report to both the convening authority and, if the accused is in confinement, the commander of the confinement facility.[28] As a matter of policy and courtesy it is very important that the accused's immediate commander be notified promptly.

3. Relations with accused and defense counsel. *a. Deals with accused through his counsel.* Immediately upon receiving charges which have been referred to trial, the trial counsel serves or causes to be served on the accused a copy thereof, and notifies the defense counsel of the service. This date of service begins the running of the period for preparation of a defense, within which accused may object to being tried.[29] All other dealings with accused are through his counsel.[30] It has even been held that paragraph 44*h* of the Manual protects the accused from questioning, without his counsel, by any officers or agents having an official interest in the case. To the government's argument that the Manual was intended to restrict only the *trial counsel's* dealings with the accused in the absence of his counsel, an Army board of review noted that, while it did not presume to say how far the pertinent provision of paragraph 44*h* extends,

> We do not believe the rule or principle should be so narrowly applied; to do so would thwart its purpose. We think that the prohibition must apply to all officers and agents of the Government who are officially interested in and acting with regard to a pending case, and that it would be patently improper for some other official, having knowledge of the status of of the case, such as an assistant staff judge advocate, or the accuser, to bypass the defense counsel and communicate directly with the accused . . .[31]

b. Allows the defense to examine papers accompanying charges.[32]

(1) *General.* Paragraph 44*h* of the Manual provides that "Except as otherwise directed by the convening authority, he [trial counsel] will permit the defense to examine from time to time any paper accompanying the charges . . ." This appears to supplement the pretrial "discovery" procedure afforded by the Article 82 investigation. In addition, it has been stated that once

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[23] See generally MCM, 1951, para. 44*d*, 44*g*(1).
[24] UCMJ, Art. 38(a); MCM, 1951, para. 82*a*, 83*a*.
[25] *Id.*, para. 82*c*.
[26] *Id.*, para. 83*b*.
[27] *Id.*, para. 44*e*(1).
[28] *Id.*, para. 44*e*(2).
[29] UCMJ, Art. 35 (5 days, in case of trial by general court-martial; 3 days, when trial is by special court-martial).
[30] See MCM, 1951, para. 44*h*.
[31] CM 399759, Grant, 26 CMR 692, 696 (1958). The rule apparently is otherwise in the Federal courts. See United States v. Massiah, 307 F. 2d 62 (2d Cir. 1962), in which the court upheld a Government agent's post-indictment interrogation of the defendant in the absence of his counsel, and assumed *without deciding*, that it would be improper for a prosecutor to do the same.
[32] MCM, 1951, para. 44*h*.

privileged matter is considered by the pretrial investigating officer, its privileged status disappears and the accused may examine it.[33] Further, the accused is to be furnished a complete copy of the pretrial investigation.[34] If, however, materials were *not* examined by the investigating officer, but subsequently have been furnished the trial counsel, it appears to be as yet an open question whether these materials are "papers accompanying the charges" within the meaning of paragraph 44*h*. Even if they are, it is further debatable to what degree the trial counsel must submit to the defense's demand for discovery, when the convening authority has "directed otherwise" against such disclosure.

Regarding the first question, if the paper has been transmitted to the trial counsel through the staff judge advocate, prior to the pretrial advice, possibly the convening authority would have to consent to the trial counsel's release of the privileged document upon a defense demand, under paragraph 44*h*, or bear the risk, at the very least, of having the witness' testimony stricken at the trial. The staff judge advocate in his pretrial advice must state that the charges are warranted by evidence indicated *in the report of investigation*.[35] The Court of Military Appeals has stated that paragraph 44*h* gives the defense counsel a pretrial right to inspect the pretrial advice.[36] It might be held, therefore, that if the staff judge advocate based his recommendation on matter not available to the defense counsel, the latter was, practically, denied his right to inspect the pretrial advice.[37]

This possibility is rendered less remote by the decision in *United States* v. *Samuels*, 10 USCMA 206, 27 CMR 280 (1959), where great importance was accorded the pretrial *investigation*, because "it operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges." One might conclude that the pretrial *advice* is intended also as a "bulwark against baseless charges" and that the accused should have the right to inspect the "baseless charges" of potential witnesses considered by the staff judge advocate in his advice, even though they were *not* considered by the investigating officer. This presupposes, of course, that the prosecution intends to utilize the statement at the trial, for there would be no obligation to disclose an informer's statement which is not to be used to convict the accused or is not "essential to the defense."[38]

If the defense is entitled to inspect certain requested documents before the court is convened, he should first direct his request to the trial counsel, and then, if denied access, to the convening authority.[39]

(2) *Documents.*

a. Documents which are to be introduced in evidence are in the custody and control of military authorities, the trial counsel, the court, or the convening authority, will, upon proper request, take necessary action to effect the production of such documents, without the necessity of further legal process.[40]

A pretrial denial of defense's request

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[33] See OM 391879, Craig, 22 CMR 488 (1956); cf. MCM, 1951, para. 34*d*; see also, Legal and Legislative Basis, MCM, 1951 at 55; see generally, Boysen, *Discovery in Criminal Cases: What Must the Government Reveal* (Unpublished thesis) The Judge Advocate General's School, 1962).

[34] See MCM, 1951, para. 34*e*.

[35] UCMJ, Art. 34(a) (emphasis added).

[36] See United States v. Beatty, 10 USCMA 311, 27 CMR 385 (1959).

[37] *But cf.* United States v. Shotter, 12 USCMA 283, 30 CMR 283 (1961)—a case in which matter not shown to the investigating officer was given to the staff legal officer and the convening authority. No prejudice was found, since the accused knew of the material, it was not used at the trial, and the other evidence of guilt was compelling.

[38] See United States v. French, 10 USCMA 171, 27 CMR 245 (1959).

[39] See United States v. Gandy, 9 USCMA 355, 26 CMR 135 (1958); *cf.* DA Pam 27-10, "The Trial Counsel and The Defense Counsel," ch. 7, para. 4*d* (1962).

[40] MCM, 1951, para. 115*c* (emphasis added).

to examine material statements or documents in possession of the Government is without prejudice and may be renewed at the trial itself.[41] A defense motion to produce, being an interlocutory question,[42] is decided finally by the law officer,[43] the defense being required to support its motion by a preponderance of the evidence.[44] Unless a request is made, however, trial counsel has no affirmative duty to disclose pertinent material, because the Manual states that "he will *permit* the defense" to examine papers.[45] Failure of the defense to request inspection at or before the trial, therefore, constitutes a waiver of whatever such right existed.[46]

(3) *Extent of right of inspection.* The extent of the right to discovery has not yet been clearly defined by military judicial decisions. An advisory opinion from Office of The Judge Advocate General of the Army has stated the defense may not only examine any paper accompanying the charges prior to trial, but also may inspect any items in the custody of military authorities "upon a showing that the items are admissible in evidence."[47] Nevertheless, it should not be necessary to show the item's "admissibility in evidence" as a prerequisite to inspection.[48] Whatever the right of inspection is, it depends on a procedural, not an evidentiary rule.[49]

The JAG opinion, however, purports to broaden the scope of the material subject to inspection—from items in possession of the prosecutor, to those in the hands of any military authorities. A subsequent opinion of The Judge Advocate General of the Army follows this policy in respect to the release of the files of military criminal investigation reports.[50] This latter opinion would allow *military* defense counsel "normally" to have "unrestricted access to these reports" (when not made part of the Article 32 investigation). Civilian defense counsel would have similar rights, except that he could not: (1) examine material furnished by agencies outside the Army; (2) determine identities of confidential informers; (3) examine confidential reports; (4) examine medical reports, such as autopsies, without the permission of the Adjutant General; or (5) examine material which would aid in the prosecution of a claim against the United States, without prior approval of The Judge Advocate General of the Army.

These exceptions are based upon the general restrictions against release of information, contained in Army regulations, rather than any distinction between the discovery rights of military and civilian counsel.[51] If a civilian defense counsel, for instance, was

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[41] *Id.*, para. 67*a*.

[42] *Id.*, para. 69*a*.

[43] *Id.*, para. 57.

[44] See United States v. French, 10 USCMA 171, 27 CMR 245 (1959); see also MCM, 1951, para. 67*e*.

[45] MCM, 1951, para. 44*h* (emphasis added); see also, *id.*, para. 115*a* (*"Upon proper request"* the Government must produce for preliminary inspection its essential documentary evidence) (emphasis added).

[46] See United States v. Gandy, 9 USCMA 355, 26 CMR 135 (1958).

[47] JAG Chronicle Letter, JAGS 250 22/157 (5 July 1957).

[48] See United States v. Heinel, 9 USCMA 259, 26 CMR 39 (1958).

[49] *Cf.* Palermo v. United States, 360 U. S. 343 (1959). Merely because an item may theoretically be admissible in evidence does not mean that its production may be compelled. In United States v. Franchia, 13 USCMA 315, 32 CMR 315 (1962), two accused committed larceny while in confinement as sentenced prisoners. Having pleaded guilty, and before sentence, accused moved to compel production of that part of their "correctional treatment" files which had not yet been disclosed to them, including Red Cross reports on their civilian life and family background, FBI reports on their previous criminal records, and the confinement facility's classification summaries" containing, *inter alia*, opinions and comment on the accused by two psychiatrists and the Chaplain. Even though these documents were "hearsay twice removed," they might have been admissible in mitigation, on the sentence. Nevertheless, the Court held that the law officer did not abuse his discretion by denying a motion to compel production, since the Government disclosed the names of the informants on whose opinions the reports were based, and the law officer twice offered accused a continuance to interview such informants, which accused rejected.

[50] JAGJ 1951/5021 (12 Aug 59). An interesting variant on this situation occurs when the Government, without negligence, destroys essential *res*[*]l evidence and is thereby unable to produce it for the accused's inspection. In CM 409099, Mayers (26 Apr 63) (unreported), this problem arose when a small amount of material taken from the accused, and asserted to be heroin, was entirely dissipated by the Government laboratory in the process of qualitative chemical analysis. The testing procedures used by the Government were scientifically necessary, and the accused was held to have no absolute right to the production of the substance, when the report of analysis clearly showed the substance was heroin.

[51] Compare AR 340-10, para. 15 (30 Aug 55) (restricting disclosure of Red Cross reports for use in courts-martial), which was involved in United States v. Franchia, *supra* note 49.

unreasonably denied access to classified material, the violation of his discovery right would, on appeal, be accorded the same effect as a denial of the same right to appointed counsel.[52]

(4) *Federal procedure.* Prior to a Federal criminal trial the civilian defendant may avail himself of these statutes:

(1) 18 USC Sec. 3432, requiring the Government—in a capital case only—to furnish a list of prospective witnesses.[53]

(2) Fed. R. Crim. P. 7(*f*), requiring the Government, in answer to a defense request for bill of particulars, to provide available facts (not evidence) essential to the preparation of the defense.[54]

(3) Fed. R. Crim. P. 16, allowing inspection of real evidence, obtained from others or the defendant *involuntarily* by Government agents.

(4) Fed. R. Crim. P. 17(*c*), allowing pretrial subpoena of *documents* or materials obtained voluntarily or by solicitation when the Government does not intend to use them at the trial and the defendant in good faith believes they are necessary to his defense.[55]

At the trial these same rules may be employed. With one important statutory exception, a failure to comply with these rules—denying the defense access to what may be essential information—will call for dismissal of the pertinent count of the indictment.[56] The exception is the so-called "Jencks Act," under which the defendant is entitled to see the prior statements made by a prosecution witness to a Government agent only after the witness has testified.[57] If the Government objects to disclosure of such statement, on the grounds that it does not pertain to the subject matter of the witness' testimony, the trial judge decides the question after examining the statement *in camera.* The United States Supreme Court has stated that this statute provides the exclusive procedure for compelling inspection of the statements of a Government witness to a Government agent.[58] Failure of the Government to produce the statement, once ordered, results in the striking of the witness' testimony, but does not automatically call for dismissal.[59]

(5) *Application of the Jencks Act to courts-martial.* The application of the Jencks Act to courts-martial is as yet undecided by the Court of Military Appeals.[60] The wording of the statute supports an argument that it does apply to courts-martial, *i.e.*, "any criminal prosecution brought by the United States." Furthermore, the intent of Congress was to restrict unwarranted "fishing" expeditions into Government files.[61] Although the legislative history of the Act does not show a Congressional intent to include courts-martial in its scope, it is reasonable to conclude that military confidential files need at least as much protection from unwarranted inspection as do civilian investigative files. The Act did not, however, expressly repeal any provisions of the Manual that give the accused rights expressly denied by the Act.[62] Thus, the Man-

[52] See United States v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).

[53] Compare para. 44*h*, MCM, 1951 entitling the defense counsel—in all cases—to be informed of the probable prosecution witnesses.

[54] This requires the Government, *inter alia*, to divulge the name and address of an essential defense witness. See Novairo v. United States, 353 U.S. 53 (1957).

[55] See Bowman Dairy Co. v. United States, 341 U.S. 53 (1951). But see United States v. Murray, 297 F. 2d 812 (2d Cir. 1962), cert. denied, 369 U.S. 828 (1962). ("documents" does not include a written pretrial statement made by the accused).

[56] See Bowman Dairy Co. v. United States, *supra* note 55; United States v. Jencks, 353 U.S. 657 (1957).

[57] 18 U.S.C. § 3500 (1958), specifically enacted to limit the rule of United States v. Jencks, *supra* note 56.

[58] See Palermo v. United States, 360 U.S. 343 (1959). When an *agent*-witness summarized the accused's confession, it has been held that the accused may examine the summary, after the agent testifies. Tatiane v. Governor of Guam, 187 F. Supp. (D. C. Guam 1960).

[59] 18 U.S.C. § 3500 (1958).

[60] But see United States v. Walbert, 14 USCMA 34, 33 CMR 246 (1963) (by implication).

[61] See Palermo v. United States, *supra* note 58.

[62] See MCM (1951), para. 44*h* (accused's right to inspect papers accompanying the charges), promulgated by the President pursuant to congressional delegation of its rule making power. Art. 36(a), UCMJ.

ual should still have legal effect until the legislative intent of the Jencks Act is clearly established by either Congressional action or judicial decision. Further, the Court of Military Appeals has expressed a preference for the rule existing before the enactment of 18 USC § 3500.[63] It is unlikely, therefore, that the Court will adopt the new statute completely.[64]

In the meantime, some board of review decisions have taken the position that the Jencks Act applies to courts-martial.[65] An Air Force Board of Review overruled *Combs*,[66] which said that the Jencks statute did not apply to pretrial proceedings by holding that the "policy" of the Jencks Act applies to Article 32 investigations as well as to the trial itself.[67]

4. Presentation of the case.[68] *a. Presenting legal authorities.* The Manual states that the trial counsel will, after the pleas, present pertinent legal authorities to the court "to the extent required by the law officer (president of a special court-martial)."[69] The Manual also implies that this is an affirmative duty, to be accomplished subject only to an objection by the law officer.[70] Nevertheless, the Court of Military Appeals, following the general civilian rule, has held that such authorities should be presented only when requested by the law officer, and then only rarely.[71]

b. Opening statement. Trial counsel may make an opening statement to outline the presentation of his case to the court members.[72] The procedural guide to the Manual cautions against an opening statement "unless it will clarify the procedure to be followed by the trial counsel."[73] It then gives as an example the situation where a prosecutor, relying principally on an accused's confession, announces in an opening statement that he will first introduce corroborating testimony and then the accused's confession. Such a practice unnecessarily could result in reversible error in a case sustainable on evidence independent of an inadmissible confession, and should be followed with caution. Trial counsel in his opening statement must avoid including matters as to which "no admissible evidence is available or intended to be offered."[74]

c. Duty to present competent evidence.

(1) *General.* "A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility. . . ."[75] The trial counsel also must insure that his papers are protected against inadvertent examination by members of the Court.[76] While it is equally unethical for trial or defense counsel to assert his personal opinion of the guilt or innocence of the accused,[77] such an improperly expressed opinion by the trial counsel is apt to be prejudicial for the reason that a court is prone to give undue weight to the statements of a prosecuting attorney whose impartiality is presumed.[78]

(2) *Effect of presenting incompetent evidence.* Whether deliberate or in good faith, the offer or presentation of incompetent evidence is error. In theory, however, such conduct must substantially prejudice the accused's right to

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[63] See United States v. Heniel, 9 USCMA 259, 26 CMR 39 (1958).

[64] At least in its limiting aspects. *Cf.* United States v. Villasenor, 6 USCMA 3, 19 CMR 129 (1955).

[65] NCM 5800089, Parks, 27 CMR 829 (1959).

[66] ACM 16857, Combs, 28 CMR 866 (1959).

[67] ACM 18433, Jackson, (19 Jul 63, unreported).

[68] For a complete discussion, see DA Pam 27-10, "The Trial Counsel and the Defense Counsel," ch. 3 (Nov 62).

[69] MCM, 1951, para. 44*g*(2).

[70] See *id.*, app. 8*a* at 510.

[71] See United States v. Fair, 2 USCMA 521, 10 CMR 19 (1953).

[72] MCM, 1951, para. 44*g*(2).

[73] *Id.*, app. 8*a* at 510.

[74] *Id.*, para. 44*g*(2). To refer to matters which are not admissible is not misconduct unless it appears that trial counsel did so deliberately, in the belief that they were not. Even so, such references will not cause reversal absent a showing of specific prejudice to the accused. See ACM 17542, Moore, 31 CMR 647, *petition denied*, 31 CMR 814 (1961).

[75] ABA Canons of Professional Ethics, Canon 22.

[76] MCM, 1951, para. 44*g*(1).

[77] *Id.*, para. 44*g*(1), 48*c*.

[78] See United States v. McCants, 10 USCMA 346, 27 CMR 470 (1959).

a fair trial, to warrant reversal.[79] Nevertheless, the more it appears that the error was not made in good faith, the less likely the Court is to look for specific prejudice.[80]

d. Examination of the file. Although the trial counsel should correct and initial any minor errors in the charge sheet or orders appointing the court, he should report substantial errors to the convening authority.[81]

e. Reporting inadvisability of trial. If the trial counsel discovers matters which he believes makes trial inadvisable he should report this to the convening authority, if the latter had not considered these matters.[82] Only the convening authority has the power to withdraw the charges from trial.[83]

f. Notification of personnel.

(1) *Court personnel.* After ascertaining from the president the time and place of trial, and proper uniform,[84] the trial counsel will so notify the other members of the court, the officer responsible for the custody of the accused, the reporter, and other persons concerned.[85]

(2) *Witnesses.* It is the duty of trial counsel to obtain the presence of material witnesses for both sides.[86] He may subpoena and compel attendance of any material civilian witness in any part of the United States, its territories and possessions.[87] Failure of a witness (who has been subpoenaed and tendered fees) to appear and qualify as a witness is a Federal offense.[88] To obtain the presence of military witnesses who must travel at Government expense the trial counsel should make a formal request through military channels; where no such travel is required he need only notify the military witness, or the latter's commanding officer.

(3) *Equal opportunity for the defense to obtain witnesses.* The defense has the same right to obtain witnesses as does the trial counsel. Thus, he may not be compelled to present the defense testimony of a vital witness by a deposition when the Government refused to obtain the presence of the witness for the trial.[89] When the trial counsel disagrees with the defense as to the materiality of the requested defense witness testimony—and thus as to the the necessity of obtaining his presence at the trial—he will present the defense's written request to the convening authority for decision.[90]

g. Preparing for trial. The trial counsel bears the full administrative responsibility for preparing the courtroom, copies of the charges and specifications for the court members, and securing the attendance of the accused.[91]

5. Duties after trial.[92]

[79] See United States v. Valencia, 1 USCMA 415, 4 CMR 7 (1952). *Accord*, United States v. McCants, 10 USCMA 346, 27 CMR 470 (1959) (nonlawyer counsel in special court-martial testified and then argued on basis of own testimony); United States v. Johnson, 3 USCMA 447, 13 CMR 3 (1953).

[80] See United States v. Grant, 11 USCMA 728, 29 CMR 544 (1960) (irrelevant minor offenses not involving moral turpitude utilized to impeach a principal defense witness); United States v. Liscar, 11 USCMA 708, 29 CMR 524 (1960) (improper cross-examination of accused concerning juvenile offense); United States v. Bolden, 11 USCMA 182, 28 CMR 406 (1960) (persistent and extended examination of accomplice-witness in spite of repeated claim of privilege against self-incrimination). Compare United States v. Krokroskia, 13 USCMA 370, 32 CMR 370 (1962) (attempt to impeach accused by showing his child born only 2 months after his marriage).

[81] MCM, 1951, para. 44*f*(1). For a discussion of procedures to amend the charges at the trial, see III, XII, *infra*.

[82] MCM, 1951, para. 44*f*(5).

[83] See MCM, 1951, para. 56*a*. *Cf.* United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954) (power of law officer to declare mistrial).

[84] See MCM, 1951, para. 40b(1).

[85] *Id.*, para. 44*f*(2).

[86] *Ibid.*

[87] See UCMJ, Arts. 46, 47.

[88] See UCMJ, Art. 47; see also, AR 37-106, para. 13-41 to 13-86 (9 May 58) (procedures to obtain funds for witness fees for civilian witnesses).

[89] United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957); see DA Pam 27-172, *Evidence*, 285-86 (Jun 62).

[90] See MCM, 1951, para. 44*f*(2), 115*a*.

[91] *Id.*, para. 44*f*(3). For a more complete discussion of these duties, see DA Pam 27-10, "The Trail Counsel and the Defense Counsel" 48-50 (Nov 62).

[92] See generally *id.* 68-70; MCM, 1951, para. 44*f*, 82, 83 (trial counsel's duties concerning authentication of record of trial).

Section IV. PARAGRAPHS 46–48, MCM, 1951, DUTIES OF THE DEFENSE COUNSEL PRIOR TO TRIAL[93]

1. Consultation with the accused. As soon as he is appointed, the defense counsel will consult with the accused with a view to preparing the defense, unless individual counsel is requested.[94] "Counsel should endeavor to obtain full knowledge of all the facts of the case before advising the accused, and he is bound to give the accused his candid opinion of the merits of the case." [95] The defense counsel will explain to the accused his testimonial and other rights, regardless of the accused's intentions to exercise these rights.[96] When there are joint accused the defense counsel should examine the case file *before* consulting the accused, to determine whether there may be any disqualifying conflict of interest.[97] In this way, should he be disqualified from representing the accused jointly, he is not disqualified from being appointed to represent only one of the defendants since he has never consulted with the others.[98] If the possible conflict of interest in the defenses of the respective joint accused is not discovered until after the consultation, the defense counsel must so advise the accused.[99]

2. Preparation for trial.[100]

3. Securing witnesses. The trial counsel will procure the presence of material defense witnesses.[101] If trial counsel disagrees with defense counsel as to the necessity of the defense witness' presence at the trial, the matter will be submitted in writing to the convening authority for the latter's personal decision, or to the law officer if the court has already convened.[102] According to the Manual, if either party offers to stipulate to the testimony of the witness whose presence is requested by the opposite party, the latter has the burden of showing that his case would be clearly prejudiced by the witness' absence from the trial.[103]

The legality of this provision, when applied to a material defense witness, is extremely doubtful, for the Code provides that counsel for each side "shall have equal opportunity to obtain witnesses." [104] The Manual allows the trial counsel to make his own decision as to the necessity of the attendance of a prosecution witness,[105] but as stated above, allows him to object to the defense request for a witness' presence. Practically, therefore, the trial counsel cannot be forced to forego the presence of his witness through a defense offer to stipulate, whereas, according to the Manual, the converse is not true, unless the defense can show prejudice thereby. This does not seem to be "equal opportunity to obtain witnesses."

It is error to refuse to subpoena a material and necessary witness requested by the defense. In the leading case on this point,[106] accused was the officer in charge of a post craft shop and had filed false overtime reports on enlisted employees, to receive indirectly overtime pay to which he was not entitled by regulations. He maintained he had been doing this in reliance on the assurances of his predecessor that the practice was customary and proper. The accused requested the presence of another officer (by then 1200 miles away) who he said would testify to hearing this technique suggested by the predecessor. Accused's request for the witness was denied, although the law officer offered a continuance for taking the witness' deposition. The accused declined, and stipulated with the trial counsel as to the witness' testimony. The Court of Military Appeals reversed the conviction, noting that the witness' testimony went to the core of the accused's defense. It supports his explanation of his conduct which constitutes a denial of the specific intent necessary to support a finding of larceny. . . .

An accused cannot be forced to present the testimony of a material witness . . . by way of stipulation or deposition. On the con-

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[93] See generally, DA Pam 27–10, ch. 8.
[94] See MCM, 1951, para. 46*d*.
[95] *Id.*, para. 48*f*.
[96] *Ibid.*
[97] See DA Pam 27–10, para. 62*c*.
[98] See sec. V, *infra*.
[99] See MCM, 1951, para. 48*c*.
[100] See MCM, 1951, para. 48*g*; DA Pam 27–10, 74–85.
[101] MCM, 1951, para. 44*f*(2), 48*d*, 115*a*.
[102] See *id.*, para. 115*a*.
[103] *Id.*, para. 58*f*.
[104] UCMJ, Art. 46.
[105] MCM, 1951, para. 115*a*.
[106] United States v. Thornton, 8 USCMA 446, 24 CMR 256 (1957).

trary, he is entitled to have the witness testify directly from the witness stand in the courtroom. To insure that right Congress has provided that he "shall have equal opportunity [with the prosecution and the court-martial] to obtain witnesses." [107]

The witness, however, must be material and necessary, and the defense has the burden of showing that this is so. Thus, in an assault case,[108] when there was no admissible evidence raising the issue of self defense, witnesses requested by the accused were not found material and necessary when they were expected to testify only to the violent character of the victim of the assault.[109]

Section V. PARAGRAPH 48, MCM, 1951, ADEQUACY OF REPRESENTATION OF JOINT ACCUSED

1. General. The accused in a general court-martial is entitled to defense counsel who will represent him in a professionally adequate manner, and with undivided loyalty. In the preceding chapter it was noted that the mere appointment of a lawyer as defense counsel raises a rebuttable presumption that he "acted" in that capacity and is thereafter ineligible to prosecute the accused in the "same case." Divided loyalty may also arise in the defense of accomplices when (1) at the same trial, counsel can only strive for one accused at the expense of the other, or (2) at different trials, counsel may feel restrained in cross-examining a former client who was the accomplice of his present client. When there is even a fair risk of prejudice to the accused on these grounds, a conviction will be reversed—so important is the right to loyal counsel. Whenever possible, therefore, separate counsel should be appointed for each joint accused.

2. At separate trials. When the defense counsel previously defended the principal prosecution witness, both records of trial will be reviewed on appeal, to insure that the present accused received full representation. If there is a possibility that counsel did less than he could have to defend the present accused, by reason of his dual role, then the case will be reversed even though the defense was otherwise apparently adequate. The undivided loyalty of counsel is so important that even the appearance of evil must be avoided.[110]

Thus, in one case,[111] W and L had jointly assaulted C. They were both charged with assault, but tried separately. W pleaded guilty, pursuant to a pretrial agreement, and was convicted. He then became the "star witness" against L. The same lawyer who had defended W also defended L. The conviction of L was reversed because of the risk of inadequate representation arising from a possible conflict of interest. The record of trial did not show whether this conflict of interest had been disclosed to L. After the Court considered the records of both trials, it stated:

> Counsel must not represent conflicting interests. So strong is the prohibition that, despite the unquestioned purity of counsel's motives, any doubt concerning equivocal conduct on his part "must be regarded as having been antagonistic to the best interests of his client." *United States* v. McCluskey, 6 USCMA 545, 550, 20 CMR 261.

The fact that in another case a defense lawyer represents a Government witness against the accused does not by itself justify a conclusion that the accused was denied effective legal assistance. On the contrary, inquiry can be made for the purpose of determining whether the relationship is of such a nature as to prejudice counsel's efforts on behalf of the accused. . . . Here,

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[107] 8 USCMA 446, 450, 451, 24 CMR 256, 259, 260. *But cf.* United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960), indicating that as to *adverse* witnesses, accused has no absolute constitutional right to their presence in court, but only a right to confront them at the taking of a deposition.

[108] United States v. Harvey, 8 USCMA 698, 25 CMR 42 (1957).

[109] The court also distinguished the *Thornton* case on the ground that here the subpoena had been denied by the convening authority, while in *Thornton*, the subpoena had been denied before trial only by the acting staff judge advocate, without the knowledge or concurrence of the convening authority, which was error in itself.

[110] See United States v. Thornton, 8 USCMA 77, 23 CMR 281 (1957).

[111] United States v. Lovett, 7 USCMA 704, 23 CMR 168 (1957).

there can be no doubt about the prejudicial nature of the relationship. Presumably, counsel was attempting to establish the accused's innocence. At the same time, however, he was under an affirmative duty to protect Walker's rights in a situation in which the interests of the accused were directly opposed to those of Walker.[112]

In a similar case,[113] the Court emphasized that the appearance of evil must be avoided, and again stressed that the record of trial did not show whether accused was informed of his counsel's possible disability.

> The Government vigorously contends that a perusal of the record illustrates that defense counsel effectively represented the accused and that his trial tactics and strategy were proper and correct. This argument falls short of the mark because the test is not whether counsel could have done more by way of further cross-examination or impeachment of his former client, but whether he did less as a result of his former participation. We have often said that the interests of justice require that "the appearance of evil should be avoided as well as the evil itself." United States v. Hill, 6 USCMA 599, 20 CMR 315; United States v. McCluskey, supra [6 USCMA 545, 20 CMR 261]; United States v. Walters, 4 USCMA 617, 16 CMR 191. It is unnecessary to don 'presbyopic spectacles' in this case to find the appearance of evil—it is readily apparent to the naked eye.
>
> Other than the single disclosure by Fields [the prosecution witness] that the defense counsel had previously represented him before a court-martial, the record is silent as to any indication that the accused knew prior to trial of counsel's conflicting interests and that he consented to be represented by this counsel. Paragraph 48*c*, Manual for Courts-Martial, United States, 1951, in discussing the duties of defense counsel, requires that an accused be informed of any interest his counsel may have in connection with the case, any ground of possible disqualification, and any other matter which might influence the accused in the selection of counsel. Good practice demands that such disclosures be made a matter of record and brought to the attention of the law officer prior to arraignment so that the latter may assure himself the accused is fully cognizant of the limitations and restrictions placed upon his counsel. With the benefit of this information an accused can make an enlightened election whether to retain appointed counsel or seek a replacement.
>
> We conclude, therefore, that the accused was denied the effective assistance of counsel as a result of defense counsel's prior representation of Fields.[114]

This whole problem is normally avoided by sound administration—counsel who may have a conflict of interest is not appointed to defend the accused, or is relieved, at his own request and before the trial, as soon as the possibility at such a conflict is apparent.

The language in the cases above, however, seems to indicate that if the record of trial showed that the accused *had* been informed of his counsel's possible disability, there would be no problem—the accused would then have made an "enlightened election" if he chose to keep his appointed counsel. It may be questioned whether this is so. It is impossible for an attorney to know before trial the *exact extent* to which his obligation to a prior client will hamper his service to the present accused. And if counsel cannot know, how can the accused? True, the accused can be made aware of the *risk* that he will be inadequately represented, but he cannot know, and probably could not appreciate the *extent* of the risk. Under such circumstances, it is hard to see how he can make an "enlightened election". On the other hand, if counsel *does* know of specific reasons why he cannot fully serve the accused without being disloyal to his prior client, it would seem best for him not simply to inform the accused, but ask to be relieved. The difficulty with this reasoning is that the accused might prefer to be defended by an excellent lawyer with some

[112] 7 USCMA 704, 707, 23 CMR 168, 171.
[113] United States v. Thornton, *supra* n. 110.
[114] 8 USCMA 57, 61, 23 CMR 281, 285.

disability rather than a journeyman who has no handicap other than limited talents.

Presumably, paragraph 48c of the Manual—providing only that counsel inform the accused of any possible disability that might influence him in the selection of counsel—rests on the assumption that the decision is best left entirely to the accused. The dilemma is that if counsel does not know the exact extent of his limitations, the accused cannot make a truly "enlightened election," and if counsel does know he will be definitely limited, then, by continuing, he is permitting the accused to be incompletely—perhaps inadequately—defended.

Possibly a useful distinction may be drawn between appointed defense counsel, and counsel retained or selected by the accused. It would be unseemly to allow the accused to choose to be inadequately and incompletely defended by appointed counsel. Not only the accused, but also the bar, the courts, Congress and the public have an interest in insuring that counsel fully and ethically represent the military accused whom he is appointed to defend. If the "appearance of evil" is truly to be avoided, counsel should withdraw from a situation in which he cannot give undivided loyalty to his client.

The lack of disclosure on the record of trial in the *Lovett* and *Thornton* cases gave the Court an easy way out. Even if there had been disclosure, however, the result might well have been the same for the reasons noted above.

3. At same trial. When an accused at a joint trial moves for a *severance* of trials on the basis that his defense is antagonistic to that of the other accused, he may be required to establish to the law officer's satisfaction that the defenses are, in fact, antagonistic.[115] Even though the severance is properly denied, however, if there is any *risk* that an accused will be prejudiced by having a single defense counsel represent all the accused at the same trial, then separate counsel should be appointed, and in any event the accused is entitled to a continuance to obtain individual counsel.[116]

The prohibition against representing conflicting interests affects proceedings on the sentence as well as the findings. In fact, the conflict may in some cases involve only the proceedings on the sentence. In a classic case on this point,[117] the accused—Fisher and Faylor—were jointly charged and tried for misappropriation of a car. They were defended by one lawyer. After both pleaded guilty, and during the presentencing proceedings, counsel made an unsworn statement on behalf of both accused in which he urged the court to consider: (a) Fisher's extreme youth and prior lack of trouble with military or civilian law enforcement agencies, (b) that Fisher may have been more intoxicated than Faylor, (c) that Faylor was the motivating force in this offense, and (d) that Fisher deserved only a comparatively brief sentence to confinement, without a punitive discharge. Fisher received the recommended sentence. Faylor was sentenced to dishonorable discharge, total forfeitures and 2 years' confinement at hard labor, the confinement portion being reduced pursuant to a pretrial agreement to one year. A rehearing on the sentence was ordered for Faylor.

A better example of conflict of interest could not be given clearly and amply demonstrated. United States v. Lovett, 7 USCMA 704, 23 CMR 168; Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. ed. 680. The sideling tactics of counsel, with the apparent objective of totally sacrificing the accused Faylor in an attempt to impress the court with the need of [illegible] for his other client left the accused Faylor inadequately and ineffectively represented. It is additionally evident from a glance at the severity of the sentence meted to the accused Faylor, as contrasted with that accorded Private Fisher, that the court was as equally impressed as defense counsel with the accused's "motivating force of criminality referred to by counsel in his plea. This accused was de-

[115] See United States v. Borner, 3 USCMA 806, 12 CMR 62 (1953); ch. XII, *infra*.

[116] See CM 375569, King, 17 CMR 423 (1954). J was jointly tried with K, with K's consent. W and S were appointed defense and assistant defense counsel for both J and K. Having possibly erred in denying a motion for severance of trials, the law officer definitely erred in refusing to allow W to withdraw from the defense of J and represent K alone, in the face of W's statement that he "did not feel that he could represent both accused to the best of his ability." The Court noted that neither counsel subsequently attempted to cross-examine the other co-accused as to their antagonistic defenses.

[117] United States v. Faylor, 9 USCMA 547, 26 CMR 327 (1958).

prived of the undivided loyalty of his counsel. Although counsel may not have been aware of his impropriety, a proper understanding that he must at all times serve the best interests of his client would have served to avoid the conflict.[118]

The mere fact, however, that co-accused's defenses are not the same does not mean that their representation by a single defense counsel was inadequate. Also, the result of the trial may in some cases reinforce the inference that counsel did not sacrifice the interests of one client in favor of the other. Thus, when, in the face of overwhelming evidence, defense counsel conceded that one accused knifed the victim after being hit on the head with a rock, but maintained that the other accused could be guilty of nothing more than simple assault and battery, no prejudicial error was found. The Court laid great stress on the fact that both accused were given *identical,* fairly lenient sentences.[119]

Section VI. INADEQUATE REPRESENTATION OF SINGLE CLIENT

Initially, the Court of Military Appeals presumed, absent evidence to the contrary, that appointed defense counsel performed his duties diligently. The Court took cognizance of the unfairness of "Monday morning quarterbacking" trial tactics in the calm, unhurried forums of appellate proceedings. Thus, at one time, and even in a capital case, the Court had stated:

> 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 . . . 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. It must be remembered that appellate counsel and the Court have the advantage of viewing the record after the . . . verdict.[120]

The Court thus began by adopting the civilian test for adequacy of representation. This approach, initially taken by the Court, was soon followed by other decisions in the same vein.[121] Perhaps it could have been foreseen, however, that while the form of this doctrine might remain the same, the actual operation of it was bound to change. Any viable system tends to respond at the point where pressure is applied to it. In civilian practice, the attorney who defended an accused often represents him on appeal as well, and might naturally be reluctant—before the appellate courts—to vigorously attack the adequacy of his own performance at the trial. In the military system, however, entirely different appellate counsel is appointed for the accused.[122] This counsel was not at the trial and generally does not know the attorney who defended accused below. The military system, therefore, tends to invite the charge of inadequate representation as one more string in the bow of appellate defense counsel. Pressure was applied at this point, and the Court responded.

Two years after its initial decision, the Court radically changed its approach to this question in United States v. Parker, 6 USCMA 75, 19 CMR 201 (1955)—a capital case. The Court gave lipservice to its prior decisions, but found inadequate representation under circumstances that would have satisfied its previously announced standards. In the *Parker* case, the Court used a technique that it has since followed in similar cases—that of seizing on one critical shortcoming in the defense, and reinforcing its decision with other shortcomings in the defense which, taken together with the principal failure, deprived the accused of adequate representation. In Parker, the Court was

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[118] 9 USCMA 547, 548, 26 CMR 327, 328.

[119] United States v. Young, 10 USCMA 97, 27 CMR 171 (1958).

[120] United States v. Hunter, 2 USCMA 37, 41-42, 6 CMR 37, 41-42 (1952).

[121] See United States v. Bigger, 2 USCMA 297, 8 CMR 97 (1958) (death case); United States v. Wilson, 2 USCMA 248, 8 CMR 48, (1958) (same). In *Wilson*, it was held that inadequate representation was not shown simply because counsel had only one 10 minute consultation with the accused prior to trial.

[122] See UCMJ, Art. 70.

most severely critical of counsel's failure to attempt to avoid the death sentence. In addition, however, the Court recited other factors to bolster its decision:

(1) Although not conclusive, there was *some* evidence that the defense counsel interviewed the accused only once, for 30 minutes, and then only 3 days before the trial.[123]

(2) The Court "sense[d] from the cross-examination of Government witnesses that defense counsel had not consulted with them prior to trial as their answers to his questions, for the most part, strengthened rather than weakened the prosecution's case." [124]

(3) The defense counsel did not conduct a *voir dire* examination of the members nor did he exercise any challenge for cause or peremptory challenge, even though the court was specially appointed and unusually high ranking.[125]

(4) During the taking of testimony only two objections were made.[126]

(5) No instructions were submitted and no exceptions were taken to those given.[127]

(6) The defense offered no testimony on the merits.[128]

(7) "[I]n spite of the fact that defense counsel suggested undue influence caused the accused to confess, the Government's evidence was to the contrary and no evidence was offered to refute this." [129]

(8) Lastly, the Court criticized defense counsel's failure to request a continuance to properly prepare the case:

> It would be unfair in every sense of the word to hold against an accused the fact that his appointed counsel did not see fit to demand the time necessary to prepare properly for the trial. The attorney is the advisor and the accused must necessarily rely on him. When the record shows the former failed, we are not prone to let a death sentence stand.[130]

Parker was a rape case, and the dissenting judge took the Court to task on its principal objection to the defense—the failure to introduce evidence in mitigation to avoid the death sentence: the dissent noted that any attempt to present mitigation would only have invited rebuttal by the prosecution, to the effect that (1) the accused's commander rated his service unsatisfactory, (2) the accused was married—one of his children having been born prior to his marriage, and (3) he had contracted venereal disease less than 6 months after his arrival overseas:

> I have a feeling that the majority is disturbed by the death sentence. They would like it reduced but are unable to accomplish that purpose short of a rehearing.[131]

Nonetheless, subsequent capital cases involving the issue of inadequate representation began following in the footsteps of *Parker*, with emphasis being placed upon counsel's inadequacy in failing to avoid the death sentence.[132] The approach in *Parker* was then extended to noncapital cases involving guilty pleas pursuant to pretrial agreement. The first in this series of cases was one in which the accused agreed to plead guilty to an 8 month desertion when the convening authority agreed not to approve any sentence exceeding dishonorable discharge, total forfeitures, and 18 months confinement at hard labor.[133] Despite accused's lack of admissible prior convictions, his defense

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[123] 6 USCMA 75, 84, 19 CMR 201, 210.

[124] 6 USCMA 75, 86, 19 CMR 201, 212.

[125] *Ibid.* The Court noted no evidence that any member should have been challenged, although it saw "some grist which were worth probing."

[126] The Court did not state that other objections should have been made.

[127] The Court did not indicate that the instructions were erroneous in any respect.

[128] Again, there is no indication that there was any testimony favorable to the accused. Compare United States v. Jones, supra note 120 ("If there are no witnesses favorable to the accused counsel cannot be criticized for failure to call").

[129] 6 USCMA 75, 86, 19 CMR 210, 212. The dissent notes indicate that there was any evidence of undue influence, it is inconceivable that defense counsel used all he had, i.e., a "suggestion".

[130] 6 USCMA 75, 87, 19 CMR 210, 213.

[131] 6 USCMA 75, 91, 19 CMR 210, 217.

[132] See United States v. McMahan, 6 USCMA 709, 21 CMR 31 (1956); United States v. McFarlane, 8 USCMA 96, 23 CMR 320 (1957) (counsel "conceded everything, explored nothing, was unprepared on every issue, and made the least of what he had.").

[133] United States v. Allen, 8 USCMA 504, 25 CMR 8 (1957).

counsel presented no evidence in extenuation or mitigation, nor did he make any argument or statement calculated to lessen the sentence. After the court's 5 minute deliberation, it returned a sentence to dishonorable discharge, total forfeitures, and 2 years confinement at hard labor. On appeal, the accused contended that his defense counsel was negligent in failing to inform the court that he had absented himself, as a last resort, to provide for his pregnant wife. The Court held that inadequate representation may be found when the accused pleads guilty in accordance with a pretrial agreement, and no matters in extenuation and mitigation are presented although the record and allied papers indicate such matter and are supported by the accused's unrefuted posttrial affidavit. In this case, however, trial defense counsel refuted the accused's affidavit, and the case was therefore returned to the board of review for the taking of sworn testimony and determination of the issue.

In another case,[134] pursuant to a pretrial agreement the 20 year old accused pleaded guilty to charges of a 3 day AWOL, failure to obey an order, and separate larcenies of a Government telescope and rifle. After the findings it was stipulated that the rifle was stolen by another soldier who told the accused where to find it. Defense counsel presented no evidence in extenuation and mitigation, and made no argument on the sentence. After 5 minutes deliberation the court adjudged a maximum sentence of dishonorable discharge, total forfeitures, and confinement at hard labor for 10 years and 7 months. *Held:* The charge of larceny of the rifle dismissed and the case returned to another court-martial for a rehearing on the sentence.

> Two things stand out with special clarity. First, the accused's plea of guilty to the theft of the rifle is patently inconsistent with the stipulation as to the "facts." The latter unmistakably shows that the accused did not steal the weapon. In its worse light, is shows receipt of property known to be stolen. . . .
>
> The second matter which is especially noteworthy is that the circumstances suggest "the court surmised from the accused's plea of guilty that he had an agreement with the convening authority as to the maximum sentence and abdicated their function of adjudging an appropriate sentence in the case." United States v. Buckland, CM 394524, decided February 19, 1957. We need not make a specific ruling on this point, but it is appropriate to point out that there seems to be a disposition on the part of courts-martial, in cases in which a plea of guilty is entered and no evidence in mitigation is presented, "automatically [to] conclude that the accused had made a pretrial agreement as to the sentence . . . [therefore, they] see no real purpose in their devoting time and effort to consideration of an appropriate punishment. . . ." This disposition appears to be connected with a tendency on the part of defense counsel to present no evidence, and to make no argument, in mitigation when there is an agreement with the convening authority on the plea and the sentence. The latter practice has already brought a number of cases to this Court on a claim by the accused that he was inadequately represented at the trial. See United States v. Allen, 8 USCMA 504, 25 CMR 8; United States v. Elkins, 8 USCMA 611, 25 CMR 115; United States v. Armell, 8 USCMA 513, 25 CMR 117. The issue has also been raised in this case. *A continuation of these trends may require reexamination of the practice of negotiating agreement on the plea and the sentence with the convening authority. . . .*[135]

In such guilty plea cases, when the record fails to disclose any good reason why nothing was presented to persuade the court to adjudge a light sentence, the Government has the burden of showing on appeal, by affidavit of counsel or otherwise, why such matters were not presented. This burden, however, may be discharged if the Government shows that the defense, despite lack of argument on the sen-

[134] United States v. Welker, 8 USCMA 647, 25 CMR 151 (1958).

[135] 8 USCMA at 648–49, 25 CMR 152–53 (emphasis added). See also United States v. Watkins, 11 USCMA 611, 29 CMR 427 (1960) (Chief Judge Quinn concurring in the result, Judge Ferguson agreeing with the Chief Judge's serious reservations concerning the guilty plea program).

tence, managed to obtain a stipulation of testimony more favorable to the accused than the actual facts.[136]

Finally, the Court critically appraised the tactics of appointed defense counsel in a *contested, noncapital* case.[137] In doing so there is some indication that the Court has modified its holding in *Hunter* by emphasizing the higher degree of performance expected of appointed, as distinguished from retained, counsel:

> By that broad language [the opinion in Hunter] *We did not intend to be understood as saying that the highest degree of professional competency is not to be expected of appointed defense counsel.*[138]

The Court's principal criticism of the appointed defense counsel in *Horne* was that he failed to raise the defense of entrapment, although Judge Latimer in his dissent argued: (1) it was a questionable tactic to raise that defense on the merits, and (2) even if it might have been raised it would have resulted in a more severe sentence if accused were convicted.

Because the problem of "adequate representation" has become a potential hazard for every military lawyer, it seems wise to attempt a broad assessment of the current status of the law in this area. The Court has been concerned chiefly with errors of omission rather than commission. While it has found inadequate representation in a *failure* to act, it has seldom criticized ill-considered action (such as defense counsel's asking the witness a question that elicits an unfavorable response).[139] This distinction may be seen in one fairly extreme case, in which two accused—Winchester and Weems—were charged and tried, at a common trial, for larceny.[140] Winchester pleaded guilty, but after the Government and Weems had presented their cases, Winchester took the stand—against the advice of his (*individual*) counsel, and over the objection of counsel for Weems—and testified that *he* was the leader in the wrongdoing and Weems was an unwilling participant. Winchester's own counsel then told the law officer, in open court, that he wished to be relieved of his duties as counsel because he had reason to believe that "this witness has perjured himself and I will not be a part and parcel of it." The law officer, after probing counsel's attitude, denied the request. The Court reversed, for inadequate representation, but not on the grounds of this statement *per se:*

> The convening authority and the board of review merely considered whether counsel's allegation of perjury led the court-martial to impose a more severe sentence than it would have otherwise adjudged. That is not the real question. What is at issue is whether counsel's belief in the falsity of the accused's statement so undermined his representation of the accused as to amount to an abandonment of the cause. What better indication of the answer to that question can we look to than counsel's own words. In open court, he represented that while he was willing to try to be fair, it was "apparent that . . . [he] would be laboring under certain mental difficulties" in regard to any statement that might be made in mitigation. The firmness of his conviction that the accused was lying, and his expressed desire to avoid any possible connection with accused's testimony, stand out so strongly and so starkly, that his representation of the accused during the sentence phase of the trial takes on the appearance of perfunctory formalism.[141]

The Court has been especially concerned with defense counsel's failure to strive for a lighter sentence. For instance, in a larceny case, the Court reversed when no lawyer counsel had not tried to bring to the court's attention—for consideration on the sentence—that the accused had made restitution of some $1,699.10.[142]

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[136] See United States v. Sarlouis, 9 USCMA 148, 25 CMR 410 (1958).

[137] United States v. Horne, 9 USCMA 601, 26 CMR 381 (1958).

[138] 9 USCMA 601, 604, 26 CMR 381, 384.

[139] A series of ill-considered questions and damaging responses, however, might indicate to the Court that counsel had not prepared his case adequately. Compare United States v. Parker, *supra* note 124.

[140] United States v. Winchester, 12 USCMA 74, 30 CMR 74 (1961).

[141] 12 USCMA 74, 79, 30 CMR 74, 79. Note that this case involved inadequacy of *individual* counsel. The Government appellate counsel argued for affirmance on the ground that the law scrutinizes the conduct of appointed counsel more closely than that of counsel *chosen* by the accused; the accused must bear the burden of errors of conduct of the latter, unless he repudiates the acts at the trial; this accused was given the chance to repudiate his counsel but chose not to do so, and should therefore be estopped from complaining now. The Court noted this argument but, neither the majority nor [illegible] discussed it further.

[142] United States v. [illegible] (1958).

Similarly, reversal followed when, during proceedings on the sentence, defense counsel failed to appraise the court that the accused had already been tried and punished for the same offense in a civilian court.[143] These cases fall into a fairly intelligible pattern. They indicate less than full effort on the part of counsel. Inaction has also been criticized even when *deliberate,* however, such as when counsel did not allow his client to take the stand, or present any evidence in mitigation, for fear that his client might for the second time repudiate a negotiated plea of guilty. This so disturbed the Court that it stated:

> It is . . . astonishing . . . to find at this level a record of trial which not only clearly depicts improper representation but also blatantly proclaims that it was motivated by a desire to avoid giving the accused an opportunity to contravene his plea of guilty.
>
> Under all the circumstances, the error goes to all the findings of guilty and the sentence, for the conduct of counsel is such that it impugns the validity of the entire trial.[144]

Thus, the attorney's action on the sentence may be taken to reflect the attitude with which he represented the accused at previous stages of the proceedings. And the deliberateness of his strategy does not necessarily insure its "adequacy" in the eyes of the Court. Moreover, the line between action and inaction by the attorney becomes very hard to draw, when he adopts a plan of limited action. These points may be clearly seen in another case,[145] in which a *Sergeant* had once been convicted of desertion, although that finding was subsequently reduced to AWOL by the convening authority. After this conviction, he was retained in service on probation, and, proving himself a worthy individual, gained several promotions by virtue of good performance. When trying to reenlist, to accompany his unit overseas, however, his application was summarily denied, on the grounds of his previous conviction for desertion. Confronted with this action, he deserted again. After a long period of absence, terminated by apprehension, he was tried for this desertion. He pleaded guilty, pursuant to a pretrial agreement and, during the proceedings on the sentence, his appointed counsel chose to introduce no evidence concerning the circumstances of the offense. Instead, counsel put the accused on the stand and elicited from him that the highest grade he had attained was that of *Staff* Sergeant and that, subsequent to deserting, he had obtained a lucrative civilian job, at which his employer would rehire him. Defense counsel concluded by arguing to the court that the accused deserved special consideration because he had attained "high standing in the military community" by virtue of his status as a noncommissioned officer—"an office not to be taken lightly, an office of honor that demands respect." The court-martial took 11 minutes to retire, deliberate, vote, reduce the sentence to writing and announce in open court that it had adjudged the maximum punishment for the offense. On appeal, appointed defense counsel filed an affidavit asserting the correctness of his course of action; he stated that he had not introduced evidence concerning the circumstances of the offense for fear of exposing the accused's prior conviction (and suspended dishonorable discharge) for desertion. A majority of the Court rejected defense counsel's explanation, and reversed for inadequate representation:

> It may be that the selection of the alternatives of evidence is the lawyer's surest test. That this lawyer failed, there can be no doubt. After misconceiving the nature of the undisputed evidence available to him, he rejected it in favor of a few questions to his client, the answers to which served only to assure imposition of the maximum penalty. By this unfortunate choice, the court-martial was deprived of the only sound basis for a considered judgment—the actual facts of the case. *By concentrating his efforts exclusively upon pretrial arrangements,* counsel succeeded only in withholding from the trial forum all matters from which it could determine a just sentence.[146]

[143] United States v. Rosenblatt, 18 USCMA 28, 32 CMR 28 (1962).
[144] United States v. Rose, 12 USCMA 400, 401, 30 CMR 400, 401 (1961).
[145] United States v. Huff, 11 USCMA 397, 29 CMR 213 (1960).
[146] 11 USCMA 397, 402, 29 CMR 213, 218 (emphasis added).

This language appears very strong, and may seem to contravene the Court's own prefatory remark that "It is not our purpose to supplant the judgment of counsel with our own ideas of sound trial tactics . . ."

It is quite possible, however, that the Court assessed the situation as one in which counsel negotiated a fairly lenient sentence if the accused pleaded guilty, and then simply "rolled over and played dead" at the trial.

It is still true that "adequate" representation is not synonymous with the "best that anyone could have done." Nevertheless, it must be apparent that in courts-martial, "adequate" has come to mean "zealous" and "reasonable." Counsel who is lazy or acts in bad faith will be deemed "inadequate." Diligence alone will not protect an attorney, however, nor will the mere *deliberacy* of his tactics. To some extent, the *correctness* of his judgments will also be considered. This poses a serious problem for military defense counsel, especially when, in good faith and in his best judgment, he chooses a course of limited resistance. Some of the Court's language might indicate that an attorney must fight all-out on every point, to avoid the risk of censure by second guessers who were not at the trial. This cannot be so, of course. The lawyer must, as a practical matter, gain a measure of credibility in the eyes of the court members. He needs this to persuade the court that his case is valid or his opponent's dubious, and, if necessary, to persuade the court to impose the least severe appropriate sentence. To gain this credibility, it is often wise for him to concede the incontrovertible, and concentrate on the weaker aspects of the prosecution's case. Even more, he may be wise not to object to every single item of questionably admissible evidence. The lawyer who spends a great deal of the court's time in objecting to minutiae risks giving the impression that he has nothing better to argue about.

A small-scale but knotty example of the points mentioned above is the case in which a small item of inadmissible and damaging testimony arises in the course of a prosecution witness' answer. The item itself was unresponsive to the question asked. If defense counsel thinks that the court members may not have heard it, or appreciated its damaging character, should he nevertheless object to it as inadmissible? Presumably, he might also ask the law officer to instruct the court members to disregard the statement. If he does this, he is technically correct, and will never be criticized for failing to make a vigorous and zealous defense. The fact is, however, that if the court members did hear the statement, and it was damaging, they will not be able to forget it—certainly not just by being told to. And if they did not hear the statement or appreciate its impact, objection by counsel and the law officer's instruction to disregard it will undoubtedly call their attention to it and *magnify* its damaging effect in their minds. In this situation, however, the attorney who deliberately chooses to "lay low," in good faith, and with a view to the best interests of his client, may open himself up to censure.

A larger example is in the area of guilty pleas—the context in which most cases involving charges of inadequate representation have arisen. If the evidence of guilt is incontrovertible and the possible sentence is fairly severe, counsel may be well advised to recommend to his client that he be authorized to negotiate a guilty plea if he can get a guarantee of a fairly lenient sentence as the maximum that the convening authority will approve. Guilty pleas are accepted by the Government because they save the time and expense of a trial on the merits. A reduced sentence is guaranteed, to encourage the accused to plead guilty, and because, aside from other independently mitigating or extenuating circumstances that may be present, the very fact of a guilty plea indicates some element of remorse. In addition, the court members appreciate a guilty plea—if the accused considers himself guilty—because it saves their time, too. Suppose, however, that despite incontrovertible evidence and the accused's own private admission of guilt defense counsel recommends that the accused plead *not* guilty, and generates a protracted but futile trial, replete with challenges to the court members (even though weak and groundless), uses every possible delaying tactic and makes every possible objection to evidence, regardless whether the matters are important or the ob-

jections well-founded. After the accused is convicted, and counsel rises to argue for a lenient sentence, he may find that nothing he can say will persuade the court members to adjudge less than a severe sentence. This is not because the members are cruel or vindictive, but because counsel has persuaded them only that he is a man who will make any argument, just for the sake of putting on a show. He lacks credibility. Unfortunately, it is unlikely that any claim of inadequacy would subsequently be made, under these circumstances, since the accused would probably feel that everything has been done for him that could possibly have been done. Moreover, it would be very difficult for appellate defense counsel to make out a case of inadequate representation on these facts. Yet defense counsel who did "less," in an effort to make the best of the situation, might be open to censure for lack of zealous, wholehearted representation. What should an honest and intelligent lawyer do, to give his client the best possible service and yet protect himself from censure?

There are no pat answers to this question. Some general guidelines can be suggested, however. First, appointed defense counsel should make running memoranda of the number of times he consulted with the accused, for how long, and a summary of what transpired. Secondly, counsel should insure that any guilty plea the accused wants to enter is provident.[147] Thirdly, if counsel decides upon any overall course of limited resistance he had better write down, for his own benefit and use, a very good reason for it—such matters should be covered as the decision to enter a plea of guilty, or not to raise a possible affirmative defense. If a plea of guilty is entered, pursuant to a pretrial agreement on the sentence with the convening authority, counsel has not yet fulfilled his obligations to the accused with regard to the sentence: knowing he can do no worse than the negotiated sentence, counsel should go all-out in court to do better, presenting every known matter in mitigation or extenuation. If the case is a capital case, counsel should be wary of conceding anything, and must make every possible effort to avoid the death penalty.

Section VII. PARAGRAPH 48*j*, MCM, 1951, POSTTRIAL DUTIES OF DEFENSE COUNSEL

1. Clemency matters. In the event of conviction, as soon as possible after the sentence, defense counsel should (in an appropriate case) attempt to secure the court members' signatures to a clemency petition prepared by him.[148] This petition should not impeach the sentence.[149] Another procedure, not related to the clemency petition (signed by court members) is the so-called "clemency interview." In general courts-martial, in the event of conviction, the accused is customarily afforded the opportunity for a personal interview with the staff judge advocate, or his delegate.[150] This interview is designed to develop information concerning the accused's personal and family background, his attitude toward the Army, and whether he thinks he was fairly represented and tried—all of which are to assist the staff judge advocate in preparing the portion of his review dealing with sentence recommendations. This interview is not an adversary proceeding, and, unless the accused requests counsel's services thereat, defense counsel has little to do with it. He should advise the accused of the existence and nature of the proceeding, and of his right to say nothing, and give such other advice as the accused requests.

2. Appellate brief. The Code provides that defense counsel may "forward for attachment to the record of proceedings a brief of such matters as he feels should be considered in behalf of the accused on review, including any objection to the contents of the record which he may deem appropriate." [151] The Court of Military Appeals has held that this brief is to be regarded as a part of the record of trial, for purposes of consideration by the Court and the

[147] For the meaning, effect, and providence of the guilty plea, see generally *infra*, ch. XIV; Melhorn, *Negotiated Pleas in Naval Courts-Martial*, 26 JAG Journal 108 (OTJAG, Navy, Sep 62).
[148] MCM, 1951, para. 48*j*(1).
[149] MCM, 1951, para. 77*a*; see cases *infra*, ch. XIX, sec. 8.
[150] See cases and discussion in DA Pam 27-175-1, *Initial Review* 88, 131, 161 (Jun 62).
[151] UCMJ, Art. 38(c); MCM, 151, para. 48*j*(2).

boards of review.[152] The Court has *strongly* encouraged the use of this brief.[153] It is an extremely useful vehicle for calling the attention of appellate authorities to errors of law that occurred at trial, to newly discovered evidence relating to the findings [154] and sentence,[155] and to facts that might impugn the integrity of any phase of the proceedings.[156] In theory, there is no limit to the matters that defense counsel may include within this brief. In practice, however, except when the matter goes to the fundamental integrity of the proceedings, appellate authorities will be reticent to consider matters of fact that were not brought to the attention of the court-martial unless there was a good reason for it. Again, in theory, the brief may be filed at any time during the pendency of the proceedings or even until the time for petitioning for a new trial has run. However, the longer counsel waits, the less likely are the appellate authorities to give serious consideration to his brief.[157] This is entirely sound. Orderly proceedings can only be had if all pertinent matters are considered first at the lowest possible level. Orderliness of proceedings and substantial justice often are competing interests, however, and the more fundamental the issue raised, the more likely it is that appellate authorities will consider it, even at the expense of orderly proceedings. Nevertheless, to insure consideration of what he has to say, counsel should forward his brief—through the trial counsel—as soon as possible after conclusion of the trial. This will enable the staff judge advocate and the convening authority to consider it in their actions. In any event, counsel would do well to explain in his brief why any new matters of fact therein were not raised sooner.

In addition to defense counsel's brief to be considered on review, he may be afforded the opportunity to make oral argument thereon before the convening authority. This, however, is within the discretion of the convening authority.[158]

3. Advising accused of his appellate rights. The defense counsel must advise his convicted client, *specifically*, of his rights to appellate counsel—not "generally," as provided by paragraph 48*j*(3), MCM, 1951.[159] This same subparagraph of the Manual provides that a request for appellate counsel must be made "within ten days from the date of the sentence" to avoid waiver, in the event that the board of review has taken final action before receiving his request for counsel. The Court of Military Appeals, however, has considered such a short time objectionable, because the accused cannot take informed action until the convening authority has acted on the record of trial. Accordingly, the Court has established the date of the convening authority's action as the beginning of the 10 day period.[160] In an appropriate case, defense counsel may properly give his personal opinion as to the inadvisability of accused's exercising his right to request appellate defense counsel, provided that when doing so counsel makes it clear to his client that it is his advice, and that his client's decision need not be based on any illegal command policy against exercising this right.[161]

Once defense counsel has correctly advised the accused of his right to appellate counsel, the accused may, if he wishes, forego this right by signing a statement expressly waiving such representation.[162] This statement that accused does or does not desire appellate counsel should be attached to the original record of trial just after the chronology sheet.[163] When the accused is represented by appellate counsel, the defense counsel may furnish the former with such factual information as he received in his capacity as defense counsel. Otherwise, it has been

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[152] United States v. Fagnan, 12 USCMA 132, 30 CMR 132 (1961).

[153] *Ibid.*

[154] See United States v. Chadd, 13 USCMA 488, 32 CMR 488 (1963) (petition for new trial); United States v. Roland, 7 USCMA 401, 26 CMR 181 (1958) (inquiry into findings).

[155] United States v. Fagnan, *supra*; notes [ ].

[156] See, *e.g.*, United States v. Strahan, 14 USCMA 71, 33 CMR 283 (1963) (unauthorized communication between witness and court member); United States v. Hardy, 11 USCMA 521, 29 CMR 337 (1960) (impartiality of staff judge advocate review); United States v. Ferguson, 5 USCMA 68, 17 CMR 68 (1954) (command influence).

[157] See generally United States v. Strahan, *supra*, note 156.

[158] See ACM 15904, McArdle, 27 CMR 1009 (1959); and cf. [illegible]

[159] United States v. Darring, 9 USCMA 651, 26 CMR 431 (1958); see also United States v. Jones, 9 USCMA 709, 26 CMR 489 (1958).

[160] United States v. Darring, *supra* note 159.

[161] United States v. Harrison, 9 USCMA 692, 26 CMR 472 (1958); cf. United States v. Darring, *supra* note 159, in which it was held that no waiver occurred since accused's failure to request appellate counsel may have been based on an illegal command policy discouraging such requests.

[162] United States v. Outlaw, 9 USCMA 807, 27 CMR 76 (1958).

[163] Ltr., JAGV, CM 350154, 23 Jan 1952.

stated that he need not accept any responsibility for appellate representation.[164]

4. Examination of record.[165] The trial counsel "should" allow the defense counsel to examine the record when "undue delay will not result." [166] If defense counsel, in his examination, discovers errors or omissions he should suggest appropriate changes to the trial counsel. The latter, if he does not concur "should" call these to the attention of those authenticating the record.[167]

[164] Ltr., JAGJ 1958/9959, 24 Dec 1958. The Court has urged, however, that there be close cooperation between defense counsel at the trial and appellate levels. United States v. Fagnan, 12 USCMA 192, 30 CMR 192 (1961).

[165] See generally, DA Pam 27-175-1, *Initial Review* 13-14 (Jun 62); MCM, 1951, para. 48*f*(4), 82*e*.

[166] *Ibid.*

[167] See MCM, 1951, app. 9 at 528, for form of notation that defense counsel has examined the record.

CHAPTER VIII

PRELIMINARY ORGANIZATION OF THE COURT

References: Para. 11*c*, 59–61, app. 8*a*, MCM, 1951; para. 7–13, DA Pam 27–9.

Section I. PARAGRAPHS 60, 61, MCM, 1951, ACCOUNTING FOR PERSONNEL

1. Time of assembly. The court assembles on the date stated in the appointing order, or any time thereafter, at the call of the president.[1] See section II, *infra*, as to the effect of holding a trial during unusual times or at unusual places.

2. Attendance and security of accused. *a. Attendance.* The convening authority, or other authority having pretrial custody or command of the accused is responsible for accused's security and attendance at the trial in the uniform prescribed by the president of the court.[2]

b. Uniform. Besides being in the prescribed uniform, the accused must wear his ribbons and decorations.[3] It has even been stated that in certain circumstances the failure of the president to insure that the accused is in proper uniform may amount to a denial of due process.[4]

c. Security at trial. While neither the court nor trial counsel is responsible for the accused's security at the trial, they may make appropriate recommendations as to his restraint; further, the court does have control of the personal freedom of the accused while in the court's presence.[5] Thus, if the law officer deems it necessary, he may require the accused to be shackled in the court room.[6]

d. Absence of accused from trial. The accused must be present at all the proceedings. He may waive this right, however, by his voluntary and unauthorized absence after arraignment, in which case the court may proceed with the findings and sentence.[7] This Manual rule is similar to Federal Rule of Criminal Procedure 43, which, however, applies the waiver only to noncapital cases, and even then does not authorize the imposition of *sentence* (*cf.*, verdict) on an absent accused. Nevertheless, the Court of Military Appeals in approving the Manual provision, has found no differences involving due process between it and Rule 43.[8]

3. Preconvening procedures. *a. Informal inquiry of law officer.* Before the court is called to order the law officer (or president of a special court) should ascertain from the appointing order if qualified counsel, a quorum of members, and the accused are present. In determining the accused's presence, particularly where the accused's identity may be disputed at the trial, the law officer should be unobtrusive in his inquiry, so as to avoid the court members hearing or obtaining any damaging admission.[9] Where a pretrial request for enlisted members has been made, at least one-third of the members present should be enlisted members. When the law officer has finished his preliminary in-

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[1] MCM, 1951, para. 60.

[2] MCM, 1951, para. 60. See also *id*, para. 51 as to the responsibility for providing guards, clerks, and orderlies.

[3] MCM, 1951, para. 60.

[4] See NCM 5802691, Whitehead, 27 CMR 875 (1959). Accused's appearance in dungarees, unshaven, and the presence of armed guards patrolling the court room all deprived accused of a fair trial. United States v. West, 12 USCMA 670, 31 CMR 256 (1962). *Cf.* United States v. Scoles, 14 USCMA 14, 33 CMR 226 (1963).

[5] MCM, 1951, para. 60.

[6] United States v. Henderson, 11 USCMA 459, 29 CMR 272 (1960).

[7] MCM, 1951, para. 11*c*, 60.

[8] United States v. Houghtaling, 2 USCMA 290, 8 CMR 90 (1953). See chapter X, *infra*.

[9] See Kinette v. United States, 230 F. 2d 749 (5th Cir., 1956).

quiry, the president may call the court to order.[10]

b. Seating of personnel and the accused.[11] The law officer will sit apart from the court members and accused will be permitted to sit with his counsel. Members will be seated according to rank. All other seating arrangements will be as directed by the president of the court.[12]

c. Announcing personnel of the court and the accused.

(1) *Initially.* After the court is first called to order the trial counsel will announce: (a) the alleged name of the accused, (b) the appointing order, (c) the names of the law officer and members present and absent.[13]

(2) *During trial.* During trial, the trial counsel announces changes in court personnel.[14]

(3) *After adjournment or recess.* After any other opening of the court the trial counsel announces whether all parties to the trial who were present before are again present.[15]

d. Swearing reporter.

(1) *General.* After accounting for the personnel of the court-martial, the trial counsel will administer the oath to the official reporter.[16]

(2) *Authority for appointment.* Article 28 of the Code authorizes the Secretary of a Department to prescribe regulations under which the convening authority shall detail or employ court reporters. Absent such regulations to the contrary, the Manual provides that: (1) "unless otherwise directed by the convening authority, a reporter will not be appointed for a summary court-martial", (2) "the convening authority . . . may direct that a reporter not be used in a special court-martial."[17] The Secretary of the Army has published regulations directing that no official reporter be used at Army summary and special courts-martial, without first securing, in each instance, his prior approval.[18]

The practical effect of this regulation has been to preclude an Army special court-martial from adjudging a bad conduct discharge, since it would be virtually impossible to obtain a legally satisfactory verbatim record of trial without the services of an "appointed" reporter.[19]

(3) *Duties.*[20] The reporter's duties are solely ministerial and mechanical, since the trial counsel of a general court is responsible for the preparation of the record of trial,[21] and the law officer and a member of the court for its authentication.[22] Therefore, the failure to swear the reporter, although violative of Article 42(*a*), is not in itself prejudicial.[23]

(4) *Qualifications.*

(*a*) *General.* Neither the Code, the Manual, nor service regulations express any minimal legal requirements as to the skill or qualifications of the official reporter.

(*b*) *Bias.*

Illustrative Case

United States v. *Moeller,* 8 USCMA 275, 24 CMR 85 (1957)

A special court-martial convicted the accused on charges sworn to by the reporter who had no personal interest in the outcome of the case. He also: (1) entered a secret session of the court-martial while it was deliberating on the sentence,

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[10] MCM, 1951, para. 61*a*.
[11] MCM, 1951, app. 8, p. 501.
[12] *Id.*, para. 61*b*.
[13] *Id.*, para. 61*c*.
[14] *Ibid.*
[15] *Supra*, note 13.
[16] MCM, 1951, para. 61*d*, 114, app. 8*a*, p. 502.
[17] MCM, 1951, para. 7, 49.
[18] AR 22-145, 13 Feb 1957.
[19] See MCM, 1951, para. 82*b*, 83*a*. United States v. Nelson, 3 USCMA 482, 13 CMR 38 (1953), regarding requirement of verbatim records of trial.
[20] See MCM, 1951, para. 49*b*.
[21] *Id.*, para. 82*a*.
[22] *Id.*, para. 82*f*.
[23] ACM 8891, Williams, 16 CMR 717 (1954).

and (2) failed to record the proceedings therein.

Opinion: The net effect of these errors require reversal of the *findings* and sentence. It is contrary to the concept of a fair trial to appoint an actual accuser as reporter.

> Likewise . . . statutory, or what we shall designate as nominal, accusers should not be detailed as reporters. The potentialities for harm . . . are great if one who appears on the record as an accuser can be a key party to the preservation of the rights of an accused.

[Accepting the fact that he performs essentially a ministerial function, "it is impossible for anyone but the reporter to record all of the testimony".]

> In many instances, it is impossible to appeal to ascertain the true status without some sort of hearing, and posttrial hearings are not desirable. . . . We, therefore, believe it erroneous to combine the two assignments.
>
> While . . . the last two irregularities go merely to the sentence, the appointment of an accuser as reporter affects the proceedings as a whole."[24]

e. Swearing interpreters.

(1) *General.* Interpreters must be sworn.[25]

(2) *Authority for appointment.*

(*a*) *For the court.* The Code provides that the convening authority of a court-martial, under appropriate Departmental regulations, may appoint an interpreter to interpret for the *court.*[26] The Manual provides that this may be accomplished personally or through a staff officer (such as the trial counsel) and that the appointment may be oral.[27]

(*b*) *For the accused.* Although not provided by the Code, the Manual requires the "court" to obtain the appointment of an interpreter for the accused, upon the defense's showing of the need therefor.[28] Such a request is decided as an interlocutory question.[29]

(3) *Duties.*[30]

(4) *Qualifications.*

(*a*) *General.* Like any other witness, the testimony of the court's interpreter is subject to scrutiny. The right to challenge his accuracy may be exercised either through his cross-examination or the calling of other witnesses to test the interpretation. The court also may allow a defense counter-interpreter to correct the official interpreter's mistakes.[31]

(*b*) *Bias.*

Illustrative Case

United States v. *Martinez,*
11 USCMA 224, 29 CMR 40 (1960)

Major G, accused's commanding officer, was the actual, although not the nominal accuser. After the accused was charged with cashing worthless checks in the Dominican Republic Major G acted as interpreter in obtaining the deposition on written interrogatories of B, a Dominican. Neither the defense counsel of the general court-martial —or the defense counsel at the rehearing by special court-martial— objected to the receipt in evidence of this prosecution exhibit on the

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[24] But see United States v. Reyle, 12 USCMA 455, 31 CMR 41 (1961): Nonprejudicial for accuser to have acted as a reporter at the taking of a deposition where the deposition was not admitted at the trial.

[25] UCMJ, Art. 42(a); MCM, 1951, para. 114. For time of the administration of the oath, see MCM, 1951, para. 112*c*, and app. 8*d*, p. 502.

[26] UCMJ, Art. 28.

[27] MCM, 1951, para. 7.

[28] *Id.*, para. 53*b*.

[29] *Id.*, para. 57*b*.

[30] See *id.*, para. 50*b*.

[31] United States v. Rayas, 8 USCMA 479, 20 CMR 195 (1955). See DA Pam 27-172, Evidence, (Jun 62), ch. XVII.

specific grounds of Major G's disqualification.

Opinion: The deposition should not have been admitted in evidence:

> The reasons advanced for our decision in United States v. Moeller, supra, are even more strongly applicable to interpreters. . . . In the case of a reporter-accuser, counsel is at least to some degree familiar with the proceedings. . . . Thus, he has an opportunity upon his examination of the record to determine whether the report of trial is grossly inaccurate. While we held that possible safeguard inadequate in United States v. Moeller, supra, even that degree of protection is totally absent in the case of an interpreter.
>
> [A]n accuser, whether actual or nominal, is disqualified from acting as an interpreter in the case in which he is interested.

4. Introduction of counsel. *a. For the prosecution.*

(1) *Announcement.* Trial counsel announces: (a) whether his legal qualifications are correctly stated in the appointing order, and (b) whether he has acted in a prohibited capacity in the same case.[32]

(2) *Court's action on possible ineligibility.* Where it appears that trial counsel may be disqualified as a result of prior participation the court will determine:

(a) if, in fact, he is disqualified and, if so, has acted. If he is disqualified and *has* acted, the court must adjourn pending appointment of qualified counsel.[33] In such a case it seems that the minimum corrective action that should be taken by the convening authority would be to relieve *all* members of the prosecution and appoint a new team, directing that they not confer with the old prosecution team. This action is necessary because of the possibility that all members of the prosecution would be tainted with the knowledge of one.[34] Where the disqualified member has *not* acted, he will be excused, and, if there is no remaining qualified member of the prosecution, the court will adjourn and report the matter to the convening authority; otherwise it will proceed.[35]

b. For the defense.

(1) *Right to counsel.*[36] Accused must be advised, in open court, of his right to the presence of appointed counsel.[37]

(2) *Reasons for excusing.* If the appointed defense counsel is not legally qualified, the court adjourns, and a report is made to the convening authority.[38] If he has acted for the prosecution he must be excused:[39] similarly if he has acted as a member, investigating officer, or law officer in the "same case", he must be excused unless the accused, with knowledge of his ineligibility, expressly requests his services.[40]

5. Request for enlisted members. Just prior to the swearing of the court personnel, the accused is given a final opportunity to request enlisted members for the court.[41] It is better practise to have the record of trial to show that accused has been advised of his right to enlisted members,[42] even though appendix 8*a* of the Manual does not require such showing.

6. Administration of oaths. *a. General.* The present Code requires all personnel to be sworn

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[32] MCM, 1951, para. 61*e*. See ch. VI § IV, *supra*.
[33] *Id.*, para. 61*e*.
[34] See ACM 5777, Bishop, 6 CMR 719 (1952), ch. VI, *supra*.
[35] MCM, 1951, para. 61*e*.
[36] See chs. VI, VII, *supra*.
[37] MCM, 1951, para. 61*f*(1)(b); ACM 11220, Gudobba, 20 CMR 884 (1955); § II ch. VI, *supra*.
[38] MCM, 1951, para. 61*f*(3).
[39] Id., para. 61*f*(4).
[40] *Ibid.*
[41] MCM, 1951, para. 61*g*.
[42] See United States v. Parker, 8 USCMA 75, 19 CMR 201 (1955).

in the presence of the accused.[43] This is accomplished before challenging procedures, and in this respect is different from preexisting military law where the court personnel were not sworn until after the opportunity for challenging.[44] This former Article also implied that this oath was necessary to give the court power to act in the particular case:

> The trial judge advocate . . . shall administer to the members of the court, *before they proceed* upon any trial, the following oath. . . .[45]
>
> No such procedure is recognized as swearing a court *generally* at the outset for all the cases to be tried by it. The court must be qualified separately for every case precisely as if this were the only case to be adjudicated; *such qualifying being an essential preliminary to its being authorized to "try and determine" the same.* [Emphasis supplied].

While the present Code does not contain such a "jurisdictional" statement, it does, where its predecessors did not, require that the oath be administered in the presence of the accused.[46] Further, the present Manual provides: "After the oaths have been administered, the convening of the court is complete." [47]

b. Form of oaths.[48] The legislative history of the recodification of Article 42 discloses that the word "oath" is intended to include the word "affirmation."

c. Procedure for administering oaths.[49] The president swears the counsel, and the trial counsel swears all other personnel of the court.

d. Effect of failure to swear personnel.

(1) *General.* Although it has been held that the failure to swear the members of the court is a jurisdictional defect, rendering the proceedings void, the better view would seem to be that at the most it would constitute a reversible error, authorizing a rehearing. In this way accused's rights would be more adequately protected.

(2) *Members.*

Illustrative Case

NCM 58, *Stevenson,* 2 CMR 571 (1951)

After the special court-martial had been sworn it was reduced below a quorum as a result of a peremptory challenge. The convening authority then appointed a new court with the same membership as the remaining members of the old one, with the exception of the addition of one new member. The personnel of the new court, with the exception of the new member, were not sworn.

Opinion: The failure to swear the entire court, including counsel, was jurisdictional error, voiding the ensuing proceedings. 'Another trial' was authorized.[50]

(3) *Law officer.*

Illustrative Case

ACM 5274, *Pino,* 6 CMR 543 (1952)

The record of trial failed to show that the law officer was sworn, nor could an appropriate certificate of correction be obtained.

Opinion: Rehearing authorized. In view of the mandatory provisions of Article 42*a*, and paragraphs 62*h*, 112*b*, *c*, and 114, of the Manual:

> There appears to be little doubt that taking the prescribed oath by the law officer, even though procedural in nature, is considered to be a fundamental requirement which must be met before that official can legally perform his duties. . . . See ACMS 3051, *Nyman,* 5 CMR 598.

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[43] UCMJ, Art. 42(a).

[44] AW 19, 1949 Code; MCM, 1949, para. 61.

[45] AW 19, 1949 Code; also, Winthrop *Military Law and Precedents* (2d ed., 1920), p. 232.

[46] UCMJ, Art. 42(a).

[47] MCM, 1951, para. 61*b*. See also *d*, para. 112*b*, which states "prior to functioning" the court personnel will be sworn. These Manual provisions, at least, seem to imply that the court has no power to act as such, until its members (and the law officer of a general court-martial) are sworn.

[48] MCM, 1951, para. 114.

[49] See MCM, 1951, para. 114*a* and Winthrop, p. 232.

[50] But see *Pino,* 6 CMR 543 (1952).

However:

> In our opinion, the failure to administer the oath to the law officer did not deprive the "court" of its jurisdiction to try this accused. As was said by the United States Court of Military Appeals "it is not every provision of the Code that reaches the level of a jurisdictional requirement" (U. S. vs. Goodson . . ., 3 CMR 32) and we are not disposed to so label the Code requirement that the law officer be sworn. Not only will the accused be fully protected if we order a rehearing in this case (MCM, 1951, par 92; UCMJ, Art. 63) but, additionally, from a practical viewpoint, such action will obviate the possibility of future difficulties which could well arise should 'another trial' be ordered (see U. S. v. Padilla and Jacobs . . ., 5 CMR 31).

(4) *Defense counsel.*

(*a*) *Appointed defense counsel.*

Illustrative Case

ACM S—3051, *Nyman*, 5 CMR 598 (1952)

The record of trial showed that the appointed defense counsel of the special court-martial entered the courtroom and seated himself at the defense table, after the personnel of the court had been sworn. *Opinion:* Rehearing authorized. Failure to swear an appointed defense counsel, who then participates in the trial, is reversible error. In absence of a record showing of nonparticipation, it is presumed he did participate. Prior to the Code it was the unanimous opinion in the military that failure to swear the court members or the prosecution constituted a jurisdictional defect. Congress, in enacting Article 42, intended to place defense counsel on the same plane as these personnel, and a violation of such a Congressional mandate precludes the application of "harmless error" under Article 59.

(*b*) *Civilian defense counsel.*

Illustrative Case

ACM 6499, *Danielson*, 11 CMR 692 (1953), *pet. denied*, 12 CMR 204

The record did not show that civilian defense counsel was sworn. *Opinion:* The error was non-prejudicial. Paragraph 112*b*, MCM, 1951, requires individual defense counsel to be sworn, but apparently Article 42(a) does not. The Legal and Legislative Basis, MCM, 1951, at p. 95, supports this conclusion. Accordingly, since no mandate of Congress was violated in the instant case [as it was in *Nyman, supra*], the effect of the error can be examined for specific prejudice. Because civilian defense counsel represented his client adequately, reversal is not required:

> Individual civilian defense counsel is sworn on oath as an attorney to protect the rights of the accused. He has no obligation to the military and is not subject to the Code. Furthermore he is expressly chosen by the accused and, in most cases, receives remuneration for his work from him. His loyalties are therefore entirely to the accused even in the absence of an oath before the court-martial. In this respect, however, we do not intend to cast any aspersions upon the loyalty, integrity and ability of military counsel, and we believe that Congress expressly provided for the mandatory swearing of appointed counsel to obviate any possibility of criticism rather than because they doubted the existence of those qualities where such ap-

pointed counsel were concerned.

(5) *Reporter.*[51]

7. Single convening for several accused. If several accused are to be tried consecutively before the same court-martial, the Manual authorizes only a single convening procedure in the presence of all accused. After the court personnel are sworn, and the court-martial thus convened, the remaining accused are excused, the court proceeding on with the first trial. When each of the other accused's turn for the trial comes, the court need not be resworn.[52] In such a case, charges cannot be withdrawn from that particular court-martial, except for good cause.[53]

This procedure has been officially discouraged, however, because of the possible confusion attendant on; (1) representation by separate counsel, (2) a request by one or more accused for enlisted members, and (3) transcribing separate, but identical records of the preconvening procedures.[54] Nevertheless, a reexamination of the feasibility of this procedure for general courts-martial is indicated in view of: (1) the lack of express authorization for pretrial motion practise,[55] and (2) the establishment of a permanent law officer cadre.

These two factors could make it desirable in proper circumstances to dispose of pretrial motions on a mutually consensual basis, without requiring the sporadic presence of members of a general court-martial, or their immediate availability during numerous out-of-court hearings on interlocutory questions.

Section II. PARAGRAPH 53*e*, MCM, 1951, PUBLIC TRIALS

1. Historical background. The Code and its legislative history are silent on the right of a military accused to a public court-martial, although traditionally, courts-martial have been open to the public. Winthrop points out that this custom goes back "to the earliest military practices . . . under the administration of Carlovingian kings and the code of Gustavus Adolphus." [56] He then states, but without any citation of preconstitutional English legal authority, that the courtroom may be closed at the discretion of the *"court."*[57]

The question as to the extent of an accused's right to a public court-martial was not answered by the United States Supreme Court in *Ex Parte Quirin,* 317 U. S. 1 (1942), because of doubt as to whether at that time a military commission convened to try a violation of a *law of war* was bound by the then existing procedural safeguards applicable to courts-martial. *Quirin* has since been cited, in dictum, for the proposition that the constitutional right to a public trial does not apply to courts-martial.[58]

2. Manual provisions. The present Manual authorizes the court or the convening authority to close the hearing to the public "for security or other good reasons." [59] The 1949 Manual had included as an illustration of "other good reasons" the words "as when the testimony to obscene matters is expected." [60]

3. Excluding the public. *a. General.* If, as Judge Quinn stated in *United States* v. *Brown,*[61] the VIth Amendment right to a public trial is guaranteed to a military accused, then this right in courts-martial should be tested by federal decisions on civilian hearings. There is no indication that the drafters of the Constitution even considered whether the right applied to the military. The British Mutiny Act in effect at time of adoption of our Constitution, did not purport to deny, or grant, the right to a public hearing. In any event, until the right to exclude the public for security reasons is clearly established, the law officer should proceed with caution in closing the court for that reason, and the Government should be required to show justification for such procedure.

[51] See *supra* note 20 and accompanying text.
[52] MCM, 1951, para. [illegible], app. 8a, at 501, 505.
[53] United States v. Williams, 11 USCMA 459, 29 CMR 275 (1960).
[54] See, Legal and Legislative Basis, MCM, 1951, at 61.
[55] See ch. XI, *infra.*
[56] Winthrop, Military Law and Precedents, (2d ed., 1920), 161, 162.
[57] *Id.,* at 161.
[58] Re Oliver, 333 U.S. 257 (1948).
[59] MCM, 1951, para. 53*e*.
[60] MCM, 1949, para. 49*e*.
[61] 7 USCMA 251, 22 CMR 41 (1956).

b. Security reasons.

(1) *General.* In dicta in *United States* v. *Brown*,[62] the majority opinion took pains to point out "we are not concerned with any security question in the present instance," but it noted that the United States Supreme Court had never been faced with a case "where public disclosure would seriously endanger this nation's security." In a case involving the national security, as distinguished from a case merely dealing with routine "classified" information, it is doubtful that the VIth Amendment itself would require a public trial, nor should any requirement of military due process. One of the most important reasons for guaranteeing a public trial is to have the witness' testimony presented to spectators among whom, to the witness' knowledge, may be a person who can detect the witness' false testimony.[63] Such a rationale is difficult to apply to an espionage case where the last person in the world to come forward to contradict the Government witness would be a fellow spy—or any individual who, for that part, was legally forbidden to examine the classified matter. As for the possibility of having a defense witness contradicted, the accused would be benefited, rather than harmed, by a closed hearing.

(2) *Procedures for conducting closed hearing.* Assuming that the national security (including the secrecy of combat operations) requires a closed hearing, still the accused must be provided a fair trial behind the closed courtroom door, and he must be allowed to examine the Government evidence and present his contentions.[64] The following alternative procedures are available to insure secret, yet fair proceedings:

(*a*) *Security clearance.*[65] The burden is on the Government to obtain the necessary security clearance for individual defense counsel.[66] If the interests of national security preclude the necessary security clearance, then the Government must either "disbar" the lawyer or dismiss the proceedings.[67] (Judge Latimer, in a separate opinion, stated that where national security is at issue, a lawyer who is not a good security risk should not be considered "reasonably available").

(*b*) *Cautioning participating personnel.* The courtroom having been cleared of spectators during presentation of the classified evidence, the court should warn the personnel whose duties require them to remain that "they are not to communicate such confidential or secret information." [68]

(3) *Postponing hearing.* The Manual provides that where the prosecution of a case "would probably be detrimental to the prosecution of a war *or* inimical to the national security" the charges may be so certified to the President by the Secretary concerned, for postponement of trial in accordance with Article 43, UCMJ.[69] Article 43, in such a case, extends the statute of limitations six months after the formal cessation of hostilities; but Article 43, by its express terms, authorizes this action only in time of war, and not, as might be implied by the wording of paragraph 33*f* of the Manual, in time of peace when the interests of national security might be compromised. Further, it is questionable whether in time of war the accused's right to a speedy trial would allow the government to confine an accused without trial until after the hostilities have ended.

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[62] *Ibid.*
[63] *Supra*, note 61.
[64] CM 389529, Dobr, 21 CMR 451 (1956).
[65] See CM Dobr, *supra*, note 64.
[66] United States v. Nichols, 8 USCMA 119, 23 CMR 343 (1957).
[67] *Ibid.*
[68] MCM, 1951, para. 151*b*(3).
[69] MCM, 1951, para. 33*f*. (Emphasis supplied).

(4) *Army policy.* The opinion has been expressed that only in rare cases should the record of trial be classified, and that the staff judge advocate, at least when reviewing the record, should attempt to have its contents declassified. He should justify his failure to do so by a letter attached to the record.[70]

c. "Other good reasons."

(1) *General.* The presentation of obscene or scandalous matter, by itself, does not constitute a good reason for closing the courtroom to spectators, over the objection of the accused;[71] however, for any of the following reasons[72] the courtroom may be closed to all, or certain classes of, spectators, over the objection of the accused.

(2) *Overcrowding.* Persons having no concern with the case may be removed to provide room for those who have good reason to remain.

(3) *Disorderly conduct.* An unruly spectator may be removed.

(4) *Child witness.* "Where a child is a witness and cannot testify before an audience, it is permissible for the court temporarily to exclude the public in order that competent testimony may be obtained."[73]

(5) *Youthful spectators.*[74] Youthful spectators may be excluded where the presentation of indecent matter would have a demoralizing effect on immature minds.

d. Obscene matters.

Illustrative Case

United States v. *Brown,* 7 USCMA 251, 22 CMR 41 (1956)

Accused was convicted of communicating obscene language to a telephone operator. Both the victim and her supervisor, the principal witness, were mature women. Prior to the convening of the court, the convening authority had directed the courtroom be closed to the public, but informed the defense counsel that the accused could have anyone present he wished. At the trial when defense counsel objected to the closed hearing, the law officer, who considered the convening authority's order a reasonable exercise of discretion, denied the objection. *Opinion:* The overruling of accused's objection constituted an abuse of discretion and required reversal because it constituted a denial of "military due process of law." [J. Quinn, concurring, stated that it violated accused's VIth Amendment right]. The right to a public trial is based on the following reasons: (1) *"it improves the quality of testimony . . .* [for] it produces in the witness' mind a disinclination to falsify", (2) it has a wholesome effect on the court members who will be more attentive to their duties, and (3) the public respect for and confidence in the processes of justice will be thereby increased.

The law officer or the convening authority has some discretion in excluding some spectators or classes of spectators, but in this case the exclusion order was too broad:

> It may well be that under some circumstances a burden can be shifted to the accused to designate those who may remain, but to place that load on his shoulders when this type of offense is alleged clearly goes beyond the bounds of necessity. One of the basic reasons for insisting that the public be admitted is to raise the possibility that false witness testimony will be exposed through disclosure by interested persons who may chance to be present. In all probability, the accused would be unable to identify those persons who might possess information unbeknown to the parties, and so to require him to designate merely grants him a privilege without substance.

Further, the order did not specify that the press could attend, and the right to a public trial includes the right of attendance of the press.

[70] Ltr. JAGJ, 14 Feb. 1952, Subject: Declassification of Records of Trial.

[71] The right to a public trial belongs more to the accused than to the public. Thus, at accused's request, it should be permissible to exclude the public. United States v. Henderson, 11 USCMA 556, 29 CMR 372 (1960).

[72] United States v. Brown, *supra,* note 61.

[73] *Accord,* ACM 12586, Frye, 25 CMR 769 (1957), *pet denied,* 29 CMR 486 (1958).

e. Unusual times and places.

(1) *General.* The Manual provides that as a general rule the public should be permitted to attend courts-martial.[74] Although the president of the court selects the place where the trial is to be held,[75] he should do so with a view to permitting the public to attend. Likewise, he should select a convenient time of trial.

(2) *Time.*

> A court-martial may hold sessions at any hour of the day, but should not meet at unusual hours, nor should the duration of the sittings be unusually protracted, unless the court is informed by the convening authority that the case is one of extraordinary urgency and that such a measure is therefore warranted.[76]

The foregoing provision must of necessity be advisory only, as the court has discretion to determine when it shall recess, adjourn, or grant continuances.[77] Thus, a flat direction by the convening authority that all general and special courts-martial be convened after 1900 hours is considered to usurp the functions of the president, law officer, and counsel. Further, when done for an improper motive, such as censuring the past actions of courts, the order is an illegal attempt to exert unlawful command influence.[78]

(3) *Place.* The opinion has been expressed that where accused is entitled to a public trial the convening authority cannot legally, in holding the trial at an isolated place, do indirectly what he is forbidden to do directly.[79]

4. Publicity of trials. *a. General.* Advance notice of trials should be published so that persons subject to the Code may attend.[80]

b. Press, radio, and television coverage. Photographs and broadcasting by radio or television are now allowed to be taken or conducted during sessions without prior approval of the Secretary of the Department concerned.[81] This provision of the Manual is based on Rule 53 of the Federal Rules of Criminal Procedure which in turn reflects the ethical standards of Canon 35 of the Canons of Judicial Ethics, ABA. The provisions of paragraph 53*e* must be adhered to scrupulously during periods immediately prior to convening the court, following adjournments and during all recesses.[82]

5. Witnesses should be excluded from courtroom. The Manual requires that "ordinarily" witnesses be excluded from the courtroom,[83] and suggests that in appropriate cases the law officer instruct the witness to refrain from discussing his testimony with anyone except counsel or the accused.[84] This provision does not, by itself, appear to preclude the law officer from allowing an expert witness to hear pertinent testimony in order to avoid the subsequent posing of a long hypothetical question.[85]

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[74] MCM, 1951, para. 53*e*.
[75] *Id.*, para. 40*b*(1).
[76] *Id.*, 1951, para. 53.
[77] *Id.*, 1951, para. 53.
[78] JAGJ 1957/4807, 7 June 1957.
[79] JAGJ 1958/6100, 18 August 1958.
[80] MCM, 1951, para. 53*e*.
[81] MCM, 1951, para. 57*e*.
[82] Ltr, JAGO, 1957/4207, 9 May 1957.
[83] MCM, 1951, para. 53*f*.
[84] See app. 8d, p. 511, MCM, 1951.
[85] See McCormick, Evidence, (1954 ed), at 30–32; see also MCM, 1951, para. 138*e*. See Blanc, "The Expert Witness in Criminal Trials", 52 J. Crim. L., C. & P.S. 317 (1961).

CHAPTER IX

CHALLENGES

References: Arts. 29(*a*), 41, 51(*b*), UCMJ; para. 62–64, MCM, 1951; app. 8*a*, pp. 506, 507, *id.*

Section I. INTRODUCTION

After the court personnel have been sworn, counsel are given opportunity to exercise their rights to challenge.[1] The general civilian rule is that a party may waive an undisclosed statutory ground for a juror's disqualification where such an objection could have been discovered by the exercise of due diligence before trial.[2] This rule is not completely applicable to courts-martial, however, because: (1) the law officer, members, and trial counsel have an affirmative duty to disclose grounds for challenge of the members and the law officer, and failure to carry out this duty is error, and (2) if the undisputed facts show a person is ineligible for any of the statutory grounds stated in subparagraphs 62*f*(1) through 62*f*(8) of the Manual [henceforth referred to as "grounds 1 through 8"], he must be removed forthwith by the court, even though he has not been formally challenged.

These two requirements probably arise from the system peculiar to the military, whereby the members of the court are generally appointed from the same close-knit military community as the accused's. Under such circumstances, an application of the stricter civilian waiver rule might not afford the accused an adequate protection against a biased or ineligible member.

Section II. PARAGRAPH 62*b*, *c*, MCM, 1951, DISCLOSING GROUNDS FOR CHALLENGE

1. General. The failure of a member or the law officer, in a contested case, to disclose any ground for challenge generally has been held to constitute reversible error because it tends to interfere with accused's right to challenge, "one of the important facets of military due process." [3] Therefore, because of the possibility of prejudice to the rights of the accused—as distinguished from actual proof thereof—the boards of review, in contested cases, have declined to search the record of trial for the effect of the error of nondisclosure.[4] The Court of Military Appeals has not as yet applied expressly the doctrine of "general prejudice" in this area.[5] Nevertheless, in view of the Court's emphasis on the avoidance of "the very appearance of impurity" it is likely that the court will hold nondisclosure to constitute reversible error, where the accused has pleaded not guilty. Where accused pleads guilty the effect of the *law officer's* nondisclosure of a nonstatutory ground for challenge will be assessed for its specific prejudice, if any, on the sentence.[6]

[1] See MCM, 1951, app. 8*a*, at 506, 507.
[2] See 31 Am. Jur., *Jury* § 119.
[3] CM 390706, Lackey, 22 CMR 884 (1956).
[4] CM 360188, Thorpe, 9 CMR 351 (1953) (law officer failing to disclose pretrail action in drafting charges and other aid to trial counsel—62*f*(11). CM 348889, Gordon, 2 CMR 822 (1952) (member forwarding charges—MCM, 1951, para. 62*f*(9) and (13)).
[5] *See* United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954).
[6] CM 401181, Harmon, 27 CMR 879 (1959).

2. Effect of accused's knowledge of undisclosed information. The actual knowledge of undisclosed grounds for challenge, by a qualified defense counsel, neutralizes the effect of the error of nondisclosure. It should be noted, however, that if the grounds are one of the first eight, there still remains the independent duty on the court to remove the ineligible individual "forthwith." [7] Therefore, mere silence by the defense, as distinguished from an affirmative waiver, should not cure the error of failing to eliminate the individual, disqualified on these particular grounds, from further participation in the proceedings. The knowledge of a qualified defense counsel is imputed to the accused,[8] but such may not be the case where defense counsel is not a lawyer.[9] Although the Court stated in one case that it will impute to the accused knowledge of disqualifying facts discoverable by his counsel in "the exercise of ordinary diligence," [10] it may be inferred from the opinion in the same case that *actual* knowledge of the defense counsel was the basis of the application of waiver of the error of nondisclosure.

3. Effect of guilty plea. Since an accused could not suffer any prejudice on the findings, as the result of nondisclosure by an ineligible member, the effect of such error is limited to the sentence.[11] The same result should follow from nondisclosure of grounds for challenge against a law officer. Even though this official does not vote on the sentence, his rulings may influence the sentencing procedures.[12]

4. Disclosure of prejudicial information. As a disclosure by the member of the facts forming the basis of the challenge may be so inherently prejudicial as to require a mistrial, the law officer should limit such disclosure, insofar as practicable, to the pertinent ultimate grounds for challenge.[13]

> In some cases, this may admittedly place the law officer and counsel in a dilemma, which must be solved through a balancing of the interests involved. Whether the ultimate disclosure will also require declaration of a mistrial cannot be determined by any hard and fast rule. . . . In any event, the law officer is empowered to examine the member in an out-of-court hearing in order to ascertain whether the challenge procedure or declaration of a mistrial will best serve the ends of justice. It is this situation, as well as other equally important considerations, which led this Court to recommend the enactment of legislation requiring the law officer rather than court members to pass upon challenges for cause. See Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury, 1960, page 11. In light of the present case, we strongly reaffirm that recommendation.[14]

5. Action upon disclosure. *a. First eight grounds.* When a person discloses undisputed facts making him ineligible under the first eight grounds, which are based on statute,[15] the Manual requires he be "excused forthwith" by the law officer, whether or not he is chal-

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[7] MCM, 1951, para. 62*d*; United States v. Bound, 1 USCMA 224, 2 CMR 130 (1952); but see United States v. Dyche, 8 USCMA 480, 24 CMR 240 (1957).

[8] ACM 7724, Meadow, 18 CMR 788 (1958) (law officer acted as law officer in closely related case—MCM, 1951, para. 62*f*(18)), and although failed to disclose that fact, the board held that since defense counsel in the present trial was also defense counsel in the closely related case, the error in failing to disclose was nonprejudicial.

[9] *Cf.*, United States v. McBride, 6 USCMA 430, 20 CMR 146 (1955), where a member became a "witness for the prosecution" when a document signed by him was introduced into evidence, thus subjecting him to challenge on the ground of para. 62*f*(4), MCM, 1951. The failure of nonlawyer defense counsel to challenge the member was not imputed to the accused and no waiver enforced. It should be noticed, however, that since the ground involved was a statutory ground—Art. 25(d)(2), UCMJ, the member should have been excused "forthwith" in any event. See MCM, 1951, app. 8*a*, p. 506.

[10] United States v. Weaver, 9 USCMA 13, 25 CMR 275 (1958).

[11] CM 390706, Lackey, 22 CMR 384 (1956).

[12] *Cf.*, United States v. Bound, 1 USCMA 224, 2 CMR 130 (1952).

[13] United States v. Washington, 8 USCMA 588, 25 CMR 92 (1958); United States v. Richard, 7 USCMA 48, 21 CMR 172 (1956).

[14] United States v. Talbott, 12 USCMA 446, 449, 450, 31 CMR 32, 35, 36 (1961). In this connection, see Report to Honorable Wilber M. Brucker, Secretary of the Army By The Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army, (1960), at 108 and 123.

[15] UCMJ, Arts. 25, 26, 63.

lenged.[16] If a member is challenged for obvious nonstatutory ineligibility, the Manual authorizes the law officer to excuse the member summarily, unless a member demands a vote.[17] Nevertheless, the Court of Military Appeals, in a broad holding where the first eight grounds for challenge were not involved, stated that these Manual provisions violate Articles 41, 51, and 52 of the Code, requiring the court members to vote on all challenges.[18] In a subsequent opinion, however, the Court did recognize the right of the law officer to "disqualify" himself, where he had assisted the prosecution before trial.[19]

Waiver. While the Manual draftsmen considered the first eight grounds listed in paragraph 62*f*(1)–(8), of the Manual, "jurisdictional,"[20] the Court of Military Appeals has distinguished between statutory "qualification" ("jurisdictional")[21] and statutory "ineligibility",[22] which is "nonjurisdictional" and may thus be waived. However, the court appears to require an affirmative waiver in such cases,[23] and a mere *failure* to challenge is not sufficient.[24]

b. Grounds based on 62f(9) through 62f(13). Since these grounds are not based on any statutory ineligibility, the Manual does not make them self-operating. Therefore, a failure to challenge, when such grounds have been disclosed, normally operates as a waiver.[25]

6. Inquiry preparatory to challenging (voir dire). *a. Procedure.* Prior to challenging, trial counsel, followed by defense counsel, may question the court, or individual members thereof, to bring out the facts which may be grounds for challenge. It is optional with the questioning party whether the person examined will be required to answer under oath.[26]

b. Extent of Inquiry.

(1) *General.* The law officer has considerable discretion in limiting the inquiry. While he must be liberal to the accused, he need not allow excessive voir dire examination designed as a substitute for an opening argument, nor should he permit members to express opinion on hypothetical questions not supported by facts then before them.

(2) *Discretion of law officer.* At a trial for burglary and indecent assault, the law officer did not abuse his discretion when he refused to allow defense counsel to query the members as to: (1) how they would vote in case of reasonable doubt, (2) matters they would consider in determining an appropriate sentence [Chief Judge Quinn dissenting on this point], (3) the credibility members might give a witness prejudiced against the accused, and (4) what the members would consider aggravating circumstances in a particular offense.[27] With respect to the first question, the court felt that such questions merely trifle with the time and patience of the court. The second question was held to be hypothetical with many essentials missing.

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[16] MCM, 1951, para. 62*c*. The drafters of the Manual considered all these grounds to be "jurisdictional." Legal and Legislative Basis, MCM, 1951, p. 62. But the Court of Military Appeals has drawn a distinction between statutory "qualification" (affecting "jurisdiction") and statutory "ineligibility", which is "nonjurisdictional" and thus may be waived. United States v. Law, 10 USCMA 578, 28 CMR 199 (1959). Whether even a lack of statutory "qualification" would result in a finding of complete lack of *jurisdiction* is, however, open to question. No doubt such an error could not be waived and is automatically reversible, but since it is the Government's duty to appoint only qualified personnel, it might well be argued that the accused should not be deprived of his failure to do so and a rehearing should be ordered. Compare United States v. Gordon, 1 USCMA 255, 2 CMR 161 (1952) (convening authority the accuser); United States v. Kraskouskas, 9 USCMA 607, 26 CMR 387 (1958) (accused represented by unqualified counsel).

[17] MCM, 1951, para. 62*c*, *h*(2), app. 8*a*, p. 506.

[18] United States v. Jones, 7 USCMA 283, 22 CMR 73 (1956).

[19] United States v. Renton, 8 USCMA 627, 25 CMR 201 (1958).

[20] See *supra* note 16.

[21] *Ibid.*

[22] See United States v. Law, *supra* note 16.

[23] United States v. Beer, 6 USCMA 180, 19 CMR 306 (1955). *Accord:* United States v. Hurt, 8 USCMA 224, 24 CMR 34 (1957).

[24] United States v. Bound, 1 USCMA 224, 2 CMR 130 (1952). *But see* United States v. Dyche, 8 USCMA 480, 24 CMR 240 (1957).

[25] NCM 169, Reid, 7 CMR 459 (1953). See also United States v. Thomas, 8 USCMA 161, 11 CMR 161 (1953); United States v. Glaze, 8 USCMA 168, 11 CMR 168 (1953).

[26] MCM, 1951, para. 62*b*.

[27] United States v. Parker, 6 USCMA 274, 19 CMR 400 (1955). Although the court found no abuse of discretion in refusing to permit the particular questions, language in the opinion indicates that law officers should be especially liberal with the accused in permitting considerable latitude in *voir dire*. "The accused should be allowed considerable latitude in examining members so as to be in a position intelligently and wisely to exercise a challenge for cause or a peremptory challenge. Accordingly, when there is a fair doubt as to the propriety of any question, it is better to allow it to be answered." When a member is challenged during the trial, neither side may inquire as to the member's opinion as to the weight which he has tentatively assigned to the evidence already presented. See United States v. Carver, 6 USMCA 258, 19 CMR 384 (1955).