future,' but that he agreed to be interrogated orally, provided his doctor was present and the questioning did not exceed thirty minutes." Defense counsel again refused to cross-examine the witness by deposition and the original deposition was admitted. These facts furnish a sufficient showing of unavailability "because of sickness."

Notes. (1) The accused's petition for review in this case was denied on 8 April 1960, four weeks prior to the decision in *United States v. Jacoby* recognizing the right of the accused to be afforded *the opportunity* to confront in person adverse deponents. However, it is clear that he was afforded such an opportunity and declined to make use of it.

(2) *Hoffman* also involved a latent issue as to whether the accused would have had valid grounds for a continuance until the witness would be able to testify in person (see *United States v. Daniels* (par. 10*b* (2), *infra*).) but the defense elected instead to move for dismissal of the charges, to which he was not entitled.

(2) *Insanity.* It is clear that a witness may be so insane as not to be able to testify at a trial. However, when it is desired to use the deposition of such a witness the proponent must of course establish the mental competency of the witness at the time the deposition was taken and in so doing must overcome the inference that the witness' present incompetence has existed continuously for some indefinite prior period of time.

Illustrative case.

United States v. Parrish, 7 USCMA 337, 344, 22 CMR 127, 134 (1956). A deposition taken while the witness was mentally competent to testify may be used when he has relapsed into a state of insanity at the time of the trial and the law officer may accept the testimony of witnesses (also by deposition) as to the deponent's mental condition at both the time of the deposition and that of the trial. The appearance of the deponent before the court is unnecessary and to require it ". . . would emasculate the provisions of the Code, as every deposition would be subject to attack on the grounds that the witness was not present and his competency could not be ascertained. . . . So far as we are able to ascertain, the witness had reverted to a state of insanity at the time of the trial, and had he been produced, he probably could not have testified. The latest information shows him to be insane and we have no way of ascertaining whether he has had any temporary periods of sanity since that time. The time of trial should not be controlled by any such contingency. . . . There is no substantial dispute in the medical testimony and the record conclusively establishes that at the time when the deposition

was taken, the Captain was mentally competent to testify . . . a complete picture of the Captain's mental deterioration, his return to sanity prior to the taking of the deposition, and his subsequent relapse was painted for the court. Whether he was competent and whether he should be believed were issues which were properly proved by the testimony, and the rulings by the law officer and the finding of the Court are supported by the record."

(3) *Beyond reach to process.* When a witness is claimed to be unavailable because of not being amenable to process, the proponent of the deposition must show that the witness has been at least requested to appear and has refused to do so.

Illustrative case.

United States v. Stringer, 5 USCMA 122, 136, 17 CMR 122, 136 (1954). A mere showing that a French national, residing within 100 miles of the court in France, was not amenable to American subpoena does not establish unavailability. ". . . there must be shown an inability, or a refusal, to testify. No inability to testify is apparent in the record . . . the records fail to recite unavailability of transport at the time. Nor is any sort of refusal to testify revealed. In short, we have no single shred of information indicating that Mrs. Ecale would not have come to La Rochelle to testify in person, had trial counsel asked that she do so. . . . We consider it no undue burden to require that the prosecution—when it seeks to use a deposition—communicate with a nearby foreign witness, notify him of the expected date of trial, request his attendance, and advise him of any departmental regulations authorizing a fee for such attendance."

(4) *Other reasonable cause.* It is difficult to imagine any circumstance, not fairly included within the specific instances set out in Article 49, which could be deemed to provide reasonable cause for inability or refusal to appear and testify. For example, such matters as the lack of transportation or funds therefor would certainly fall within the broad category of physical inability. An improper refusal to testify would not be "reasonable cause" and should not render the witness unavailable.

Illustrative case.

United States v. Barcomb, 2 USCMA 92, 93, 6 CMR 92, 93 (1952). In a pandering case, the prostitute involved took the stand as a prosecution witness but refused to answer the trial counsel's questions. After repeated unsuccessful efforts to persuade her to testify, the law officer held her in contempt

and she was excused as a witness. The prosecution then introduced, over objection, her deposition which had been taken at a time when it was believed she would be unavailable at the trial. "The situation in this case fits none of the excepted circumstances listed in Article 49(*d*) of the Code, supra. Admission of the deposition in evidence constituted error."

Note. The Court's opinion contains no discussion whatsoever other than the conclusion quoted. However, the fact that the witness was held in contempt indicates that her refusal to testify was not based on valid grounds and was not, therefore, "reasonable."

10. Unavailability caused in bad faith. *a. General.* A party who has control over the whereabouts or "availability" of a witness and who makes such a witness unavailable for the express purpose of permitting the use of a deposition will not be permitted to profit by his wrongful act in depriving the court of the personal testimony of the witness and the deposition will be excluded. If, therefore, it is established that a military witness has been transferred or discharged for such a purpose, his deposition would be inadmissible. However, the failure to object to such transfer or discharge might be deemed a waiver of this irregularity provided that the adverse party had the opportunity to object. Furthermore, such bad faith on the part of the military authorities will not be presumed. The fact that a witness who is "unavailable" at the scheduled trial date is expected to become available in the very near future can be made the basis for a motion for a continuance. In such a situation the ruling on the motion lies within the sound discretion of the law officer.

b. Illustrative cases.

(1) *United States v. Ciarletta*, 7 USCMA 606, 610, 23 CMR 70, 74 (1957). The mere fact that an accomplice of the accused, scheduled for accelerated discharge by reason of unfitness, could have been retained in the service does not show that the action of the military authorities in concluding not to prosecute him but to discharge him as scheduled was taken for the express purpose of rendering him unavailable as a witness. Defense counsel urge that ". . . the Government deliberately and unreasonably made Dooley unavailable as a witness by the affirmative act of giving him a discharge to which he had no right, when he could easily have been retained in the Service, and, hence, present to testify at the trial in person. Obviously, the Government should give consideration to the rights of those charged with offenses, but imposition of that duty must be kept within reasonable limits. Here the record does not show that the convening authority of this court-martial had any power to retain

Dooley or that he was ever as much as informed that the accused desired Dooley's presence at the trial. For aught that he knew, they could have been only too glad to have Dooley unavailable. As a matter of fact, the record discloses that Dooley was a member of a senior command. This command had independently determined to release him because of his inferior intelligence and his past record of offenses prior to the crimes of December 5, 1955, which are in question. . . . Defense counsel were notified of the taking of the deposition and the reason therefor before Dooley was discharged. They appeared with their clients, participated fully in the hearing, yet rendered no objection to the taking of the testimony at the time it was given. They did not then either claim or offer to prove that Dooley's discharge was being accomplished for the purpose of preventing his personal appearance at the trial. But more consequential to this issue is the fact that they never made any request to have him retained. It is one thing to charge the Government with bad faith when it ignores the rights of an accused, but it is quite difficult to support that contention when an accused sleeps on his rights, fails to make a timely request for relief, and gives no hint of dissatisfaction with the procedure adopted. Had counsel for the accused wanted to prevent the presentation of the testimony, the least they should have done was to ask military authorities to delay the the administrative discharge or forfeit the taking of the deposition. For us to hold that Dooley was discharged only to prejudice the accused would be in conflict with any fair analysis and interpretation of this record, and we therefore reject this contention."

(2) *United States v. Daniels*, 11 USCMA 22, 25, 28 CMR 276, 279 (1959). A larceny trial was set for 5 December in San Francisco. On 4 December defense counsel informed the convening authority that the victim concerned, whose deposition had been taken in Washington, would be in Oakland, 10 miles from San Francisco, on 9 December for two weeks and requested that trial be delayed so that the victim could testify in person. The request was denied. The request was renewed and again denied at the trial. Upon appeal, all members of the Court joined in reversing the findings upon a ground not here pertinent. Judge Ferguson would also hold that the law officer abused his discretion in denying the continuance. "Here, it is obvious that it would have been entirely reasonable to have, the witness, yet a member of the military service, present at the hearing. The delay requested

was relatively brief. The witness would have been in a nearby city, and there can be no doubt that his presence before the court-martial would have afforded an infinitely fairer opportunity for the testing of his statements." (Latimer, J., would find no abuse of discretion. Quinn, C.J., expresses no opinion on the issue.)

11. Competency of deposition and deponent. *a. General.* The mere fact that the testimony of a witness appears in the form of a deposition adds nothing to the competency of either the witness or his testimony. The deponent must be one who would have been competent to testify as a witness and his testimony must be such as he could have given in person on the stand, subject to all ordinary rules of evidence. However, because of the difficulties inherent in the obtaining of testimony by written interrogatories the prohibition against asking leading questions on direct examination is relaxed to a reasonable extent.

b. Competence of the deponent. The law officer must determine the competency of a deponent allegedly incapable of testifying because of mental infirmity or youth just as in the case of any other witness. However, he need not personally observe the witness so long as he has adequate information upon which to base his ruling.

Illustrative case.

United States v. Parrish, 7 USCMA 337, 345, 22 CMR 127, 135 (1956). When the deposition of a witness, unavailable due to insanity, is offered, the law officer must determine whether the deponent was mentally competent to testify at the time the deposition was taken. The ruling in favor of competency is supported by the testimony (also by deposition) of doctors who were of the opinion "that he was in a period of remission, could recall the facts and circumstances surrounding his dealings with the accused, could relate them clearly, and understand the moral obligation of telling the truth."

c. Competence of the testimony.

(1) *General.* With a few exceptions, set forth below, the testimony contained within a deposition is subject to objection just like any other testimony.

Illustrative case.

United States v. Shepherd, 9 USCMA 90, 25 CMR 352 (1958). Where a deposition is taken from W under charges of failing to obey a lawful order of W and making a false official statement, the withdrawal prior to trial of the former charge renders that portion of the deposition referring thereto irrelevant, since it had no independent relevance as to the remaining charge, and the introduction of the deposition at the trial resulted in improperly placing before the

court evidence of an act of misconduct of the accused which was not charged.

(2) *Failure to object at taking.* A failure to object at the oral examination of a deponent or at the time interrogatories are prepared will be deemed a waiver only of those objections the grounds for which could have been obviated or removed had the objection been made at such time. As a general proposition it may be stated that this waiver will apply in those areas where a failure to object when a witness is on the stand also will be held a waiver.

Illustrative cases.

(*a*) ACM 5198, *Wilson*, 5 CMR 762 (1952), *pet. denied*, 5 CMR 131 (1952). Where the deposition of the cashier of a bank lays a proper foundation for admitting certain bank records as business entries and the deponent thereafter testifies as to the contents of such records, there is a violation of the best evidence rule but the failure to object to such secondary evidence at the time the deposition was taken constitutes a waiver of the deficiency and the best evidence rule cannot be raised for the first time at the trial.

(*b*) *United States v. Bryson*, 3 USCMA 330, 12 CMR 86 (1953). The accused was charged with larceny and forgery of a state bonus check of which W was payee. The testimony of W was taken by written interrogatories to which was attached a purported photostat of the check and which made frequent references to the check (but he was unable to authenticate the check). No objection was made to the interrogatories but, at the trial, the defense objected to the check being received in evidence. Although the failure to object when the deposition was taken may have been a waiver of the best evidence rule it cannot be deemed a waiver of the requirement that the check not be received in evidence until it had been properly authenticated—if not by the testimony of W then by some other method. An agreement to the use of a copy does not waive the requirement that the copy be properly authenticated. A failure to object waives only those errors which might have been obviated by a retaking of the deposition. Herein, W's deposition indicates quite plainly that even if defense counsel had objected to the lack of authentication at the time the deposition was taken, W could not have authenticated it and the failure to object cannot be regarded as being the cause of the lack of authentication.

(c) *United States v. Bergen*, 6 USCMA 601, 20 CMR 317 (1956). The testimony of a laboratory technician as to the results of a urinalysis was taken by deposition upon written interrogatories. His testimony indicated quite clearly that he merely read from certain memoranda which were not forwarded with the deposition. Whether these memoranda were to be used to refresh the deponent's memory or represented his past recollection, the defense was entitled to see them. Furthermore, the failure to object to the interrogatories did not constitute a waiver in this regard. There was nothing in the interrogatories to put defense counsel on notice that the memoranda, if used, would not be forwarded. Since this irregularity could not have been anticipated, it was not waived.

(3) *Leading questions and non-responsive answers.* Because of the difficulties inherent in eliciting testimony without confronting the witness, some latitude is permitted in the use of leading questions on written interrogatories. Needless to say, a failure to object to a question as being too leading would constitute a waiver of the objection. Furthermore, a party cannot demand the same preciseness of answer to his questions as he can on cross-examination of an ordinary witness. It is sufficient if the deponent fairly answered the questions as they could reasonably be expected to be interpreted by the witness.

Illustrative case.

United States v. Parrish, 7 USCMA 337, 347, 22 CMR 127, 137 (1956). The mere fact that the witness did not answer all cross-interrogatories or that some of his answers were not responsive does not render a deposition inadmissible. "There is no doubt that where a witness refuses or declines to answer pertinent and material questions, regarding facts apparently within his knowledge, good grounds exist for excluding the deposition. On the other hand, recognition is given to the rule that when a witness fairly attempts to answer the question as he understands it, admission is not denied. In the instant case the witnesses were not contumacious or evasive, and they did not refuse to make a full and fair disclosure of all matters as to which they were questioned. In those instances where the witness stated that no answer was required he or she based that reply on the fact that the information given on the previous cross-interrogatory rendered the question inapplicable. . . . Had the witnesses gone outside the script and departed from the subject

of the question, the accused might have been denied his right of cross-examination, but no such event occurred. Stated in a light most favorable to him [the accused], all his counsel was contending for was an opportunity to require a witness to answer an interrogatory in a different manner. . . . As we understand the principle involved, the accused must be afforded the right to cross-examine a witness within the scope of the direct examination. In the case of depositions, if the witness ventures into new areas which are material and relevant because of non-responsive answers, defense counsel should be afforded an opportunity to explore those fields. If, however, the issues are well identified, the witness confines himself to the controversy involved, and cross-examination is conducted, no substantial right has been infringed, even though the answers are not what counsel would have preferred."

(4) *Business entry exhibits.* When a deponent has properly authenticated a business entry, a copy of such entry, identified as such by the deponent, may be substituted for the entry actually used and will accompany and be part of the deposition and such copy will not be subject to objection on the ground of the best evidence rule.

12. Use during deliberations of court. A deposition is not an exhibit in the ordinary sense of the term but is "the equivalent of the testimony of a witness" and may not be taken into the closed session of the Court during its deliberation. (*United States v. Jakaitis*, 10 USCMA 41, 27 CMR 115 (1958).)

13. Authentication. A deposition, like any other writing, may be authenticated by any competent evidence of its geniuneness. Ordinarily, it is authenticated by taking judicial notice of the signature of the person before whom it was taken. (See par. 147*a*, MCM).

14. Waiver. *a. General.* By virtue of the provisions of paragraph 145*a*, MCM, a failure to object at the time a deposition is taken is a waiver of any objection which could have been obviated by a retaking of the deposition and a failure at the time the deposition is offered, to specifically raise the objection that it was not taken on reasonable notice or before a proper officer or that the deponent has not been shown to be unavailable is a waiver of any objection not so raised. The use of a copy, inadmissible under the best evidence rule, or the failure to properly authenticate the deposition would also be waived by a failure to object. Furthermore, minor procedural irregularities are also waived by a failure to object thereto at the time a deposition is offered provided only that their sum total does not indicate a complete abandonment of procedural requirements.

b. Illustrative case.

United States v. Ciarletta, 7 USCMA 606, 23 CMR 70 (1957). "Appellate defense counsel allege that the record does not show that the convening authority authorized the taking of the deposition, . . . that the officer before whom the deposition was taken was properly appointed or authorized to take it; that a reporter was present, or, if so, that he was sworn; that the deponent was given a proper oath; or that he had read and corrected the deposition . . . we do not find, as requested by counsel that the cumulation of irregularities in the taking of the deposition is so great as not to permit a waiver by counsel certified to try cases before general courts-martial." (At 611, 75.) "While counsel for defense rely on our holding in *United States v. Valli*, *supra* [7 USCMA 60, 21 CMR 186] to sustain their position that many irregularities require rejection of a deposition, there is no similarity between the two cases. Here we do not have a record replete with deficiencies, as was the case in that instance. Rather than equaling 'total abandonment' of all procedural requirements, a failure to object here only bars complaint about a few possible but highly technical errors by the Government which could easily have been corrected if defense counsel had objected at the proper time. We are constrained to hold, therefore, that the irregularities in the taking of the deposition were immaterial or were waived by failure to assert timely objection." (At 613, 77.)

15. Effect of error. *a. General.* With one exception, there are no special rules applicable to the appellate review of cases wherein depositions have been improperly admitted into evidence. Such error is to be tested for specific prejudicial effect upon the outcome of the case and reversal is not required unless there is such prejudice. The only exception applies when a deposition is improperly used by the prosecution in a capital case. In this situation the error will be deemed prejudicial and cannot be cured by the court returning a finding as to a noncapital lesser included offense or by a reviewing or appellate authority approving only such a lesser offense unless the competent evidence of guilt of the lesser offense *aliunde* the deposition is so compelling that the deposition could not possibly have affected the result.

b. Illustrative cases.

(1) *United States v. Bergen*, 6 USCMA 601, 607, 20 CMR 317, 323 (1956). In a prosecution for wrongful use of narcotics, the use by the Government of a deposition as to the results of an analysis of the accused's urine, inadmissible because of the failure to attach to the deposition the writing from which the deponent testified, does not require reversal where the theory of the defense was one of use by mistake and impliedly conceded the nature of the drug used by the ac-

cused. "Error in the admission of evidence justifies setting aside a correction only if the improper evidence is prejudicial to the accused."

(2) *United States v. Aldridge*, 4 USCMA 107, 110, 15 CMR 107, 110 (1954). The prejudicial effect of the use of a deposition as evidence of the capital offense of being drunk on duty as a sentinel cannot be cured by the convening authority reducing the offense to being drunk as a member of the guard where the evidence of the latter offense is not compelling. "The evidential posture of the case was such that the deposition . . . furnished the essential fact that accused was posted as a sentinel. . . . Here we do not have a situation where the deposition added little, if any, measureable weight to the prosecution's case. On the contrary, we are presented with a problem where the deposition evidence proved the Government's case, at least as to one element. That is prejudice." ". . . the error present here cannot be cured by the subsequent action unless we can say there is no reasonable probability that the accused could have been found not guilty of drunk on duty as a member of the guard on the evidence presented at trial, exclusive of the depositions. If, on this record, absent the depositions, the members of the court-martial could have arrived at any finding on the lesser included offense other than guilty, then the present findings cannot stand. . . . [W]e need only concern ourselves with the question of the compelling weight of the competent evidence as to the lesser offense presented at trial." (At p. 111.) "We conclude, therefore, that the evidence is not of such a quality and quantity as to compel a finding of guilty as to the offense of drunk on duty as a member of the guard. Therefore, the convening authority's action was insufficient to purge the error which occurred here." (At p. 112.)

16. Depositions not offered as such. The foregoing principles pertaining to depositions and the limitations upon their use have application only when a deposition is offered in evidence as such. They have no application whatsoever when a purported deposition is offered in evidence not as a deposition but merely as a statement made out of court as, for example, when it is offered as a confession or admission of the accused, or as a prior inconsistent statement of a witness.

17. Hypothetical problems. *a.* In a rape case the prosecutrix testified on direct examination as to the actions of the accused and her lack of consent. At the outset of cross-examination, she broke down and was unable to continue giving testimony. After a brief continuance, the trial counsel called her doctor who testified that she had had a

severe nervous breakdown due to the emotional strain of the rape and the subsequent events and that any further interrogation of her in court might do permanent harm to her mind. The prosecution then moved that the witness' testimony be stricken from the record and that it be permitted to introduce the deposition of the victim taken upon oral examination several weeks before the trial. The defense objected to the use of the deposition and moved that the testimony of the witness given on direct examination be stricken from the record. How should the law officer rule? (Assume that the defense also objected to a mistrial being declared.)

b. In a robbery case, the accused's civilian defense counsel is given proper notice of the taking of the oral deposition of the victim, a civilian residing in a town adjacent to the installation where the trial will be held and in the same state. The attorney refuses to participate in the taking and demands the presence of the witness at the trial. The convening authority notifies the attorney that the witness will be subpoenaed but that the deposition is being taken to preserve testimony. The attorney does not participate in the taking of the deposition and both he and the accused refuse to consent to military defense counsel taking part. The accused, over the objection of his attorney, is required to be present at the taking and the attorney also appears over protest but does not participate. There is no cross-examination of the victim. The victim dies before trial. May the deposition be used by the prosecution?

c. The accused is charged with premeditated murder and robbery. The offenses took place at different locations and times and are completely independent of each other. The prosecution offers separate confessions of the accused as to each offense. The defense objects to the confessions as having been procured without a proper Article 31*b* warning having been given to the accused who testifies that he was not warned. The prosecution offers the deposition of the CID agent who warned the accused prior to the one interrogation which resulted in both confessions. The case has not been designated as non-capital. Is the deposition admissible?

d. After referral of the charges, the regularly assigned defense counsel, whose services have been accepted by the accused, consents to having a certain JAGC officer represent the accused at the taking of the oral deposition of a defense witness in a distant country and supplies such officer with a memorandum of points to be covered in the cross-examination of the deponent. Subsequently, the accused retains civilian counsel and dismisses his military counsel. At the trial, civilian counsel objects to the deposition on the ground that the accused had not consented to be represented by the officer who acted on his behalf in taking the deposition. How should the law officer rule?

e. In a robbery case, the defense objects to the receipt in evidence of the deposition of a duly qualified expert as to the value of the ring allegedly taken from the victim on the ground that at the time the deposition was taken the accused was charged with larceny and that the specification has since been amended to allege the robbery. How should the law officer rule?

f. At a trial being held in New York the prosecution offers the deposition of a military witness stationed in California. The defense objects on the ground that despite its timely request to the convening authority for the personal attendance of this witness no action was taken to secure it and, furthermore, that one of the prosecution witnesses who testified in person is a member of the same unit as the deponent and was transported to New York. What action should the law officer take?

g. The prosecution offers a deposition and establishes the residence of the civilian deponent as being without the state in which the court is sitting. (1) The defense objects and offers the affidavit of the witness that he is willing to attend if transportation is provided him by the Government. How should the law officer rule? (2) The defense objects and states that, at the request of the defense, the witness has traveled to the courtroom and is now in the witness room. The prosecution calls the witness and the latter repeatedly invokes the Fifth Amendment and refuses to testify as to his knowledge of the case. The law officer upholds the claim of the privilege and excuses the witness. The prosecution again offers the deposition. Is it admissible?

CHAPTER XXIX

FORMER TESTIMONY

References. Art. 50, UCMJ; Par. 145*b*, MCM.

1. General. There is a well recognized exception to the hearsay rule which permits the use of the testimony given in another proceding at which both parties to the instant trial, or their predecessors in interest, were afforded the opportunity to elicit and explain, attack or impeach the testimony of the witness on the identical issues now before the court. This exception exists in order not to deprive the parties of the testimony of unavailable witnesses and the purpose of the hearsay rule is deemed satisfied by the former confrontation.

Illustrative case.

United States v. Niolu, 4 USCMA 18, 20, 15 CMR 18, 20 (1954). "The framers of the Manual realized—in conformity with the thinking of civilian law—that occasions may arise on which it will be necessary that the same parties relitigate the same issues. . . . Where witnesses at the first hearing are for specified reasons unavailable, it has been felt that both common sense and sound practice require that their former testimony be admissible, as having earlier withstood the rigors of cross-examination by the same adverse party. We are certainly without disposition to impede what appears to constitute a salutary procedure, and one which preserves the rights of confrontation and cross-examination. . . ."

2. Types of former testimony. *a. General.* The Manual sets forth two types of former testimony, testimony at a former trial and testimony given at a court of injury. The Court of Military Appeals has held that, under certain conditions, testimony given at an Article 32 investigation may also be treated as "former testimony."

b. Former trial. Either party may offer the testimony of a witness given before either a civil or military court at a former trial of the accused in which the issues were substantially the same as that now before the court. However, the prosecution may not offer such former testimony unless, at such former trial, the accused was confronted with the witness and afforded the opportunity to cross-examine him. The foregoing limitation does not apply to depositions properly used or taken for use at the former trial. Testimony given at a former trial is used most frequently at rehearings or new trials.

c. Court of inquiry. Either party may offer the sworn testimony given by a witness before a court of inquiry in a proceeding which involved the same issues and to which the accused was a party. However, in any case in which the prosecution introduces such former testimony to prove the allegations of a specification, the court may not adjudge the death penalty or sentence an officer to dismissal unless the defense specifically consents to the use against him of the former testimony. It will be noted that Article 50, in forbidding the use of such testimony by the prosecution in capital cases or cases extending to dismissal, does not require that the convening authority designate the case as non-capital or non-dismissal prior to trial. The mere introduction of the evidence by the prosecution achieves this result.

d. Article 32 investigations.

(1) *General.* The testimony of a witness given during an Article 32 investigation may be admissible as former testimony, despite the silence of the Manual in this respect, if it conforms in all material particulars to the type of former testimony authorized by the Manual. The pre-trial investigation might be treated for this purpose as analogous to the civilian preliminary hearing, testimony taken at which it can qualify as former testimony in the civilian courts.

(2) *Illustrative case.*

United States v. Eggers, 3 USCMA 191, 193, 11 CMR 191, 193 (1953). The accused was charged with several specifications of forgery. His female companion during the "spree" which produced the forged checks was called as a witness during the Article 32 investigation. Accused and his counsel were present and the witness was subjected to searching cross-examination. The witness died before trial and the prosecution introduced a verbatim transcript of her testimony as given at the investigation. ". . . we are of opinion that the omission from the Code or the Manual of a specific reference to the use of reported testimony, secured during the course of a pretrial investigation, is not necessarily fatal to the law officer's ruling in the present case. This is certainly true if evidence coming from such a source may be said to meet the tests provided as a guaranty of trustworthiness in the case of reported testimony having other origins. In our view the record offered here *does* meet these tests. Certainly, the testimony was cross-examined, searchingly and at length, by the very party-opponent against whom it is now offered; and . . . it certainly dealt with the very issues involved at the case at bar. . . . As a matter of theory we can conceive of no sound objection to it. The fact that for tactical reasons defense counsel might not wish to fully develop tes-

timony at the investigation does not change this result. ". . . cross-examination is nowhere *required*, but only the *opportunity* for its exercise. If, in pursuit of some real or fancied strategical advantage of his own, counsel sifts direct examination inadequately at a preliminary stage of the proceedings, he should not be heard to complain when, in a proper case, it confronts him later at the trial. Discovery is not a prime object of the pretrial investigation. . . . Is it better to exclude reported testimony in the present setting for the reasons proposed, or to admit it despite its conceivable—and modest—shortcomings? . . . [W]e are mindful that courts sit as well to convict the guilty as to acquit the innocent. The administration of criminal justice, as we have said before, is not a fox-hunt—and rather different ground rules must obtain. . . . We prudently leave for future consideration questions involving pretrial testimony less thoroughly sifted than was that involved here—or wholly uncross-examined, although an opportunity for such testing has been afforded. On these and related matters we express no opinion."

3. Limitations on use of former testimony. *a. General.* The testimony which is offered must of course be such as the witness could give from the witness stand if he were present in court. It is fully subject to all other rules of evidence, including those dealing with the competency of witnesses. The mere fact that the testimony has been admitted into evidence before another tribunal does not deprive the opponent of the right to object to the competency of either the testimony or the witness when it is offered as former testimony. The former testimony rule does no more than to dispense with the necessity of having the witness testify in person.

Illustrative case.

United States v. Johnson, 11 USCMA 384, 386, 29 CMR 200, 202 (1960). At a rehearing when defense counsel indicated his desire to raise objections to portions of former testimony it was improper for the law officer to rule that "if there was no objection at the original trial, no objection will be entertained here." "Before this Court the accused contends that the law officer improperly limited his right to object to the content of the former testimony. The basis of his contention is that testimony given at a former trial is 'open to objection . . . (as) incompetent, immaterial, or irrelevant, or that the witness was incompetent,' and an objection on those grounds can be interposed without regard to whether a like objection was made at the previous trial. The Government agrees with the accused's state-

ment of the right to object to previous testimony as an 'abstract proposition of law.'"

b. Lack of jurisdiction. Paragraph 145*b*, MCM, prohibits the use of former testimony given in a former trial which is shown by the opponent to have been void because of a lack of jurisdiction. In such a case the purported former trial is a nullity and can be given no legal effect. It should be noted that in such an event there would not be a "rehearing" or "new trial." The present trial would be the only trial of the case.

c. Denial of cross-examination. Paragraph 145*b*, MCM, provides that the prosecution may use former testimony only if the accused was confronted with the witness and afforded an opportunity to cross-examine him. Therefore, if these factors are absent, the former testimony is inadmissible against the accused. Furthermore, if the former conviction is set aside because the accused was denied effective representation at the former trial any former testimony which might be "tainted" by the inadequate or improper representation in the sense that the accused had been deprived of effective cross-examination, will not be admissible.

Illustrative cases.

(1) *United States v. Vanderpool*, 4 USCMA 561, 567, 16 CMR 135, 141 (1954). The conviction of the accused was set aside on the ground that the law officer erred in denying the accused's application for a continuance for the purpose of appealing the decision of the convening authority that individual counsel requested by the accused was not reasonably available, and requiring the accused, over his objection, to proceed to trial with the regularly appointed counsel. "It is undeniably true that, if the accused had been wholly deprived of counsel at the first trial, the testimony of witnesses who appeared at that trial would be inadmissible in subsequent proceedings. . . . The board [the board of review which reversed the conviction resulting from the former trial] certainly held that the accused was materially prejudiced through his deprivation of a substantial right by the law officer. . . . Within the obvious thrust of that opinion too, we are sure, is the conclusion that no legal conviction may be predicated on the testimony contained in the record of the first trial, which was conducted by counsel objected to by the accused. . . . —it would be inconsistent for us to agree that the accused was somehow denied adequate legal representation at the first trial and yet to hold the testimony given at the proceeding to be admissible to ground a conviction at the second over the objection of the accused. On the

contrary we think that there is no logical escape from the conclusion that the former testimony here was inadmissible, and that an objection by the defense to its introduction would have been well taken."

(2) CM 400641, *Story*, 28 CMR 492, 497 (1959) *pet. denied*, 28 CMR 414 (1959). The robbery conviction of the accused was set aside because his defense counsel had also acted as defense counsel for the accused's accomplice prior to the latter's trial and therefore was disqualified to cross-examine the accomplice who was called as a prosecution witness. At the rehearing, the former testimony of witnesses' *other than the accomplice* nevertheless was admissible. "We conclude that the disqualification of the defense counsel as to Morton [the accomplice] had no effect upon the rest of the record. Indeed, it is clear that former defense counsel performed his duties in a vigorous, conscientious and even exemplary manner."

4. Unavailability of witnesses. *a. General.* The various circumstances which will render a witness "unavailable" so as to permit the use of his testimony as given at a former trial or before a court of inquiry are prescibed in paragraph 145*b*, MCM, and are outlined below.

b. Types of unavailability.

(1) *Testimony at former trial.*

(*a*) Death.
(*b*) Insanity.
(*c*) Non-amenability to process.
(*d*) Illness or infirmity preventing attendance.
(*e*) Whereabouts unknown.
(*f*) More than 100 miles from court.

Note. In a *capital case* the prosecution may use former testimony only if the witness is dead, insane or beyond the reach of process. For this purpose the term "capital case" has the same meaning as it has with respect to depositions. (See par. 5*b*, chapter XXVIII, *supra*.)

(2) *Testimony before court of inquiry.* Such testimony is usable by either the defense or the prosecution if a witness is unavailable for any of the first five reasons listed in subpar. (1), *supra*. The circumstance that a witness is more than 100 miles from the place of trial does *not* permit the use of his testimony as given before a court of inquiry. The fact that a case may be "capital" does not require any special type of "unavailability" in order to permit the prosecution to use such testimony. However, a case becomes "noncapital" as soon as the former testimony is introduced by the prosecution.

5. Waiver. *a. General.* When former testimony is offered in evidence, a failure by the opponent to object on the ground that it does not appear that the witness is now unavailable or that the issues in the former trial were not substantially the same as those in the case at bar or, if offered by the prosecution, on the ground that the accused was not confronted with the witness and afforded the opportunity to cross-examine him at the former trial, will be deemed to amount to a waiver of any such objection.

b. Illustrative case.

United States v. Vanderpool, 4 USCMA 561, 570, 16 CMR 135, 144 (1954). Where the conviction resulting from the former trial of the accused was set aside because he was wrongfully compelled to be defended by counsel not of his choice, the former testimony would be inadmissible over a defense objection. However, the failure to so object will be deemed a waiver thereof in accordance with the provisions of paragraph 145*b*, MCM. "It thus appears that a failure to object to the admission of former testimony constitutes a waiver where even so fundamental consideration is involved as similarity of issues—the very core of this apparent exception to the hearsay rule. And the same is true as to the bedrock rights of confrontation and cross-examination—and the critical element of unavailability. Here the issues are identical. Unavailability was a subject of stipulation; confrontation was undeniably present; and the witnesses were thoroughly cross-examined by defense counsel whose professional competence was demonstrated at the first trial. It must follow that under the facts of the present case the failure of defense counsel at the second trial to object to the introduction of the former testimony must be deemed a waiver. . . . [W]e do not find in the instant case any of those extraordinary circumstances which preclude application of the waiver principle—on the ground that its acceptance would result in a manifest miscarriage of justice. . . . Only after a conviction for the second time did he [the accused] raise the question of admissibility, although represented throughout the later proceedings by legally qualified and competent counsel. The circumstance that the course of action adopted by the accused resulted in his conviction furnishes no ground for setting it aside."

6. Methods of proving former testimony. *a. General.* The testimony given by the witness may be proved by the official record of the former trial, by a copy of the pertinent portions of such record, by a stenographic or mechanical report of the testimony or by the testimony of any person who heard the testimony given. Since the fact which it is desired to prove is the testimony given by the witness at the former proceeding, the best evidence rule has no application in the first instance. However, if the proponent of the evidence elects to use a writing to prove the testimony, the best evidence rule applies

as to the writing offered, as does the requirement that the writing be properly authenticated. It is also possible, if the testimony is sought to be proved by a witness, that such witness will be able to use notes of the former testimony or the record thereof to refresh his memory or as past recollection recorded, provided that a proper foundation is laid. Needless to say, only the testimony of the witness who is unavailable and only those portions of such testimony which are relevant to the case at bar should be read to the court.

b. Interpreters. The manner of proving testimony given through an interpreter at a former proceeding is discussed in chapter XVII, *supra.*

7. Former testimony not offered as such. *a. General.* The principles and limitations discussed above apply only when evidence is offered under the former testimony exception to the hearsay rule. The mere fact that a relevant statement of some person which is admissible under some other rule of evidence happens to have been made at a former trial or hearing of the accused does not demand that evidence of such a statement be admitted only if it satisfies the requirement for former testimony. Thus, for example, a statement made by the accused at his former trial may be offered as a confession or admission, or the prior testimony of a witness may be offered as a prior inconsistent statement for impeachment purposes.

b. Illustrative case.

United States v. Sippel, 4 USCMA 50, 15 CMR 50 (1954). The accused elected to testify in his own behalf before a court of inquiry to which he was a party and, at that time, stated that he was doing so with the knowledge that if such testimony were used against him in a subsequent trial the court could not adjudge dismissal. At his trial by court-martial the prosecution introduced evidence of several incriminating admissions made by the accused in his prior testimony. The contention of the defense counsel that the use of the former testimony brought into play the provisions of Article 50, UCMJ, and removed the authority of the court to adjudge dismissal was properly overruled. The prosecution offered the prior statements not as former testimony but as constituting voluntary admissions of the accused under the confession and admission exception to the hearsay rule and they were properly admitted as such. The mere fact that this evidence might also have qualified as former testimony does not require that it be treated as such.

8. Hypothetical problems. *a.* At a rehearing, a certain witness for the prosecution claims his privilege under Article 31*a*, UCMJ, and the claim is upheld by the law officer. The trial counsel then offers a duly authenticated, extract copy of that portion of the former trial containing the witnesses' testimony on the matter as to which he

has now claimed his privilege. On what grounds may the defense counsel object? How should the law officer rule?

b. The accused is tried by special court-martial for the offense of drunken driving. Several months later he is tried by general court-martial on charges of manslaughter and leaving the scene of an accident committed on the same date as the drunken driving offense. In order to establish that the accused was driving the car which has been shown to have been involved in the offense the prosecution offers in evidence the testimony given at the former trial by the traffic policeman, now deceased, who arrested the accused on the drunken driving charge. On what grounds may the defense counsel object? How should the law officer rule?

c. The accused is tried for murder in a state court and acquitted. At his trial by court-martial for the same homicide, he offers in evidence the testimony given by a defense witness, now deceased, at the former trial which, if believed, conclusively establishes an alibi for the offense charged. The prosecution objects. How should the law officer rule?

d. At a rehearing, held in the United States, a crucial issue is whether or not the accused had been paid on 31 July. The only evidence on this point is the testimony of a military witness at the original trial. "I know he was paid on 31 July." When the former testimony of this witness, now a civilian and residing in Europe, is offered, the defense objects to the use of the quoted portion of his testimony on the ground that the former record does not show that the witness had first hand knowledge of this matter. (1) How should the law officer rule? (2) Assuming the objection is overruled, the defense counsel then requests a continuance for the purpose of obtaining a deposition from the witness in order to ascertain the basis for his statement. How should the law officer rule?

CHAPTER XXX

MEMORANDA: AFFIDAVITS

Reference. Par. 146, MCM.

1. Memoranda. A writing which does not come within any one of the exceptions to the hearsay rule is, of course, not admissible to establish the truth of any matters stated therein. However, under certain circumstances a witness may make use of a writing to assist himself in giving his testimony. This is permissible when the writing is used to refresh the recollection of the witness or when it represents his past recollection recorded. The term "memorandum" is used to describe a writing which is used for either of these purposes.

2. Refreshing the memory. *a. General.* If a witness testifies that although he is unable to recollect a certain fact or event he believes that his recollection thereof can be revived if he is permitted to see a certain writing or memorandum, such memorandum may be shown to him. If, after inspecting the memorandum, he is able to testify that he *now* has a recollection of the fact or event, he then may testify to such event. However, he will not be permitted to read from the writing and the law officer should, so far as is possible, not permit an attempt to impose a false memory upon the witness. The memorandum may consist of any writing whatsoever, including, for example, a newspaper account of the fact or event. However, it must, upon demand, be shown to the opponent for his inspection and may be used by the opponent on cross-examination of the witness. The memorandum itself is not admitted in evidence. A witness may also "refresh" his memory before taking the stand and whether or not he has done so is a proper matter for cross-examination. If he admits to such pre-trial "refreshing," the cross-examiner would be entitled to examination of the material which the witness had consulted.

b. Illustrative cases.

(1) *United States v. Carrier*, 7 USCMA 633, 23 CMR 7 (1957). Several prosecution witnesses were shown and asked to identify the pre-trial statements given by them to the criminal investigators. The witness then read the statements "to refresh their memories" and, after stating that the statements were true, read them to the court. This procedure constituted a clear violation of the rule forbidding the introduction into evidence of memoranda used to refresh the memory of a witness.

(2) *United States v. Bergen*, 6 USCMA 601, 605, 20 CMR 317, 321 (1956). Where the testimony of a deponent indicated quite clearly that his statements as to the result of a urinalysis were based entirely upon the laboratory data from which he read and that such data had not revived his recollection, his testimony could not be viewed as "refreshed" and unless the laboratory report qualifies as past recollection recorded, the testimony must be stricken. "In the case of a memorandum to refresh the present recollection of the witness, only the testimony of the witness is admitted in evidence. The writing is not used evidentially, and it is normally not shown to the triers of fact, although it may be used to test the credibility of the witness. . . . The memorandum . . . need not be one made personally by the witness. . . . And, since it is not itself admissible in evidence, a copy of the memorandum may be used without violating the best evidence rule. . . ."

(3) *United States v. Pruitt*, 12 USCMA 322, 327, 30 CMR 322, 327 (1961). The mere fact that an investigative report was forwarded by the trial counsel to a deponent for the purpose of "refreshing his recollection of the case" prior to giving a deposition does not entitle the defense counsel to examine the report. "A witness can refer to any document or memorandum that he desires before he takes the witness stand. If he testifies without the aid of any writing, there is no basis for contending the previous refreshment of the witness' recollection curtailed the defendant's right to cross-examine him. Counsel of course can ask any witness if he has refreshed his recollection of the case before taking the stand. If the witness replies in the affirmative, inquiry may be made into the means of refreshment; and if it appears the witness made an earlier statement about, or report on, the matter, counsel may obtain the statement or report for possible impeachment."

3. Past recollection recorded. *a. General.* If a witness has no present recollection of the fact or event of which he previously had knowledge and his recollection cannot be refreshed but he is able to testify that he *now knows* that a certain memorandum seen or made by him at a time when he did recollect the fact or event accurately reflects his then existing knowledge of such event, the memorandum is admissible as evidence of the truth of the matters contained therein bearing on such event. The fact that the witness has a present recollection as to some of the material matters appearing in the memorandum will not make it inadmissible. The witness need not himself have made the memorandum. The only requirement is that he must have

seen it at a time when he had a fresh recollection as to the event and found it to be correct. In this connection it is sufficient if the witness states that although he is now certain that the memorandum was correct when seen or read by him, because of his normal habit or course of business with respect to such memoranda he knows that he must have found it to be correct.

b. Illustrative cases.

(1) *United States v. Day*, 2 USCMA 416, 425, 9 CMR 46, 55 (1953). The pre-trial statement of a witness was properly admitted in evidence as past recollection recorded under the following circumstances: The witness professed a lack of memory of the event at issue; trial counsel showed him his pre-trial statement which "only slightly" refreshed his memory; the witness stated that he knew the statement was accurate and correct at the time he made it, several hours after the alleged murder and indecent assault, and that he could not remember any details beyond those already testified to by him. The memorandum is not inadmissible merely because the witness recalled some of the material facts stated therein. "If we were to adopt the theory advanced, memoranda would be received in evidence only when witnesses were not able to recall any of the facts contained therein and a recollection of any of the facts would bar material and competent evidence which had been preserved in a trustworthy manner. True facts which were forgotten could not be supplied because some other facts were recollected. We do not believe the rule should be so limited. We prefer to hold that where the witness is unable to recall *all* of the material facts, the memorandum may be received, provided the other requirements have been complied with." With respect to the issue of when the memorandum must have been made or seen ". . . two tests have been applied by the courts to test the document for admissibility. The first may be referred to as the 'fairly fresh' test, and the second as the 'at or near the time' test. . . . We need not decide which of the two tests should be adopted by us as we believe this memorandum fits either. The incidents took place after midnight on December 23, 1950, and the statement was made that morning. The horrifying nature of the offenses would create an impression on a normal person which would linger vividly in his mind some considerable period of time. A few hours may have elapsed between the time of the offenses and the writing of the statement but 'near the time' must, in part, be measured by the probability of the occurrence remaining fresh in the mind of the person writing the memorandum,

The details of the statement, the enormity of the offenses and the relative short interval of time lead us to conclude the necessary requirements for admission were met."

(2) *United States v. Bergen*, 6 USCMA 601, 606, 20 CMR 317, 322 (1956). Where the testimony of a deponent indicates that he used certain laboratory data as past recollection recorded, it was error to admit the deposition to which the data had not been attached. "In past recollection recorded, the memorandum itself is admitted in evidence . . . a memorandum of past recollection recorded must be based on the entrant's personal knowledge of the correctness of the facts . . . a memorandum of past recollection recorded is also subject to the best evidence rule, and the original of the writing must be produced, unless it is shown to be unavailable."

c. Cooperative records. As we have seen, a memorandum qualifies as past recollection recorded if W testifies that, at a time when his memory of the recorded event was fresh, he made or saw the particular memorandum. Let us assume, however, that instead of recording the event he merely made an *oral report* of the incident to X and let us assume that X made a written memorandum of this oral report and that W did not thereafter see the memorandum. W, therefore, is unable to qualify it as his, W's, written past recollection recorded. If W testifies to his present inability to recall the event and also testifies to the truthfulness of the oral report made by him to X and X testifies that he accurately recorded the oral report in a certain memorandum, may the memorandum be admitted as evidence of the truth of the matters therein stated? In *United States v. Webb*, the Court of Military Appeals held that this type of memorandum, based upon the composite testimony of two or more witnesses, may be admitted only when the written record was prepared in "the regular course of business," as that term is used with regard to the business entry exception to the hearsay rule.

Illustrative case.

United States v. Webb, 12 USCMA 276, 30 CMR 276 (1961). In order to establish the serial numbers of certain stolen currency the prosecution offered the following evidence. Lieutenant C testified as follows: the members of his company had been paid in alphabetical order with new twenty dollar bills which had been delivered to the men in serial number sequence; after the theft, C phoned the two men before and after the victim on the payroll and told them to read to him the serial numbers of their twenty dollar bills; C wrote down the numbers as given to him by each of these four men and then read the numbers back to each man for confirmation; Lt. C could not at

the trial remember the serial numbers but testified that the list was accurate when made. The other four payees testified that they had no present recollection of the serial numbers and that they had correctly read to C over the phone the serial numbers of their bills. None of them had seen C's memorandum while their recollection was fresh. The memorandum which C had prepared was admitted as past recollection recorded. This ruling was held erroneous by the board of review and, on certified question, the majority of the Court upheld the board's decision.

" . . . [T]he memorandum in question was not Cerinis' individual effort but the product of a joint enterprise by the Lieutenant and the four men. . . . An examination of the cases in which a memorandum established by composite testimony has been admitted in evidence will show the courts expressly based their opinions on the proposition that the memorandum had been prepared in the regular course of business, or that a factual problem of that nature was involved [at p. 278]. . . . The same general principle is espoused by writers, but again the illustrations used and the cases cited to support the statement of law are those involving mercantile convenience and necessity [quoting from McCormick on Evidence, p. 594 and Wigmore on Evidence 575]. . . . But here the facts are different and we are presented with an isolated transaction which lacks the trustworthiness of book entries. [At p. 280] . . . isolated personal transactions lack that inherent reliability and are of a different sort. . . . Any third party could make a record of a conversation and the recorder could testify if the transactor could not remember. Such a rule would effectively eat away the very essence of the hearsay rule without the guarantees essential to trustworthiness. [At p. 281.] . . . At best, then, we only have written evidence of what someone else stated to be a fact as it is used not merely to show the incident occurred but to prove the truth of what was said. . . . But there is nothing in the case at bar which gives any reasonable assurance that possible deficiencies, suppressions, sources of error, or untrustworthiness have been guarded against. On the contrary, the assertions of the effective witness [the one who supplied the information recorded] are well protected from being weakened by cross-examination, and there is no substitute to offset the loss of that guarantee of trustworthiness." [At p. 282.] (Per Latimer, J., and Ferguson, J.)

Quinn, C. J., in dissent, would hold that when Lt. C. read the list to each of the payees and they *at that time* checked the numbers read to them against the numbers on the bills and "verified their correctness," the list became *pro tanto* the past recollection recorded, not of Lt. C, but of each of the four payees.

4. Other uses of memoranda. A memorandum, as such, ordinarily is not admissible except when it represents past recollection recorded.

However, a memorandum is also admissible at any time when its contents become relevant to the issues before the court. Thus, if either party properly raises an issue as to what is contained in a particular writing, the writing may be introduced in evidence. A writing or memorandum which contains a prior inconsistent statement of a witness may be used for impeachment purposes and, on those occasions in which it is proper to rehabilitate a witness by showing a prior consistent statement, such a prior statement contained in a writing could be used.

5. Affidavits. As a general rule, affidavits may not be introduced as evidence of the truth of the matters stated therein. The hearsay rule forbids such use. However, paragraph 146*b*, MCM, specifically authorizes the defense to introduce affidavits or other written statements as evidence of the character of the accused and as to any matter offered in extenuation of a possible sentence. Furthermore, affidavits and other writings of apparent authenticity and reliability may be offered by either party on interlocutory matters such as the availability of witnesses or the need for a continuance. (Para. 137, MCM).

6. Hypothetical problems. *a.* A rape victim testifies at the trial, over a year after the incident, and is unable at that time to state that the accused is or is not the person who attacked her. However, she does testify that two days after the attack she identified her assailant at a "line up," that a picture was taken in her presence of the man she then identified, that she signed her name and the date across the face of the picture, and that she now recalls that at that time she was certain of the identification which she had made. She also testifies that if she were now shown the picture it would not refresh her memory as to the appearance of the attacker.

(1) The prosecution has her identify the picture which she signed and offers it in evidence as being the testimony of the witness as to the appearance of her alleged attacker. Is it admissible?

(2) The prosecution calls the CID agent who conducted the "line up." He testifies that he was present when the victim identified a certain person and also when she signed the picture of this person. He also testifies that the picture was destroyed, along with many other papers, in an accidental fire in the CID office several months ago. He then testifies that the person in the picture signed by the victim was substantially identical in appearance to the accused. Is this testimony admissible?

(3) The victim testifies only as to her present inability to identify her attacker and to her prior identification of him at a line up in the presence of Captain M. P. and to the fact that she now recollects that she was positive at that time as to the correctness of the identification which she made. May Captain M. P.

testify as to the identity of the person whom she identified at the line up?

b. Prior to findings, the defense introduces in evidence the affidavit of the accused's clergyman to the effect that the latter has known the accused for fifteen years and believes his character to be above reproach in all respects. The prosecution then offers in rebuttal another affidavit from the same clergyman wherein he states that his knowledge of the accused is based entirely upon the fact that he has frequently seen him at church services and that he has never had any personal dealings whatsoever with the accused. Is this second affidavit admissible?

CHAPTER XXXI

PRIVILEGED COMMUNICATIONS

Reference. Par. 151, MCM.

1. General. In order to protect certain confidential relationships, which, as a matter of public policy, are deemed highly desirable and beneficial to society as a whole, the law has thrown a mantle of secrecy over certain communications made incident to such relationships by creating and enforcing a privilege against the divulgence in a court of law of these communications. This privilege applies to certain communications made between husband and wife, attorney and client, and penitent and clergyman, and certain communications by or respecting informants.

2. Violation of the privilege. Paragraph 151*a*, MCM, provides that the court, of its own motion, should refuse to receive evidence of a privileged communication unless the privilege has been waived by the person entitled thereto or unless the evidence is produced by a person not bound by the privilege or, in other words, that the court should not permit the privilege to be violated. However, as in the case of the privilege against compulsory self-discrimination, the accused cannot complain if the privilege of someone else is violated since such violation results only in presenting to the court otherwise competent evidence and the privilege does not exist for his benefit. But an improper sustaining of the privilege may constitute error as to him if he is thereby denied evidence necessary to his defense. An improper denial of a privilege to which the accused is entitled results in having before the court inadmissible evidence and the error will be tested for its specific prejudicial effect upon the outcome of the trial.

3. Husband and wife. *a. General.* A confidential communication made by one spouse to another during the existence of a valid marital relationship not terminated by divorce or a judicial decree of separation is privileged. The purpose of the privilege is to encourage free communication between spouses on any and all matters and thereby foster the preservation of the marital relationship.

b. Confidentiality. Not every communication between spouses is privileged. The privilege applies only to those communications which are made under such circumstances as to indicate that the parties intended them to be confidential. Among the more important circumstances to be considered are the time and place at which the communication was made and the presence of other parties at such time.

Illustrative cases.

(1) *Wolfle v. United States*, 291 U.S. 7, 14 (1933). A letter from the defendant to his wife which he dictated to his stenographer is not privileged. "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails. . . . Communications between the spouses, privately made, are generally assumed to have been intended as confidential, and hence they are privileged; but wherever a communication, because of its very nature or the circumstances under which it was made, was obviously not intended to be confidential it is not a privileged communication. . . . And, when made in the presence of a third party, such communications are usually regarded as not privileged because not made in confidence. . . . Normally husband and wife may conveniently communicate without stenographic aid and the privilege of holding their confidences immune from proof in court may be reasonably enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed. The uniform ruling that communications between husband and wife, voluntarily made in the presence of their children, old enough to comprehend them, or other members of the family within the intimacy of the family circle, are not privileged . . . is persuasive that communications like the present, even though made in confidence, are not to be protected. The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence cannot otherwise reasonably be preserved."

(2) *United States v. Mitchell*, 137 F. 2d 1006 (1943). Threats made by the defendant to his wife, whom he is charged with transporting in interstate commerce for the purpose of prostitution, made both while they were alone and in the presence of third parties, are not deemed to have been intended by him to be confidential and are not privileged.

c. Communications. The privilege applies only to communications from one spouse to another. A communication need not be oral and may consist of actions which amount to the making of a statement of some kind. However, a physical object is not a communication and the privilege would not forbid its production in court. Furthermore the privilege operates only to exclude the placing in evidence of communications between spouses. It does not render inadmissible otherwise competent evidence merely because such evidence was discovered

as a result of a spouse giving to the authorities information harmful to the other spouse.

Illustrative cases.

(1) *United States v. Ponder*, 238 F. 2d 825 (1957). In a prosecution for income tax evasion, the defendant's business records which he had given into his wife's custody did not constitute "communications" so as to be inadmissible over his claim of privilege.

(2) *United States v. Seiber*, 12 USCMA 520, 31 CMR 106 (1961). The board of review erred in holding that all of the prosecution's evidence concerning the accused's false application for a Regular Army commission was inadmissible because the offense was discovered solely as a result of a complaint made to the authorities by his embittered and vengeful ex-wife. The confidential communication privilege applies only to evidence of the communications themselves and not to other evidence discovered as the result of a disclosure by a spouse ". . . [W]e must decline the invitation to apply the poison tree doctrine to marital confidences." (At p. 523, 109). The "poison tree doctrine" was developed by the Supreme Court for the express purpose of deterring wrongful conduct by Government officials and does not apply to misconduct of private persons. "In the case at bar, there has been no misconduct by the agents of any sovereign. The Government is guilty of no impropriety and hence there is no wrongful activity on its part to deter. Nor, obviously, does allowing the independently obtained evidence to come before the court-martial cause the court to become an accomplice to any wrongdoing by the Government. Thus, there is absent in this instance the compelling considerations which would support application of the exclusionary rule. Under those circumstances, there is no reason to exclude the 'derivative' and otherwise admissible evidence used by the prosecution against accused, merely because his ex-wife apprised criminal investigators of his fraud, which resulted in their obtaining the incriminating evidence independently from other sources. . . . [There was no] improper activity or misconduct on the part of any agents at any level of Government in any regard." (At p. 524, 110).

d. Beneficiary of the privilege. The person entitled to the benefit of the privilege as to confidential communications between spouses is the spouse who made the communication and the other spouse may neither claim nor waive it. However, by specific Manual provision (par. 151*b*(2)), the privilege may not be invoked by or on behalf of

the spouse of the accused over the objection of the accused. In this instance, the right of the accused to present his defense outweighs the need to protect the marital relationship.

4. Attorney and client. *a. General.* "Communications between a client and his attorney (or the agent of the attorney) are privileged when made while the relation of client and attorney existed and in connection with the matter for which the attorney was engaged, unless such communications clearly contemplate the commission of a crime." (Par. 151*b*(2), MCM.)

Illustrative case.

United States v. Marrelli, 4 USCMA 276, 281, 15 CMR 276, 281 (1954). "This privilege—one of the oldest and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him. Wigmore, Evidence, 3d ed. § 2291. Unless the client is accorded such protection as a foundation for the establishment of rapport with his attorney, the latter will be unable in many instances to secure all of the information essential to the rendition of legal services—for without knowledge of the facts a lawyer cannot properly perform his role in representing his client and in effecting a satisfactory disposition of disputes and difficulties. However, the fact that one is acting as an attorney for a party to litigation does not render him incompetent as a witness. His lips must remain sealed only as to those matters which fall within the purpose and policy underlying the lawyer-client privilege. . . . Some jurists, indeed, have remarked that the lawyer-client privilege must be confined to its narrowest limits. . . . To these statements we must agree, if they be interpreted to mean—as in the case of other exclusionary rules which operate to deprive the trier of fact material evidence—that the exclusion of relevant evidence must not exceed in scope the policy it is designed to serve. Indeed, the concept that the privilege before us now should be applied strictly in terms of its underlying policy serves to explain the rule that an attorney may be compelled to testify concerning a client confidence received in connection with a *projected* crime. . . . The social interest favoring full disclosure by clients to attorneys is inoperatve to shield with secrecy confidence made for the purpose of seeking legal advice as to how best to commit a contemplated offense. Similarly, the privilege has no application to a communication made before persons whose presence was in no wise essential to a proper performance of the attorney's function." The criteria for a protected communication have been described by Wigmore as follows: ". . . (1) Where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose,

(4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." (Wigmore, supra, § 2292.)

b. The relationship. Counsel, military or civilian, representing an accused at any stage of court-martial proceedings, including pretrial matters and appellate review, are, of course, attorneys for the purpose of being bound by the privilege. Similarly, the privilege applies in the case of a civilian attorney retained by a client for any proper purpose. Furthermore, an attorney-client relationship is created with respect to those individuals giving legal advice under the Legal Assistance program within the armed forces and this is true even though the lawyer may himself be violating a regulation in rendering advice on a matter not within the scope of the program.

Illustrative cases.

(1) *United States v. Green*, 5 USCMA 610, 18 CMR 234 (1953). The performance by assigned military counsel of the duties of defense counsel at an Article 32 investigation creates an attorney-client relationship between such counsel and the accused.

(2) *United States v. McCluskey*, 6 USCMA 545, 551, 20 CMR 261, 267 (1955). Where the accused, who was suspected of having committed bigamy, conferred with the legal assistance officer as to his proper marital status an attorney-client relationship was created despite the fact that the regulation dealing with legal assistance purported to prohibit legal advice being given in this situation. "It is to be noted, however, that paragraph 10*b*, Army Regulations 600–103, supra, prohibits the giving of advice where the subject matter is, or will be, the subject of a court-martial action. Suffice it to say that if, by operation of law, an attorney-client relationship was, in truth, formulated, such Regulations cannot operate to nullify it."

(3) *United States v. Turley*, 8 USCMA 262, 24 CMR 72 (1957). Where an individual who has been held pecuniarily liable, with another officer, by a board of officers for the loss of soldier deposits consults a JAGC officer for legal advice as to the nature of the joint liability arising from the action of the board and receives such advice, an attorney-client relationship is thereby created.

c. Confidentiality. Only those communications to the attorney which are made under circumstances indicative of a belief by the client that they are to be treated as confidential are privileged. However, all doubts in this regard are to be resolved in favor of confidentiality. Although the known presence of third parties ordinarily will destroy

the inference of confidentiality, the presence of the clerk, stenographer or assistant of the attorney or client, or any other person whose presence is reasonably necessary to effective communication between the attorney or client, will not render unprivileged an otherwise privileged communication.

Illustrative cases.

(1) *United States v. Green*, 5 USCMA 610, 613, 18 CMR 234, 237 (1955). "Under the modern view, the privilege exists for the protection of the client—not the attorney—in enabling the former to communicate to his counsel information necessary for professional representation; and in general—and for obvious reasons—doubts must be resolved in favor of the inclusion of a doubtful communication within its folds."

(2) *United States v. McCluskey*, 6 USCMA 545, 551, 20 CMR 261, 267 (1955). Where the accused had two conferences with X, the Legal Assistance Officer, concerning the accused's tangled marital status and a third party was present at one conference, it will be presumed that any revelations by the accused were made at the other conference and are cloaked with the privilege. ". . . the overwhelming weight of authority is to the effect that no privilege can be deemed to arise where a third party—the agent of neither attorney nor client—is present. . . . However, the present record is barren of information as to facts, if any . . . were developed during the tripartite portion of the discussion with X, and which during the other . . . We are thus left wholly to speculation in determining the extent to which these revelations—if any, in fact, were made in the adjutant's presence—are to be considered confidential. . . . We are therefore required to conclude that all statements material to the issues at hand were made in a general aura—a climate—of professional confidence."

(3) *United States v. Kovel*, 296 F. 2d 918 (2d Cir. 1961). The contempt conviction of an accountant employed by a law firm for improperly claiming the attorney-client privilege when called as a prosecution witness at the trial of the client for tax fraud must be set aside because of the trial judge's arbitrary ruling that an accountant may never claim this privilege. Although an accountant cannot claim the privilege as to those occasions on which he was merely rendering accounting advice to the client, any of his activities which were reasonably necessary to effective communication between his attorney employer and the attorney's client would be within the privilege.

d. Communications. Not only communications but also those documents and papers which are delivered by the client to the attorney in connection with the legal problem at issue are protected by the privileged. However, only those communications made incident to seeking legal advice from the attorney are privileged. A communication made by the client incident to the performance by the attorney of duties or functions which have no legal implications is not protected. Furthermore, information obtained by the attorney independently of the attorney-client relationship is not privileged.

Illustrative cases.

(1) *United States v. Marrelli*, 4 USCMA 276, 283, 15 CMR 276, 283 (1954). Worthless checks of the accused which were recovered by his attorney from the holders thereof do not constitute communications made by the accused to his attorney and the latter was not performing legal services in recovering the checks. Although the uttering of the checks can be deemed a communication, such action antedated the attorney-client relationship and the communication was not made *to* the attorney. "The prerequisite that the communications be made by the client is unfulfilled by the facts before us . . . instead of constituting communications to the lawyer by his client, Marrelli, the checks came into the former's possession from sources totally unrelated to that client, and in no sense agents of his. As matters of independent knowledge on the part of the lawyer, and including only information derived from persons and sources other than the accused, the checks were completely outside the attorney-client privilege. . . . The accused's agent, Mr. Johnson, called upon various merchants . . . for the purpose of reimbursing them and of obtaining possession of the checks allegedly uttered by the accused. Without disparaging in any manner the value of his efforts—or the value of lawyer's services in bad check cases—we may safely say that his function in this particular was ministerial in character, and demanded neither legal training nor ability. In other words, a non-lawyer could have served the accused's purposes here as fully as a lawyer could have done. Accordingly, we are impressed by the analogy of the present case to those decisions which deny the protection of the privilege where the lawyer's connection with information, concerning which it is sought to cause him to testify, is entirely dissociated from his capacity as an attorney, and independent of services on his part as such."

(2) *United States v. Buok*, 9 USCMA 290, 296, 26 CMR 70, 76 (1958). In a prosecution for larceny of a large quantity of

chevrons from a warehouse the evidence showed that the stolen items had been recovered from the accused's civilian attorney. The latter's testimony, as a prosecution witness (see subpar. *f.*, *infra*) that an unknown person had telephoned him and informed him that he would find the chevrons outside of his office did not violate the attorney-client relationship. ". . . when the facts concerning which his [the attorney's] testimony is sought have been obtained from third parties, there is no basis upon which the privilege can be invoked. . . . A similar situation exists when the communication was made with the understanding that it was to be imparted to third parties." Herein the testimony of the attorney ". . . relates to representations made to him by someone unknown to him. But he did know that such person was *not the accused.* Thus, all the evidence in this record even remotely touching the subject of the recovery of the chevrons was wholly unrelated to any confidential relationship."

(3) *United States v. Gandy*, 9 USCMA 355, 361, 26 CMR 135, 141 (1958). In a larceny case in which the defense raised an issue of intoxication, the testimony of a rebuttal witness who, as officer of the deck on the day in question had had dealings with the accused and who believed him to have been sober, was not violative of the attorney-client relationship formed on a later date between the accused and the witness when the latter acted as pre-trial defense counsel. An attorney may properly ". . . testify to any competent facts *except* those which came to his knowledge by means a confidential relation with his client. . . . Professor Wharton, in his work on Criminal Evidence, states the rule as follows:

'§ 809. Information acquired outside the professional relation. Information belonging to the ordinary, as distinguished from the professional relation, is not within the privilege. Thus, an attorney may be examined like any other witness concerning a fact that he knew before he was employed in his professional character, as when he was a party to a particular transaction, or as to any other collateral fact which he might have known without being engaged professionally. The privilege does not extend to knowledge possessed by the attorney which he obtained relative to matters as to which he had not been consulted professionally by his client, or to information that the attorney has received from other sources, although his client may have given him the same information.' . . . The existence, however, of the attorney-

client relationship is a question of fact to be inquired into by the court preliminary to the admission or rejection of the proffered testimony. Wigmore, Evidence, 3d. ed., § 2322. All doubt concerning whether or not the matter testified to by the attorney was obtained during the existence of the relationship should be resolved in favor of the accused. Here, Bonner's testimony was exclusively limited to matters which had come to his attention while serving as officer of the deck and before the accused was even suspected of having committed any offense. It was not contended below nor is it urged now that Bonner's testimony included any matter which he derived during the existence of the relationship."

e. Beneficiary of the privilege. The attorney-client privilege exists for protection of the client and the privilege is his. Any waiver thereof must come from the client and not from the attorney.

f. Attorney may not act adversely to client. The protection thrown by the law around confidential communications by a client to his attorney goes further than merely prohibiting divulgence thereof in court. An attorney who has once represented a client may not thereafter act in any capacity adverse to the client. This prohibition is designed to avoid any possibility of the attorney using against the client information obtained from the latter as a client and to avoid not only evil but the very appearance of evil. However where it is *clear* that there is no improper divulgence or use of privileged matter, there is no prohibition against an attorney testifying as a witness against his client, past or present.

Illustrative cases.

(1) *United States v. Green*, 5 USCMA 610, 614, 18 CMR 234, 238 (1955). It is inherently prejudicial when the counsel who represents an accused at a pre-trial investigation thereafter prepares a summary of the evidence for use in the prosecution of the case despite the absence of any showing of a violation of the attorney-client privilege. "Proper analysis, as much as a reading of the civilian cases, convinces us that a lawyer, who has on any previous occasion represented an accused person, must avoid the slightest suspicion, the very appearance, of assisting—little or much, directly or indirectly, consciously or unconsciously—in the prosecution of his erstwhile client, from whom he may have acquired private information. In short . . . the unamendable mandate of both law and morals forbids an attorney, in the homely phrase of the fields, 'to run with the rabbits and bark with the hounds.' "

(2) *United States v. Buck*, 9 USCMA 290, 296, 26 CMR 70, 76 (1958). In a larceny prosecution, where the evidence indicated that the stolen chevrons had been found outside the office of accused's civilian defense counsel it was not violative of the attorney-client privilege for the defense counsel to testify *as a prosecution witness* as to the circumstances of the finding so long as the record clearly indicated that there was no divulgence of privileged matter. The rule respecting privileged communications ". . . does not make the attorney, as attorney, incompetent as a witness under any and all circumstances. . . . In the instant case . . . trial counsel . . . called the attorney who declared he had no objection to appearing. We will not invoke a waiver upon this declaration, but shall consider the testimony he supplied. . . . all the evidence in the record even remotely touching the subject of the recovery of chevrons was wholly unrelated to any confidential relationship. Viewed realistically, when Sergeant Franz testified to the receipt of chevrons from the defense counsel . . . an inference would be drawn immediately that counsel obtained them from the accused. It certainly was to the advantage of the accused to have this inference dispelled as soon as possible. Under the circumstances, Mr. Daubney's willingness to appear as a witness is not only understandable but is entirely consistent with sound trial practice. An argument that his presence on the witness stand deprived the accused of his counsel during the period he was testifying is at once dismissed as unworthy of consideration."

(3) *United States v. Gandy*, 9 USCMA 355, 361, 26 CMR 135, 141 (1958). The pretrial defense counsel of the accused can properly testify as a prosecution witness as to matters which occurred prior to the formation of any attorney-client relationship between the witness and the accused. "The defense contends that for reasons of public policy a former attorney should not be permitted to testify against an accused in the same or related criminal proceedings. . . . It is universally recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants if such testimony 'can be avoided consonant with the end of obtaining justice.' . . . This does not mean, however, that one who formerly represented one of the parties to the litigation is thereafter disqualified as a witness. He may, the same as any other witness, testify to any competent facts *except* those which come to his knowledge by means of a confidential relationship with his client."

5. Penitent and clergyman. Certain communications between a person subject to military law and a chaplain, priest or clergyman of any religious denomination are protected by a privilege. To be privileged the communication must have been made to the clergyman in his capacity as a spiritual adviser either as a formal act of religion or concerning a matter of conscience. The beneficiary of this privilege is the penitent and any waiver thereof must come from him.

6. Termination of the privilege. The privilege which forbids the disclosure of a confidential communication by a spouse, attorney or clergyman never terminates, although it may be waived by the party entitled to its benefit. The privilege survives the termination or dissolution of the relationship which created it. Neither the dissolution, by death or otherwise, of a marital relationship nor the termination of an attorney-client relationship alters the fact that the communication was privileged when made and its privileged character remains. Furthermore, the fact that, because of a grant of immunity or other reason, disclosure of the information contained in the privileged communication will not expose the party to any danger of criminal prosecution does not render the privilege inoperative.

Illustrative case.

United States v. Fair, 2 USCMA 521, 528, 10 CMR 19, 26 (1953). Where defense counsel who had acted as counsel for a prosecution witness during the pre-trial investigation of the latter, attempted to cross-examine the witness as to certain statements, incriminatory as to the witness and exculpatory as to the accused, made by the witness to the counsel during the existence of their relationship, the witness properly invoked the attorney-client privilege and the fact that the witness had been given full immunity from prosecution did not remove the privileged character of the statements. "The attorney-client privilege . . . is designed to encourage full and unrestrained communications between client and attorney. Any forced revelation of conversations resulting from the relationship is certain to discourage free and full disclosure of facts by the person seeking assistance of counsel. It is no complete answer to say that the client is protected from prosecution based on the disclosures—he may fear for reasons other than prospective legal punishment disclosure of the statements made in confidence to the attorney. . . . It is our opinion that any forced admission of statements made under a belief of security from subsequent disclosure is certain to damage the sound policy which dictates enforcement of the attorney-client privilege. We are not persuaded that immunity from prosecution removes the reason for enforcing the privilege. In our opinion, the injury that

would inure to the attorney-client relation by the disclosure of the thought-to-be-privileged communication is greater than the benefit thereby gained for the correct disposal of litigation."

7. Waiver of the privilege. *a. General.* The person for whose benefit a particular privilege exists may, of course, waive the privilege. Such a waiver can be specific as when such a person affirmatively consents to the divulgence of the communication. More often it is implied by conduct clearly indicating a waiver of any objection to divulgence as when there is a knowing failure to object at a trial to the divulgence or by conduct which indicates that the holder of the privilege no longer regards the communication as confidential as when he himself divulges the content thereof or elicits testimony bearing thereon. A waiver will also be implied if the holder of the privilege makes an accusation against the other party to the communication which can be disproved by the latter only through making known the content of the communication.

b. Illustrative cases.

(1) *United States v. Trudeau*, 8 USCMA 22, 23, 23 CMR 246, 247 (1957). Where an accused, charged with having committed indecent acts with a minor, testifies that shortly after the alleged incident he told his wife that the boy had attempted to fondle him, he opened the door to having his wife testify, over his objection, as to her version of the conversation which differed materially from that testified to by him. The public policy of safeguarding the marital relationship casts a cloak of privilege over certain communications between spouses. "Public policy, however, cannot be perverted into a 'shield against contradiction of . . . untruths.' In his direct testimony the accused attempted to bolster his denial of guilt by representing that he had related the incident to his wife and had directed her to tell the boy's mother about it. Having thus voluntarily thrown open a subject which the law would otherwise have kept closed and made it an integral part of his defense, the accused cannot deny the Government the right to challenge his credibility on it."

(2) *United States v. Allen*, 8 USCMA 504, 508, 25 CMR 8, 12 (1957). Where, on appeal, the accused files an affidavit in which he alleges that his trial defense counsel was aware of certain mitigating factors and did not present them at the trial, a hearing must be held by the board of review to determine the truth of such allegations. "Since a charge of incompetency of the kind alleged in this case constitutes a waiver of the attorney-client privilege, the accused's former counsel can testify at the hearing to conversations with the accused."

8. Interception by third parties. *a. General.* As was mentioned in paragraph 3, *supra*, a communication made in the known presence of third parties is, with some exceptions, not deemed to have been intended to be confidential and, therefore, is not privileged. An otherwise privileged communication which has been overheard or intercepted by third parties, without the connivance or assistance of the listener-spouse, attorney or clergyman, is unprivileged *as to the third parties.* This exception is based upon the belief that no harm is done to the relationship itself and the fostering of free communication thereunder by permitting the third party to testify as to the communication. Such testimony can hardly weaken the confidence and trust of a client in his attorney or a husband in his wife. However, it must be noted that the attorney, wife or clergyman is still bound by the privilege, unlike the situation where the presence of the third party is known to the parties to the communication. It is immaterial how the third party acquired his knowledge of the communication, whether by accident or by design, so long as it was not acquired with connivance of the spouse to whom the communication was made, the attorney or the clergyman. Such connivance would clearly tend to destroy the relationship which the privilege is designed to foster. For this purpose, the attorney's agent such as his interpreter, clerk, stenographer, or other associate is not considered a third party nor is the clergyman's agent, such as an interpreter or assistant. Since communications between spouses ordinarily do not require the service of intermediaries, no such exceptions exist with regard to the marital relationship.

Illustrative cases.

(1) *United States v. Higgins*, 6 USCMA 308, 518, 20 CMR 24, 34 (1955). A written communication from the accused to his wife which was taken from her pocketbook in the course of a valid search by criminal investigators ceased to be privileged and was admissible over the objection of the defense. "Of course, had there been evidence that Mrs. Higgins had connived at the Government's acquisition of the card . . . we would have no doubt that it would fall within the privilege protecting inter-spousal communications."

(2) *United States v. Marrelli*, 4 USCMA 276, 282, 15 CMR 276, 282 (1954). Otherwise privileged matter which comes into the possession of a third party as the result of an unauthorized disclosure by an attorney remains protected by the privilege. ". . . we deem it appropriate to indicate our acceptance of the Wigmore view that the attorney-client privilege may not be defeated by an attorney's voluntary divulgence of facts or documents to an opposing party, which disclosure was beyond his authority—express or implied—from the client . . .

we recognize no reason for rewarding perfidious conduct on the part of a faithless attorney, and we believe the contrary view to be demanded if the privilege is to receive adequate protection."

b. Use by third parties. There is no prohibition against investigators making use of *information* obtained as the result of the divulgence of the contents of a confidential communication by a party who thereby violates the "privilege." The privilege operates only to render inadmissible evidence of the privileged communication itself and does not prevent it being used as an investigative lead. (See *United States v. Seibert*, par 3*c*(2), *supra*.)

c. Violation of right to private consultation. The right to counsel includes the right to have effective representation and such right is violated unless the individual is given the right to have private consultation with his counsel. Therefore, information obtained by law enforcement officers as a result of eavesdropping on a consultation between an accused and his client may not be used for any purpose.

Illustrative case.

MCM, 59–01255, *Bennett*, 28 CMR 650, 655 (1959). When the accused, who was being interrogated by investigators, asked for legal advice an officer (non-lawyer) was made available to him as "counsel." The accused offered to go to his counsel's office for consultation but, at the suggestion of the investigators, the consultation was held in the interrogation room which, unbeknownst to the accused) was equipped with a hidden recorder. The consultation was recorded. "[cited cases] . . . establish the principle that the Fifth and Sixth Amendment guarantee persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right which cannot be abridged or interfered with in any manner. . . . There is a fair risk that the information gained from the illegally recorded consultation might have led to the search which resulted in the Government obtaining Prosecution Exhibits 1 and 7." (The Board dismissed the charges in the interest of justice.)

9. The confidential informant privilege. *a. General.* Communications made by informants to public officers engaged in the discovery of crime are privileged. This privilege exists in order to conceal the identity of the informant and thereby to allow him to continue as a source of future information as well as to protect him from reprisals for his action in giving information. The public policy to assist in the prevention and detection of crime is deemed to outweigh the harm which is done to the defense by denying it knowledge of the informant's identity. However, once the identity of the informer is known, as when he testifies at the trial, the need for protection vanishes and with it the privilege and any prior statements of the witness

which are relevant are admissible. Furthermore, when knowledge of the identity of the informer is essential to the defense, the privilege may not be asserted. The privilege is that of the governmental authorities, not the informant, and may be waived by them.

b. Illustrative cases.

(1) *United States v. Hawkins*, 6 USCMA 135, 140, 19 CMR 261, 266 (1955). In a prosecution for unlawful possession of narcotics the law officer committed reversible error by allowing government witnesses to invoke the informer privilege and thereby making it impossible for the defense to develop a possible defense of entrapment of the accused by the informant. The identity of an informant who actually participates in the commission of a crime is not protected by any privilege and the accused is entitled to know his identity and call him as a witness like any other participant. Furthermore, even if it be assumed that the informant was not a participant ". . . the privilege of confidentiality is subject to one qualification. That is, when the identity or testimony of the informant is necessary or essential to the defense, the accused may compel a disclosure of that information. . . . The reasons for that qualification are not difficult to understand. If the qualification did not exist, public officials would be enabled to produce such bits of evidence as they saw fit for their purposes and to withhold testimony which might establish the innocence of an accused. In such a situation, the rule of policy must give way to the rule of justice. . . . For that reason, if the evidence which is sought to be disclosed would be necessary as tending to shed light on the guilt or innocence of an accused, he is entitled to compel its disclosure."

(2) *Roviaro v. United States*, 353 U.S. 53 (1959). When the Government seeks to justify a search as being incident to a lawful arrest and the information which led to the arrest was supplied by a confidential informant, the defense may be entitled to have the identity of the informant disclosed as being relevant to the issue of whether he was a sufficiently reliable source of information as to furnish probable cause for the arrest.

10. State secrets and confidential and secret evidence. *a. General.* As a general rule, diplomatic correspondence and all official communications the disclosure of which would, in the opinion of the head of the executive or military department or other governmental agency concerned, be detrimental to the public interest, are privileged. Also privileged are the reports of investigations conducted by the Inspectors General and their assistants. This

privilege exists for the benefit of the particular governmental agency concerned and any waiver thereof must come from the agency. In the case of inspector general reports the holder of the privilege is the commanding officer on whose staff the particular inspector general is serving or the superior officer of such commanding officer.

b. Assertion of the privilege. The fact that the government is the beneficiary of this privilege results in unique significance being given to its assertion in a court-martial. It would be unconscionable to permit the government to attempt to convict an accused person of having committed a crime and at the same time deny to him information which is vital to his defense. The courts will not seek to compel the executive branch of the government to disclose information which in the opinion of the latter must be kept confidential. However, a refusal to disclose which seriously hampers the defense may result in dismissal of the charges.

Illustrative cases.

(1) CM 389592, *Dobr*, 21 CMR 451, 455 (1956). Where military authorities, in a desertion case, ordered the defense counsel not to introduce evidence concerning certain services performed by the accused for an American intelligence agency, the assertion of the privilege deprived the accused of a fair trial and necessitates reversal of the conviction. "Here, the defense counsel was precluded by command directive from introducing testimony which was classified, the divulgence of which would impair national security and which the Government cannot and should not be required to reveal (see par. 151*b*(1), MCM, 1951). However, the assertion of this privilege by the Government will often impose a grievous hardship on an accused by depriving him of the power to assert his right to defend himself . . . in a prosecution where testimony or documents involve classified information and are relevant to any issue, either for the prosecution or the defense, the Government must make an election, either to permit the introduction of said classified evidence or to abandon the prosecution (see par. 33, MCM, 1951)."

(2) *Jencks v. United States*, 353 U.S. 657 (1957). It is reversible error for the trial court to refuse to order the government to produce reports made to the FBI by government witnesses concerning matters embraced by the testimony of the witnesses. The defense is entitled to examine such reports for possible use to impeach the testimony. Furthermore, if the government asserts its privilege, on the grounds of national defense, public interest or otherwise, against the production of the reports, the prosecution must be dismissed.

c. Procedure to obtain disclosure.

(1) *Federal.* The *Jencks* case was interpreted by some district courts as giving the defense the right to examine government files in all criminal cases regardless of whether such files contained statements of witnesses who had actually testified. As a result Congress enacted a statute (18 U.S.C. 3500, reproduced below) which makes it plain that no such unlimited right of inspection exists and limiting the right to the inspection only of those pretrial statements in the possession of the government which have been made by a witness who has actually testified on behalf of the government.

18 U.S.C. § 3500.

(*a*) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(*b*) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(*c*) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(*d*) If the United States elects not to comply with an order of the court under paragraph (*b*) or (*c*) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the

trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

1. A written statement made by said witness and signed or otherwise adopted or approved by him; or

2. A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral "statement."

Note. In *Palermo* v. *United States*, 360 U.S. 343 (1959), the Supreme Court held that 18 U.S.C. 3500 supersedes *Jencks* v. *United States* and, therefore, that the defense is not entitled to a summary of a pre-trial statement of a witness which does not qualify as a "statement" under the statute.

(2) *Military.*

(a) "The view has been expressed that with regard to the production of evidence in the custody and control of the military authorities the accused has the right (1) except as otherwise directed by the convening authority, to examine any paper accompanying the charges prior to trial; and (2) to the production of documents or other evidence in the custody and control of military authorities upon a showing that the items are admissible in evidence and are relevant and material to issues at the trial. 'Defense should make its request for production of evidence to the trial counsel. If he opposes the request the matter should be referred to the convening authority or, to the court if it has already convened. If the request is still not granted the defense should lay proper foundation by direct or cross-examination of witnesses or by offer of proof. If the request is then denied it must be determined on review whether denial was error to the prejudice (specific) of the accused.' JAGJ 1957/5066, 17 June 1957." (JAG Chronicle Letter, JAGS 250 22/59, 5 July 1957.)

(b) *United States v. Heinel*, 9 USCMA 259, 26 CMR 39 (1958). Where after arraignment, defense counsel moved for production of the transcript of the testimony given during an inspector general investigation by prospective prosecution witnesses, it was error for the law officer to rule that the defense could not examine such transcripts until "it appears that a witness is testifying untruthfully, or has made an inconsistent statement." Under the rule of *Jencks v. United States*, *supra*, the right of inspection arises as soon as a witness has testified and does not require any preliminary showing that the pre-trial statement does, in fact, have impeachment value.

(*o*) *United States v. Gandy*, 9 USCMA 355, 362, 26 CMR 135, 142 (1958). When trial counsel sought to cross-examine the accused as to a prior inconsistent statement made by him to investigators, defense counsel objected on the ground that the defense had not been provided with a copy of this statement prior to trial. The objection was properly overruled. "The rule of the *Jencks* case is clearly inapplicable under the facts of the present case. Furthermore, there is no claim that defense counsel had requested inspection of the statements either before or during trial and had been refused. . . . Under such circumstances, we can perceive of no duty on the part of the Government to open its files to an accused without some prior request on his part."

(*d*) *United States v. Combs*, ACM 16357, 28 CMR 866, 872 (1959). When the Government possesses verbatim statements of witnesses which qualify as "statements" under the "*Jencks* Statute" and is notified of the desire of the defense to make use of them, it is improper to destroy such statements before trial, even though such destruction was accomplished by a clerk as a matter of administrative routine. "The Jencks Decision has been held applicable to proceedings by court-martial. . . . There can be no doubt that the provisions of the Jencks Statute are similarly applicable . . . the Jencks Statute delineates a rule of evidence which only has application after Government witnesses have testified at the trial." Although the defense was not entitled to the notes prior to trial, the Government was on notice that he probably would demand their production once the witnesses had testified. The destruction of the notes violated a substantial right in connection with the cross-examination of these witnesses and their direct testimony must be stricken from the record.

11. Nonprivileged communications. The mere fact that communications have been made by wire or radio does not render them privileged and information thereof obtained by operators of the communications facilities is not privileged unless one of the recognized privileges is applicable. The relationship of physician and patient is not recognized under military law as placing a privilege upon confidential communications made in the course of the relationship. It must be noted that such a privilege was unknown at common law and that it is recognized only in those jurisdictions where it has been created by statute and then only to the extent provided for by the statute.

Illustrative case.

United States v. Shaw, 9 USCMA 267, 269, 26 CMR 47, 49 (1958). Appellate defense counsel ". . . contends that the relationship between the lieutenant and the accused was that of psychiatrist-patient, and consequently, communications between them were privileged. The contention is contrary to the Manual provision that 'no privilege attaches' to communications between military personnel and military doctors . . . and the rule that the privilege does not exist in the absence of a statute."

12. Hypothetical problems. *a.* The accused's wife testified as a defense witness. On cross-examination the trial counsel sought to question her about prior statements, inconsistent with her testimony, made by her to the accused. The defense objected on the ground that such statements were confidential communications and privileged. How should the law officer rule?

b. In a bigamy case the accused defended on the theory that he did not believe his alleged first marriage was valid. In rebuttal the prosecution offered a letter from the accused to the first wife in which the accused referred to her as his wife and stated his intention to divorce her. At an out-of-court hearing it was established that the wife had given the letter to the trial counsel. The accused claims the confidential communication privilege. How should the law officer rule?

c. The accused's wife accompanies him on a visit to his attorney and is present throughout a certain conference between him and the attorney during which the husband makes several incriminating admissions. May she testify to these admissions over the accused's claim of privilege?

CHAPTER XXXII

ILLEGALLY OBTAINED EVIDENCE

Reference. Par. 152, MCM, 1951.

1. General. At common law, the manner in which evidence may have been obtained did not affect its admissibility. The mere fact that evidence might have been obtained illegally or by fraud or trick did not render it inadmissible. With but few exceptions the common law rule still applies. These exceptions include evidence obtained in violation of Article 31, UCMJ, discussed in earlier chapters, and evidence obtained as a result of an illegal search and seizure or of an unauthorized interception of communications by wire or radio. The latter two categories will be explored in this chapter.

2. Search and seizure. The provision of paragraph 152, MCM, concerning the inadmissibility of evidence obtained as a result of an unlawful search operates to confer upon accused persons rights which are at least analogous to those granted by the Fourth Amendment with respect to freedom from unreasonable searches and seizures. The Court of Military Appeals, in recognition of this fact, has made frequent use of the precedents laid down by the federal courts in this area. However, there are certain aspects of the military law of search and seizure which militate against the indiscriminate application of federal precedents. The Fourth Amendment connects the right to be secure against unreasonable searches and seizures with the need for search warrants and many leading federal cases are concerned with the failure to procure a warrant or exceeding the limits of the search as prescribed in a warrant. However, there is no provision in military law for the issuance of search warrants and, therefore, the failure to obtain one is not necessarily a proper matter for consideration in a given case. For this reason the federal precedents which turn upon the failure to procure a warrant or in which a warrant is involved should be applied, if at all, with extreme caution. A search which the Supreme Court holds "unreasonable" for lack of a proper search warrant is not necessarily likewise unreasonable under military law. Just as "military due process" is not necessarily synonymous, in any given area, with civilian due process, the term "reasonable" as applied to searches and seizures may have a different meaning in military law than in the civilian courts.

3. Searches and seizures as separate factors. It is believed that much unnecessary confusion is engendered by the indiscriminate use

in court decisions and elsewhere of the phrase "search-and-seizure" as one indivisible whole. This practice tends to obscure the otherwise quite apparent fact that when it is argued that evidence is inadmissible because of an unlawful search there normally are present two separate and distinct factors, *vis.*, the legality of the search *and* the legality of the seizure. As will be seen below it is possible to have a legal seizure during an illegal search or an illegal seizure during a legal search, yet in either of these two situations the evidence would be inadmissible. Inadmissibility does not require that both the search and seizure be illegal. In any given situation the first point of inquiry is the legality of the search. If it was illegal there is no need to go any further. It is only if the search was legal that it becomes necessary to determine the legality of the seizure.

4. Lawful searches. *a. General.* The issue of the legality of a search must always be tested with reference to the specific item of evidence the admissibility of which is being contested. The narrow question is whether the searcher, at the moment when he discovered this evidence, or the information which allegedly led to its subsequent discovery, was conducting a lawful search of the specific area or place in which it was discovered. Paragraph 152 MCM, lists five examples of lawful searches and the Court of Military Appeals has recognized the existence of a sixth. These categories of lawful searches are set forth below. It is important to note that in order for a given search to be legal it need only fall within *any one* of these categories. If it does so qualify it is completely immaterial that it could not be considered lawful under any or all of the remaining categories. This is merely another application of the fundamental principle, underlying the entire law of evidence, that the proponent of an item of evidence selects the theory under which it is offered and if, as so offered, it is admissible, it is immaterial that it might be inadmissible if offered on another theory.

b. Search warrant. A search conducted in accordance with the authority granted by a lawful search warrant is lawful. The warrant must issue from a court having jurisdiction over the place to be searched. The search must be limited to the place or premises described in the warrant and must reasonably be designed to find the specific items described therein.

c. Incident to arrest. A search of an individual's person, of the clothing he is wearing, and of the property in his immediate possession or control is lawful when conducted as an incident to the lawful apprehension of such person. It is clear that any object in the direct, physical possession of the individual arrested is subject to search. The meaning of the phrase "immediate possession or control" is not quite so clear. The Supreme Court has given a

somewhat elastic meaning to this language, restricting or enlarging the permissible ambit of search, depending upon the nature of both the item being sought and the area being searched. In general it may be said that great latitude will be permitted if the search is for a specific, easily hidden object which the searchers reasonably believe to be somewhere in the area searched.

(1) *Legality of arrest.* The arrest or apprehension must be based upon probable cause to believe that the individual has committed an offense. See par. 17, MCM and Art. 7, UCMJ. Mere suspicion is not enough.

Illustrative cases.

(*a*) *United States v. Brown*, 10 USCMA 482, 488, 28 CMR 48, 54 (1959). The fact that six or seven of ten soldiers returning by truck from a visit on pass to a recreation center in Korea had been under suspicion for four months as users of narcotics does not authorize the apprehension, "stripping" and search of all members of the group which resulted in finding two bottles of heroin on the person of the accused. ". . . the person making an apprehension must have a reasonable belief that an offense has been committed and that the person apprehended committed it. . . . The record shows no basis for any such belief by Lieutenant Clark. He merely suspected several men. This suspicion had continued for a period of four months with some surveillance during that period, yielding no results. . . . An apprehension may not be used as a pretext to search for evidence of crime . . . nor can an apprehension be validated by what it uncovers."

(*b*) ACM 15962, *Williams*, 28 CMR 736 (1959). The mere fact that air policemen had "set up a surveillance" of a certain area in a Korean city for the purpose of apprehending narcotics suspects does not make lawful an arrest and search of any serviceman found in the area. There would also have to be a showing of record that the character of the area was so notorious as to provide reasonable grounds for suspecting the apprehendee of an offense.

(*c*) NCM 58-00130, *Hillan*, 26 CMR 771 (1958). The following evidence does not justify an arrest on suspicion of sodomy. The accused who occupied a single room in a YMCA invited another sailor into his room; a shore patrolman on duty in the building listened outside the door and heard "whispering," "bed springs squeaking and a rubbing noise against the wall," "like a bump and then a—like something was rolling against the wall."