

52ND MILITARY JUDGE COURSE

PROFESSIONAL RESPONSIBILITY FOR THE MILITARY JUDGE

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Outline of Instruction

In addition to ensuring his or her own ethical conduct, the Military Judge plays a central role in keeping the actions of counsel within the Rules of Professional Conduct for Lawyers. “The dogged pursuit of justice is not a dogfight.”

I. INTRODUCTION.

II. JUDICIAL CONDUCT—CODE OF JUDICIAL CONDUCT.

A. U.S. Army Code of Judicial Conduct (2003)

B. CANON 1: A judge shall uphold the integrity and independence of the judiciary.

Military judge must be responsive to the needs of discipline, but judge also must safeguard rights of service members. *United States v. Graves*, 1 M.J. 50 (C.M.A. 1975). The military judge is “more than a mere referee” and has a duty to insure the accused receives a fair trial.

C. CANON 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.

1. Canon applies to both professional and personal conduct of judges. Test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

Examples: (1) Judge alluding to his or her judgeship to gain a deferential treatment when stopped for a traffic offense. (2) Judge using judicial letterhead for conducting personal business.

2. Judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.

Letters of recommendation: Judge should be sensitive to possible abuse of prestige of office, but a judge may serve as a reference or provide a letter of recommendation.

3. Judge shall not allow family, social, or other relationships to influence judicial conduct or judgment.

United States v. Berman, 28 M.J. 615 (A.F.C.M.R. 1989) (judge having sexual relations with trial counsel); *United States v. Sherrod*, 26 M.J. 30 (C.M.A. 1988) (daughter of judge was close friend of assault victim, thereby disqualifying the judge to sit based on appearance of impropriety (R.C.M. 902); if disqualified, judge is also disqualified to preside at trial with members).

4. Judge shall not testify voluntarily as a character witness.

D. CANON 3: A judge shall perform the duties of judicial office impartially and diligently.

1. Judicial duties take precedence over all other activities.
2. Judges shall be patient, dignified, and courteous; plus, require the same of lawyers.

United States v. Clark, 31 M.J. 721 (A.F.C.M.R. 1990). “What is required of a judge in the face of unruly behavior of counsel. . . . The military judge—an unbiased umpire—must rule in a reflective, self restrained, and temperate manner. . . . Nevertheless. . . when the military judge rules, as when he indicates that discussion is closed and the parties must move forward, counsel disobey at their peril.” *Accord United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

3. Judges must be unswayed by fear of criticism, public clamor, or partisan interests.

4. Judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice.
 - a. Military judge did not abandon his impartial role by his curt and sometimes demeaning language toward the defense counsel. *United States v. Horne*, 44 M.J. 216 (1996).
 - b. *United States v. Thompson*, 54 M.J. 26 (2000). Critical, disapproving, or even hostile" judicial remarks concerning defense counsel does not require a judge to recuse himself in the ordinary case.
 - c. Military judge not per se disqualified from presiding over a bench trial after rejecting guilty pleas, unless he has formed an intractable opinion as to the guilt of the accused. *United States v. Winter*, 35 M.J. 93 (C.M.A. 1992), *cert. denied*, 507 U.S. 915 (1993).
 - d. Military judge did not abandon his impartial role by questioning defense sentencing witness when the witness's testimony was confusing and inconsistent. The military judge properly questioned the witness in an effort to resolve the confusion, reconcile the inconsistency and make clear to the members exactly what was the basis or bases of his opinions. The military judge also correctly made *sua sponte* instruction to the panel members. *United States v. Ramos*, 42 M.J. 392 (1995).
 - e. "Injudicious spoutings" of military judge were imprinted upon the minds of the court members, causing any semblance of a fair trial to disappear. Military judge had discredited defense witnesses and interfered with defense counsel questioning of witnesses. *United States v. Holmes*, 1 M.J. 128 (C.M.A. 1975).

- f. Military judge improperly impeached accused's testimony by questions that were unnecessary to clarify or further testimony. His subsequent general cautionary instruction to the court members was insufficient to ameliorate the impact of the inference of partiality. *United States v. Clower*, 48 C.M.R. 307 (C.M.A. 1974).

- g. Judge's driver had lunch in officer's club with judge during trial recess. Driver later told defense witnesses judge had decided case prior to deliberations. This was a lie, but court cautioned judges to avoid appearance of impropriety in associations with enlisted support personnel. *United States v. Aue*, 37 M.J. 528 (A.C.M.R. 1993).

- h. Military judge did not abandon his impartial role by coaching trial counsel on highly technical legal issue. Military judges are cautioned, however, not to go so far as to lay aside the judicial cloak and improperly assume the role of part-time prosecutor. *United States v. McGeeney*, 41 M.J. 544 (N.M.C.Ct.Crim.App. 1994).

- i. Judge improperly assumed role of advocate by, *sua sponte*, allowing the TC to submit rebuttal evidence after defense counsel's closing argument on sentence. *United States v. Hardy*, 30 M.J. 757 (A.C.M.R. 1990).

- j. Military judge erred by injecting his specialized knowledge into the trial (on the record) and becoming a *de facto* expert witness for the prosecution. *United States v. Howard*, 33 M.J. 596 (A.C.M.R. 1991).

- k. *United States v. Schember*, 50 M.J. 670 (N.M. Ct. Crim. App. 1999). Appellant asserted that the MJ abandoned his neutral role in three instances. First, the MJ cautioned appellant about minimizing his role in the offenses (“Minimizing is real good for mommy and daddy but not for me.” Second, at sentencing, the MJ directed the defense counsel to ask relevant questions of appellant’s father (“Counsel, I love this, you know, witty repartee between the two of you, but let’s get to something that’s relevant.” Third, the MJ asked appellant why he had taken the law into his own hands (“...you took it upon yourself, ... to play Charles Bronson and become a vigilante...?” Citing Canon 2A, ABA Code of Judicial Conduct and *United States v. Reynolds*, 24 M.J. 261 and *United States v. Ramos*, 42 M.J. 392, the court found nothing in the record to establish that the MJ had abandoned his role.

- l. *United States v. Wright*, 52 M.J. 136 (1999). Military judge disclosed prior close working relationship with investigator witness who was central to a motion to suppress evidence. On questioning by defense counsel, the military judge stated he had a “high opinion” of the witness’s “honesty” and “trustworthiness.” The military judge ultimately denied a defense request that he remove himself from the case. Examining R.C.M. 902(b) as well as Canon 3E(1) of the ABA Model Code of Judicial Conduct (1990), the CAAF affirms the lower court’s decision that the military judge was not required to remove himself from this case.

- m. *United States v. Lewis*, 63 M.J. 405 (CAAF 2006), Trial Counsel conducted voir dire on the Military Judge and then moved for recusal on the basis that the MJ had an inappropriate interpersonal relationship with a civilian defense counsel. The MJ first refused then recused herself after a stay caused by the government’s interlocutory appeal. CAAF found that the TC and the SJA action’s constituted UCI and reversed the findings and dismissed the case with prejudice.

- n. *United States v. Sowders*, 53 M.J. 542 (N.M.Ct.Crim.App. 2000). During a contested larceny case with members, the accused took the stand to proclaim his innocence. The trial counsel effectively cross-examined the accused on the issues surrounding the case. The military judge then asked a series of questions designed to attack the credibility of the accused's story, forcing the accused to speculate and to often answer with relatively unsatisfactory and "lame" answers such as "I don't know." In determining that the military judge had abandoned his impartial role, the service court focused on the fact that the credibility of the accused's story had previously been attacked in detail by the trial counsel, that the military judge did not question either of the co-accuseds, and the fact that defense counsel objected to the military judge's questions.
- o. *United States v. Burton*, 52 M.J. 223 (2000). The accused, who had previously worked as a corrections NCO in the Camp Lejeune brig, made a sworn statement during sentencing for drug use and asked the military judge not to sentence him to a punitive discharge. During questioning by the court, the judge challenged the accused to explain why he should be given any leniency when privates and lance corporals are routinely punitively discharged for drug use. The military judge additionally questioned the accused about what kind of message such disparate sentencing would send. He then sentenced the accused to a punitive discharge. In concluding that the military judge had not abandoned his impartiality, the CAAF noted that a military judge has wide latitude to ask questions and that although a "biased or inflexible judge is disqualified, a tough judge is not."
- p. *United States v. Butcher*, 56 M.J. 87 (2001). During trial, the military judge and his wife attended a party at the trial counsel's house where other attorneys in the local judicial circuit were also attending. Additionally, the military judge played doubles tennis with the trial counsel. There were no discussions about the appellant's case other than a comment by the military judge that the trial had lasted longer than he had anticipated. The CAAF stated that they would "assume, without deciding, that the military judge should have recused himself....", but upheld the lower court's ruling based on a lack of prejudice or injustice.

q. *United States v. Quintanilla*, 56 M.J. 37 (2001). The military judge created an appearance of bias when he became involved in a series of out-of-court confrontations with a civilian witness that resulted in him becoming the subject of a stipulation of fact. Additionally, he engaged in an *ex parte* discussion with the trial counsel. The confrontations with the civilian witness involved the military judge using profanity towards and initiating physical contact with the witness. The *ex parte* discussion with the trial counsel involved a strategic decision on the order of questioning of a witness, and was therefore more than a mere administrative discussion. The judge then failed to fully disclose the facts behind this confrontation on the record and gave no disclosure to the defense of the ex parte discussion.

5. Judges cannot make public comment about pending proceedings that might reasonably be expected to affect its outcome or impair its fairness. (This requirement continues during any appellate process and until final disposition.)

6. Judges must accord each party a full right to be heard according to the law.

7. Judges cannot initiate or consider *ex parte* communications.

a. Military judge and trial counsel engaged in *ex parte* conversation during continuance in trial regarding suppression motion. *United States v. Copening*, 34 M.J. 28 (C.M.A. 1992).

b. *United States v. Quintanilla*, 56 M.J. 37 (2001). The military judge's *ex parte* discussion with the trial counsel involving a strategic decision on the order of questioning of a witness, involved more than mere administrative matters. Additionally, the judge erred when he failed to disclose the discussion to the defense.

c. Permissible exceptions.

- (1) Judges may, where circumstances require, contact parties on scheduling, administrative, and emergency purposes that do not concern substantive matters if (1) the judge reasonably believes that no party will gain a procedural or tactical advantage, and (2) the judge promptly notifies the other party and allows an opportunity to respond.

United States v. Foley, 37 M.J. 822 (A.F.C.M.R. 1993). Judge ordered Article 32 hearing reopened to address uninvestigated charges. Investigating officer (IO) asked judge, *ex parte*, if judge had ruled that IO was disqualified. Judge answered no. Judge did not err by answering. Question was procedural and judge promptly notified parties of conversation.

- (2) Judges may contact disinterested experts on the law if the judge provides notice to the parties of the person consulted, the advice received, and affords parties reasonable opportunity to respond.
- (3) Judges may consult with other judges (or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities).
- (4) Judge may, with the consent of the parties, confer separately with the parties to mediate or settle matters before the court.
- (5) Judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

8. Judges shall require order and decorum in proceedings.

- a. R.C.M. 801 requires judge to:

- (1) determine time and uniform for each session of a court-martial;
 - (2) ensure the dignity and decorum of the proceedings are maintained; and
 - (3) rule on all interlocutory questions and all questions of law.
- b. R.C.M. 806(b) allows the military judge to limit the number of spectators in order to maintain the dignity and decorum of the proceedings, but cautions against violating the accused's right to a public trial.

United States v. Short, 41 M.J. 42 (C.M.A. 1994). Military judge excluded accused's three children (ages 2 years, 18 months, and 1 month) declaring: "This is not a waiting room for babies." Court noted judge must articulate findings warranting exclusion. No explicit findings here, but court held no abuse of discretion, recognizing that small children can become restless and noisy.

- c. R.C.M. 806(c) prohibits the video and audio recording and the taking of photographs (except for purposes of preparing the record of trial) in the courtroom.
- d. Judges have a duty to protect witnesses (ABA Standard 6-2.2).
- e. Colloquy between counsel (ABA Standard 6-3.2). Judges should not permit counsel to talk or argue directly with each other, unless are granted leave to confer among themselves.
- f. A judge has the duty to disqualify himself if impartiality might reasonably be questioned (R.C.M. 902 plus ethical standards). (Waiver is possible if deals solely with the "appearance," as opposed to actual disqualification.)

- g. Judges may not comment or criticize court members for their findings or sentences. However, a judge may express appreciation for members' service to the judicial system and community.

E. CANON 4: A judge shall so conduct the judge's extra-judicial activities to minimize the risk of conflict with judicial obligations.

1. Generally shall not appear at a public hearing before, or otherwise consult with, an executive body or official except on matters concerning the law, the legal system, and the administration of justice.
2. May not personally participate in the solicitation of funds or other fund raising activities for organizations (even nonprofit ones).
3. May not serve as an officer, director, manager, general partner, advisor or employee of any business entity unless it is a business closely held by the judge or members of the judge's family or it is a business primarily engaged in the investment of the financial resources of the judge or family.
4. Beware of gifts, favors and loans.
5. Judges shall not practice law (but can give legal advice to, or draft or review documents for, a member of the judge's family).

III. JUDICIAL DISCIPLINE.

A. Article 6a, UCMJ.

The President shall prescribe procedures for the investigation and disposition of charges, allegations, or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's office. To the extent practicable, the procedures shall be uniform for all armed forces.

B. Implementation of Article 6a -- R.C.M. 109.

IV. ETHICAL RULES FOR JUDGES AND ATTORNEYS PRACTICING BEFORE COURTS-MARTIAL.

A. Rules of Professional Conduct for Lawyers, by service. Rules apply to:

1. Military Rules of Professional Conduct apply to all judge advocates and civilian attorneys working under disciplinary authority of The Judge Advocate General. (Army rules apply to all DA civilian attorneys.)
2. Non-service civilians.
 - a. The Army Rules apply to civilian attorneys practicing before tribunals conducted pursuant to the UCMJ and MCM.
 - b. The Navy Rules apply to civilian counsel representing members of the service in any matter under the cognizance of TJAG.
 - c. The Air Force Rules do not apply to non-Air Force attorneys.

B. Comments.

Comments to the Army and Navy rules and discussion accompanying Air Force rules provide guidance in interpreting the rules. The rules themselves are binding.

C. Other standards—Army.

1. ABA Standards for Criminal Justice also apply to military judges, counsel, and clerical support personnel of Army courts-martial (AR 27-10, para. 5-8).
2. The ABA Code of Judicial Conduct applies to Army judges (AR 27-10, para. 5-8).

D. Conflict Rules.

1. Rule 8.5 provides that although military attorneys remain subject to the Rules in effect in their licensing jurisdictions, the Military Rules supersede in the event of a conflict when performing official duties.
2. ABA Model Rule 8.5. Disciplinary authority must make a choice of law:
 - a. For conduct in connection with a court action, apply the rules of the jurisdiction where the court sits.
 - b. For other conduct, apply the rules of the jurisdiction in which the lawyer principally practices.
3. Practical Approach to Conflicts Resolution.
 - a. Follow the standard with the most restrictive rule.
 - b. Seek a practical solution such as changing attorneys or obtaining an exception from the state bar. *See, e.g.*, Oregon Informal Ethics Opinion 88-19, providing that military attorneys following military ethics standards will not be subject to discipline by Oregon bar authorities.
 - c. If conflict is irreconcilable, follow the Military Rule when performing official duties.

V. PROFESSIONAL MISCONDUCT.

- A. **Reporting Requirement.** A lawyer with knowledge of a violation of a Rule of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness, must report the violation (Rule 8.3).
- B. **Actionable Misconduct (Rule 8.4).**
1. A lawyer is professionally answerable for offenses that indicate lack of a characteristic relevant to the practice of law.
 2. Examples: Any violation of the Rules; any criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; any conduct involving dishonesty, fraud, deceit, or misrepresentation, or which is prejudicial to the administration of justice.

VI. SELECTED ETHICAL PROBLEMS FOR THE TRIAL LAWYER.

A. Competence, Diligence. (Rules 1.1, 1.3, 1.4)

1. Competence requires legal knowledge, skill, thoroughness, and preparation to the extent reasonably necessary for representation.
 - a. *United States v. Hanson*, 24 M.J. 377 (C.M.A. 1987). Judge believed defense counsel incompetent; appointed another detailed counsel without severing existing attorney-client relationship.
 - b. *United States v. Weathersby*, 48 M.J. 668 (Army Ct. Crim. App. 1998). Lack of defense sentencing case.
 - c. *United States v. Murphy*, 50 M.J. 4 (1998). Lack of defense sentencing case in capital case.

- d. *United States v. Denedo*, 66 M.J. 214 (CAAF 2008) A civilian defense counsel's bad advice on immigration consequences of guilty plea may have rendered plea involuntary.
 - e. *United States v. Larson*, 66 M.J. 212 (CAAF 2008) A defense counsel may concede guilt on lesser charges to gain credibility on the main charge despite an accused' NG plea.
2. Lawyers must act with reasonable diligence and promptness.
- a. *United States v. Gibson*, 51 M.J. 198 (1999). Civilian defense counsel found ineffective where the CDC failed to pursue leads contained in the CID report that was provided by the trial counsel. The accused was charged with rape and adultery. The undeveloped information in the CID report included summarized interviews with teachers and students at the 15 year old victim's school, that she may have alleged rape to distract school officials from her behavior, that she had a record of exaggerating her sexual experience, that she related conflicting versions of the alleged rape, and that she did not enjoy a good reputation for truthfulness.
 - b. Post-trial submissions. *United States v. Johnston*, 51 M.J. 227 (1999). The record of trial was returned to the convening authority for a new recommendation and action. The new post trial recommendation was served on the accused's defense counsel, who was then a civilian. Substitute counsel was not appointed. The new recommendation was not served on the accused, nor did the defense counsel contact the accused. No matters were submitted by the accused or counsel. The court found the accused was not represented at a critical point in the proceedings against him in violation of Article 27 (b).

- c. Psychotherapist-patient privilege. *United States v. Paaluhi*, 54 M.J. 181 (2000). Trial Defense Counsel erroneously interpreted possible psychotherapist-patient privilege in the military. The CAAF reversed lower court's judgment and set-aside appellant's conviction and sentence, because defense counsel rendered ineffective assistance in improperly evaluating military privilege law. The resulting confession secured Paaluhi's conviction. Without his confession there might have been reasonable doubt as to his guilt.

3. Lawyers have a duty to keep clients reasonably informed about the status of a matter and to comply with client requests for information. Lawyers also must explain matters to clients to permit them to make "informed decisions."
 - a. *United States v. Wean*, 45 M.J. 461 (1997). After post-trial 39a hearing, MJ concluded, "the collective failings and inactions . . . resulted in representation of the appellant that was lacking in legal knowledge, skill, thoroughness, and preparation."

 - b. In cases where the client has retained civilian defense counsel, military defense counsel must not be lulled into inactivity and complete deference to their civilian counterparts; military defense counsel are not relieved of professional or ethical obligations to the client. *United States v. Boone*, 42 M.J. 308 (Army Ct. Crim. App. 1996), *rev'd* 49 M.J. 187 (1998).

 - c. Civilian defense counsel whose advice to accused led to an additional charge provided incompetent pretrial representation. *United States v. Sorbera*, 43 M.J. 818 (A.F. Ct. Crim. App. 1996).

 - d. Defense counsel has no professional obligation as part of trial preparation to discuss pertinent evidentiary rules with a witness. *United States v. McDuffie*, 43 M.J. 646 (A.F. Ct. Crim. App. 1995); *see also* ABA Standard for Criminal Justice 4-4.3(b).

- e. Qualifications of Counsel. *United States v. Williams*, 51 M.J. 592 (N.M.Ct.Crim.App. 1999). Appellant contended that his civilian defense counsel was ineffective *per se* because he was on “inactive status” with respect to his admissions to practice law in three states. The Navy-Marine Court disagrees and finds nothing in R.C.M. 502(d)(3)(A) requiring the practitioner to be able to practice in “the `home’ state. 51 M.J. at 597. Counsel had submitted to the trial court various related documents to include one affirming that he was a “lawyer in good standing” in the state of Iowa. *See also U.S. v. Morris*, 54 MJ 898 (N.M.Ct.Crim.App. 2001). DC’s inactive status with his state bar does not make him *per se* ineffective or deprive the appellant of the right to counsel; *U.S. v. Steele*, 53 M.J. 274 (2000). CDC’s inactive status with his state bar does not make him *per se* ineffective or deprive the appellant of the right to counsel.

- f. Notification of requirement to register. *United States v. Miller*, 63 M.J. 452 (2006). Appellant averred that he was never told that pleading to an offense of possessing child pornography would require him to register as a TX sex offender. His failure to register led him to be incarcerated in TX. The court failed to find IAC for failure to inform the accused. The court did specify for cases tried after November 2006 that counsel must notify accused that any qualifying offense under DODI 1325.7 (sex + violence or minority) requires sex offender registration.

4. Declining or terminating representation (Rule 1.16).

United States v. Spriggs, 52 M.J. 235 (2000). TDS counsel represented Spriggs at a prior court-martial resulting in an acquittal. After additional charges were preferred, including perjury charges from his first court-martial, appellant made an IMC request for his first DC. DC had left active duty. The CAAF ruled that release of the TDS counsel from active duty constituted good cause for severance of the attorney-client relationship. Additionally, appellant did not establish that there was an ongoing attorney-client relationship.

B. Communications with Opposing Parties. (Rule 4.2)

1. A lawyer shall not discuss a case with another party who is represented by an attorney (Rule 4.2).
 - a. A lawyer may not accomplish communication indirectly through an agent or encourage clients to contact opposing parties.

Trial counsel, following on the heels of military defense counsel, barged into a meeting between civilian defense counsel and accused. Trial counsel proceeded to tell the accused that his civilian lawyer had not interviewed witnesses and was ineffective. This was inappropriate contact with the accused. *United States v. Meek*, 44 M.J. 1 (1996).

- b. Communication with a party concerning matters outside the representation is permissible.
2. A lawyer is not precluded from communicating with an unrepresented party (Rule 4.3).
 - a. Lawyers may not state or imply that they are disinterested.
 - b. Lawyers should refrain from giving advice to unrepresented persons (Comment to Army Rule 4.3).

C. *Ex Parte* Communications. (Rule 3.5)

1. A lawyer shall not communicate *ex parte* with a judge, court member (current or prospective), or member of a tribunal, except as permitted by law. Rule 3.5; ABA Standards 3-2.8 & 3-5.4 (prosecution); and, ABA Standard 4-7.3 (defense).
2. Military judge initiates discussion with trial counsel on his performance in a suppression hearing during a continuance in the case. This was an improper *ex parte* communication between counsel and judge. *United States v. Copening*, 34 M.J. 28 (C.M.A. 1992).

3. During an overnight recess, assistant trial counsel talked with the president of the panel about general military justice topics. It was unprofessional conduct to communicate privately with a member concerning a case prior to or during trial except as permitted by law. Though this conversation was not about the matter pending before court and did not violate letter of law, it was contrary to spirit of both legal and ethical prohibitions against improper contact with members. Because of the conversation's length and topics, it was improper. Military judge properly excused president. Trial counsel and military judge got praise for prompt and responsible action. *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994), *cert. denied*, 115 S.Ct. 738 (1995).
4. During the morning of the trial, trial counsel discussed sentence imposed in prior case with court member. No discussion of case; no prejudice. Court warns trial participants—even casual conversations with members may create appearance of impropriety and must be examined for possible prejudice. *United States v. Smith*, 43 M.J. 390 (1996).

D. Conflicts of Interest. (Rules 1.7 & 1.9)

1. Representation adverse to existing or former clients (Rule 1.7).
 - a. Rule 1.7(a) prohibits a lawyer from representing a client if the representation of the client will be adverse to another client unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the other relationship, and
 - (2) the clients consent.
 - b. *United States v. Murphy*, 50 M.J. 4 (CAAF 1998). Dual representation by defense counsel of sentencing witness and accused required clarification of whether accused got benefit of conflict-free counsel.

- c. *United States v. Lindsey*, 48 M.J. 93 (CAAF 1998). Where accused indicated dissatisfaction with his defense counsel in his unsworn statement, court held inquiry by the military judge resolved any conflict of interest, notwithstanding MJ gave accused limited options of continuing with counsel or going *pro se*.
- d. *United States v. Cavan*, 48 M.J. 567 (A.F. Ct. Crim. App. 1998). Defense counsel must explain all options as to representation to accused who expresses dissatisfaction with counsel's representation, including the option of having new conflict-free counsel.
- e. *United States v. Smith*, 44 M.J. 459 (CAAF 1996). Conflict of interest arose when military defense counsel represented two service-members who provided evidence against one another, but appellant knowingly and intelligently waived the conflict and conflict did not adversely affect representation.
- f. *United States v. Lee*, 66 M.J. 387 (CAAF 2008) A counsel should generally avoid simultaneous service as a TC and DC even in different jurisdictions.
- g. *United States v. Beckley*, 55 M.J. 15 (CAAF 2001). The CDC had an actual conflict of interest where his law firm had represented the appellant's wife in an earlier divorce proceeding against the appellant, where the wife and appellant were both being investigated for arson of their quarters, and where the wife refused to waive any conflict of interest.
- h. Rule 1.9 prohibits a lawyer, who has formerly represented a client in a matter:
 - (1) from representing another person in the same or substantially related matter unless the client consents after consultation, or

- (2) from using information to the disadvantage of the former client.

 - i. *United States v. Newak*, 24 M.J. 238 (C.M.A. 1987). Defense counsel improperly represented accused after negotiating immunity for co-accused participant in sodomy.

 - j. *United States v. Breese*, 11 M.J. 17 (C.M.A. 1981). A presumption of prejudice exists in a conflict of counsel situation unless the judge obtains a knowing waiver from the accused.

 - k. *United States v. Moorefield*, 66 M.J. 170 (CAAF 2008) No conflict for former MJ to serve as SJA in later unrelated court-martial.

 - l. *United States v. Rhoades*, 65 M.J. 393 (CAAF 2008) MJ within discretion to remove CDC who had served as Chief of Justice during investigation of his current clients' case.
2. Representation materially limited by lawyer's own interests or lawyer's responsibility to a third party or another client. Rule 1.7(b).
- a. *United States v. Hardy*, 44 M.J. 507 (A.F. Ct. Crim. App. 1996). Military defense counsel materially limited in representation by his reluctance to question and potentially attack his supervisor on behalf of his client.

 - b. Defense counsel wrongly allowed his desire to avoid interfering with combat operations to color his advice regarding client's choice of trial forum. *United States v. Bryant*, 35 M.J. 739 (A.C.M.R. 1992).

- c. No conflict of interest arose when military defense counsel and civilian defense counsel had an affair while conducting pretrial preparations and during the trial. Without mentioning rule for professional conduct, court refused to create *per se* rule that sexual relations between defense counsel during their representation of an accused *per se* creates a conflict of interest which violates an accused's right to effective assistance of counsel. *United States v. Washington*, 42 M.J. 547 (A.F.Ct. Crim. App. 1995).
- d. A possible conflict does not preclude representation.
- e. Representation is permitted if the lawyer reasonably believes that it will not be adversely affected by the interest and the client consents after consultation.
- f. *United States v. Hicks*, 52 M.J. 70 (1999). Appellant asserted that her civilian defense counsel, who had earlier advised her that the order (which she was eventually convicted of violating) was vague and invalid, was conflicted from defending her at trial. In essence, appellant alleged that this attorney could not effectively defend appellant while simultaneously defending the propriety of his conduct (the legal advice that led to the disobedience). The CAAF dismissed this argument and affirmed, finding that appellant had stipulated to the lawfulness of the order and had chosen instead to contest the credibility of the government's witnesses as to the facts of her disobedience.

g. *United States v. Thompson*, 51 M.J. 431 (A. F. Ct. Crim. App. 1999). Appellant's wife complained to the post Inspector General's office after hearing appellant complain about the pretrial efforts of his detailed military counsel. On appeal, appellant alleged, *inter alia*, that this complaint created a conflict of interest that disqualified counsel from further participation in the case. The Air Force Court of Criminal Appeals disagrees, finding that eventhough a potential conflict arose after appellant's wife complained to the IG, the defense counsel's "prompt action" defused the situation and avoided an actual conflict. Counsel met with appellant and ascertained that the wife made her complaint unbeknownst to appellant. Counsel also determined that the appellant was satisfied with his services and advice. At trial, the appellant did not complain about his attorney and informed the military judge that he knew and understood his right to a civilian attorney and the right to request a different military lawyer.

3. Lawyers shall not enter into business transactions with clients. Rule 1.8.

4. Withdrawal of Counsel. *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999). Standard applicable to severance of an existing relationship is good cause. Active duty 0-6, pending retirement from USMC and uncertain as to when such retirement would be permitted, applied to withdraw from representation of appellant. The military judge found good cause inasmuch as counsel was still on active duty and could not participate as civilian counsel until retired. Appellant's IMC request for the 0-6 was denied. The Air Force Court affirms the Military Judge's decision finding 1) uncertainty of the retirement date of the attorney facilitated the judge's decision to grant severance; 2) the appellant made no showing that the attorney's services were unique and 3) the attorney had not become so involved in the case as to prejudice the appellant by her withdrawal.

E. Confidentiality. (Rule 1.6)

1. General rule. A lawyer shall not reveal any information relating to the representation of a client. Applies to information obtained prior to formation of attorney-client relationship.

2. Exceptions to confidentiality rule.
 - a. Implied authorization. *United States v. Province*, 45 M.J. 359 (1997). DC's disclosure that is made to further effective representation is impliedly authorized. A straggler's order issued to the accused effectively separated what the government thought was one AWOL into two offenses, and also gave rise to a disobedience charge. The DC disclosed the straggler's order to the prosecution because he thought the issue would come up during the providence inquiry, and to facilitate negotiations with the prosecution for a pretrial agreement.
 - b. A client may consent to disclosure of confidential information.
 - c. DC may disclose in order to establish a claim or defense in a controversy with a client.
 - d. Intention to commit a crime.
 - (1) Army/Navy Rule 1.6(b) *mandates* disclosure of information a lawyer reasonably believes necessary to prevent a client from committing a crime which is likely to:
 - (a) result in imminent death or substantial bodily harm, or
 - (b) significantly impair the readiness or capability of a military unit, vessel, aircraft, or weapon system.
 - (2) Air Force Rule 1.6(b) gives attorneys discretion to reveal information regarding future crimes falling within the two categories.

Imminent death exception to the rule on confidentiality (Rule 1.6) applied to defense counsel

who joined with the government in an effort to get AWOL client to abandon suicide plan and to return to the base. *United States v. Godshalk*, 44 M.J. 487 (1996).

- e. The disclosure should be restricted to the minimum amount the lawyer reasonably believes is necessary to accomplish the purpose.
 - f. There is no authority for revealing information of other future offenses under the Military Rules.
 - g. Information regarding past crimes may not be released under any of the ethical standards.
3. Mil. R. Evid. 502 - Attorney-Client Privilege.
- a. Protects against disclosure of confidential communications between the attorney and the client.
 - b. Evidentiary rule is narrower in its protection than ethical rule. It does not protect communications about future crimes.

F. Client Perjury. (Rule 3.3; ABA Formal Opinion 87-353 (1987))

- 1. Former ABA position. Allow client to testify in narrative form and not use the testimony in argument.
- 2. Current position.
 - a. A lawyer who *knows* that his or her client *intends* to testify falsely must...

First - Advise the client not to do so and explain the consequences of doing so, *including the lawyer's duty to disclose*.

Second - Attempt to withdraw (if the lawyer's efforts to dissuade the client from testifying falsely are unsuccessful).

Third - Limit examination to truthful areas *or* do not permit the client to testify at all.

Fourth - If not possible, disclose to the tribunal the client's intention to commit perjury.

United States v. Baker, 58 MJ 380 (2003). Provides additional nonbinding guidance on how defense counsel and military trial judges should handle issues of client perjury at trial.

- b. If the perjury has already been committed, the lawyer must...

First - Persuade the client to rectify it.

Second - Disclose the perjury if unsuccessful.

- 3. A lawyer "knows" that a client intends to testify falsely if the accused has admitted facts to the lawyer that established guilt and the lawyer's independent investigation establishes that the admissions are true, but the accused insists on testifying. Comment, Rule 3.3.

United States v. Elzy, 25 M.J. 416 (C.M.A. 1988)("[A] military judge can be relied upon to disregard the fact that a counsel disbelieves his client's testimony.")

- 4. A lawyer *may* also refuse to offer evidence that the lawyer reasonably believes is false. Rule 3.3(c).

G. Handling Evidence or Contraband. (Rule 3.4)

1. If the client informs the lawyer of the existence of the evidence but does not relinquish possession, the lawyer should:
 - a. Inform the client of the *lawyer's* legal and ethical obligations regarding the evidence.
 - b. Refrain from either taking possession or advising the client what to do regarding the evidence. Comment, Rule 3.4.

2. If the lawyer receives the evidence or contraband, the lawyer shall not:
 - a. unlawfully obstruct another party's access to the evidence;
 - b. unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value;
 - c. assist another person in doing either of the above. Rule 3.4.

If the evidence implicates the client, the lawyer shall disclose the location of or shall deliver that item to proper authorities *when required by law or court order*. Comment, Rule 3.4; *see United States v. Rhea*, 33 M.J. 413 (C.M.A. 1991); *see also United States v. Province*, 45 M.J. 359 (1997).

- d. If a lawyer receives contraband, the lawyer has no legal right to possess it and must always surrender it to lawful authorities. Comment, Rule 3.4.

- e. If a lawyer receives stolen property, the lawyer must surrender it to the owner or lawful authority to avoid violating the law. Comment, Rule 3.4.

- f. If the lawyer discloses the location of or delivers an item of physical evidence to proper authorities, it should be done in a way designed to protect the client's interests, *e.g.*, the client's identity, confidential information, and the client's privilege against self-incrimination.

H. Candor Toward the Tribunal. (Rule 3.3(a)(1))

1. A lawyer shall not make a false statement of material fact or law to a tribunal. Rule 3.3(a)(1).
2. A lawyer shall not knowingly fail to disclose to the tribunal controlling legal authority. Rule 3.3(a)(3).
 - a. A lawyer should disclose authority from a collateral jurisdiction if the judge would reasonably consider it important in resolving the issue being litigated. Comment, Army and Navy Rule 3.3.
 - b. Air Force considers all military appellate courts as being controlling legal authority. Discussion, Air Force Rule 3.3.
3. Regardless of client's wishes, a lawyer must refuse to offer evidence known to be false. Rule 3.3(a)(4).
4. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. Rule 3.3(a)(4).
5. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. Rule 3.3(c).

6. *United States v. Golston*, 53 M.J. 61 (2000). Prejudice does not exist merely because trial counsel had previously represented the spouse of (and witness for) the accused in a legal assistance matter. Golston was convicted of indecent acts with two minor children. His wife testified on behalf of her husband that one of the minor girls had a crush on him. During cross-examination the assistant trial counsel brought up a prior incident where Mrs. Golston had been accused of theft. After the case recessed for the day, Mrs. Golston told her husband's trial defense counsel that the trial counsel had represented her with regard to the theft incident in his prior capacity as a legal assistance attorney. Trial defense counsel made a motion for a mistrial the next day, and requested in the alternative that Mrs. Golston's cross-examination be stricken. The military judge questioned trial counsel and assistant trial counsel. He determined that the information about Mrs. Golston was not gleaned from any confidential discussions with her. The military judge denied the motion based upon his questioning of the trial counsel and assistant trial counsel. The CAAF held that the trial counsel failed in his duty to avoid the appearance of impropriety concerning his attorney-client relationship with Mrs. Golston. The court specifically noted the failure of the trial counsel to affirmatively raise this issue to the court and opposing counsel. The court found, however, that Golston was not prejudiced by trial counsel's failure to disclose the possible conflict of interest. Affirmed.

I. Fairness to Opposing Party and Counsel, Rule 3.4.

1. A lawyer shall not obstruct another party's access to evidence or counsel another to do so. Rule 3.4(a).
2. Trial counsel committed a gross ethical violation in her attempt to dissuade a defense witness from testifying. *United States v. Meek*, 44 M.J. 1 (1996).

3. *United States v. Bradley*, 51 M.J. 437 (1999). DuBay hearing's testimony regarding a Staff Judge Advocate's telephone call to a defense witness did not establish any prejudice to the appellant warranting appellate relief. The witness admitted that after the phone call she contemplated not testifying but ultimately did so, providing "strong character and truthfulness testimony on behalf of appellant." 51 M.J. at 442 citing the lower court at 48 M.J. 777, 779-80 (1998).
4. *United States v. Jones*, 52 M.J. 60 (1999). Conversation between the Staff Judge Advocate and the Regional Defense Counsel with regard to *de facto* immunity and the prospects for witnesses who did not testify held not to constitute unlawful command influence.
5. A lawyer shall not request a person other than a client (or his or her relative, employee or agent) to refrain from giving relevant information to another party. Army & Air Force Rule 3.4(f); Navy Rule 3.4a.(5).
6. Destruction of Evidence. In *United States v. Blaney*, 50 M.J. 533 (A.F. Ct. Crim. App. 1999), the appellant, an O-4, was convicted of forcible oral sodomy of another male. Air Force Office of Investigations (AFOSI) agents determined that the victim's undershorts had no evidentiary value (a lab report showed no saliva traces). Agents requested the local chief of justice to approve disposal of the undershorts. The Air Force Court reviewed the scenario under the three prongs established by *California v. Trombetta*, 467 U.S. 479, 488-89, 104 S.Ct. 2528, 81 L.Ed. 2d 413 (1984) (evidence possesses exculpatory value, accused unable to obtain comparable evidence, government acted in bad faith) and found no bad faith on the part of the government in this case. The court said: "Once again, we reinvent the wheel: staff judge advocates will be well served to instruct their staffs that it is good common sense to retain and preserve all evidence of a case which all know will result in a trial. [N]o evidence should be disposed of prior to a case running its judicial course." 50 M.J. at 543.

7. Permissible conduct at trial. *United States v. Jenkins*, 50 M.J. 577 (N.M. Ct. Crim. App. 1999). Reviewing the CAAF definition of prosecutorial misconduct [“action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule or an applicable professional ethics canon,” 50 M.J. at 579, citing *United States v. Meek*, 44 M.J. 1, 5 (1996)], the Navy Marine Court examined a trial counsel’s cross-examination and sentencing argument techniques and found error but no prejudice. During the cross-examination of the appellant, the trial counsel asked 21 times whether other witnesses lied while testifying during the Government’s case. The trial counsel also asked 3 times whether witnesses had “made up” their testimony. The court noted that such examination, compelling the accused to state that his opposing witnesses were lying, is improper impeachment and opinion testimony. Additionally, this technique unreasonably shifts the determination of credibility and the trial counsel, as a representative of the United States, is under a duty to use proper methods of cross-examination. See also 50 M.J. at 580, citing *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 70 L.Ed. 1314 (1935) (prosecutor “may strike hard blows, [but] he is not at liberty to strike foul ones.”).

J. Prosecutorial Conduct.

1. The duty of the prosecutor is to seek justice, not merely to convict. ABA Standard 3-1.2c; Air Force Standard 3-1.1c.
 - a. A lawyer prosecuting a criminal case shall recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn. Military Rule 3.8(a).
 - b. A prosecutor should not intentionally avoid pursuit of evidence because he believes it will damage the prosecution’s case or aid the accused. ABA Standard 3-3.11c; Air Force Standard 3-3.11.

- c. Trial counsel should report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers . . . bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons (R.C.M. 502(d)(6) (Discussion)).
2. Cross-examination of a truthful witness. ABA Standard 3-5.7; Air Force Standard 3-5.7.
 - a. Fair and objective cross-examination is permitted.
 - b. Unnecessary intimidation and humiliation of witness on cross-examination is prohibited.
 - c. If the prosecutor *believes* that the witness is truthful.
 - (1) Cross-examination is not precluded.
 - (2) But manner and tenor ought to be restricted. (Air Force standard says the method and scope of cross-examination may be affected.)
 - d. If the prosecutor *knows* that the witness is truthful, cross-examination may not be used to discredit or undermine the truth.
3. It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions. ABA Standard 3-4.1c; Air Force Standard 3-4.1c.
4. A prosecutor may argue to the jury all reasonable inferences from the evidence in the record, but it is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. Rule 3.4(e); ABA Standard 3-5.8(a); Air Force Standard 3-5.8(a).

5. It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. Rule 3.4(e); ABA Standard 3-5.8(b); Air Force Standard 3-5.8(b).

6. Prosecutors should not:

a. Make arguments calculated to inflame the passions or prejudices of the jury. ABA Standard 3-5.8c; Air Force Standard 3-5.8c.

U.S. v. Diffoot, 54 M.J. 149 (2000). Comments made by the trial counsel during closing argument regarding accused's ethnicity and urging a conviction based on guilt by association amounted to plain error and materially prejudiced appellant's substantial rights.

b. Make arguments that would divert the jury from its duty to decide the case on the evidence. ABA Standard 3-5.8(d); Air Force Standard 3-5.8(d) (also prohibits arguments which inject issues broader than guilt or innocence of accused under controlling law, or makes predictions of the consequences of the court members' findings).

United States v. Baer, 53 M.J. 235 (2000). The CAAF held that golden rule arguments asking the members to put themselves in the victim's place are improper and impermissible in the military justice system. However, they did recognize the validity of an argument asking the members to imagine the victim's fear, pain, terror and anguish. When improper argument is made, it must be looked at in context to determine whether it substantially impacted on the right of the accused to a fair and impartial trial. The CAAF held no such impact here and affirmed the case.

7. Prosecutors may refer to or argue facts outside the record only if the facts are matters of common public knowledge based on ordinary human experience. ABA Standard 3-5.9; Air Force Standard 3-5.9.

K. Lawyer as a Witness. (Rule 3.7)

1. A lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness except where:
 - a. the testimony relates to an uncontested issue; or
 - b. the testimony relates to the nature and quality of the legal services rendered in the case; or
 - c. disqualification of the lawyer would work a substantial hardship on the client. *United States v. Baca*, 27 M.J. 110 (C.M.A. 1987); *United States v. Smith*, 35 M.J. 138 (C.M.A. 1992).
2. *United States v. Wilson*, 47 M.J. 152, 156 (1997) (C.J. Cox, concurring). “There is no doubt that the lawyers are appearing as witnesses to ‘advocate’ a particular result, albeit they are disguised as witnesses.”

VII. CONCLUSION.