

Professional Responsibility: Peering Over the Shoulder of Trial Attorneys

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Introduction

The Court of Appeals for the Armed Forces (CAAF) and the various service courts have addressed several substantive issues affecting the professional responsibilities of both trial practitioners and military judges over the last year. This has been a year of gentle oversight, with occasional definitive reminders of how things should be done. On more than one occasion the courts have peered over the shoulders of counsel as they made arguments and other tactical decisions inside, and outside, the courtroom. This article begins by briefly describing how the Judge Advocates General of the armed services drafted and adopted their current professional responsibility rules. Next it analyzes recent cases through the lens of the particular applicable rule of professional responsibility. The goal of this article is to identify problem areas so that supervisors of trial attorneys, as well as trial attorneys themselves, can familiarize themselves with potential professional responsibility problems and fix them before they happen, or better yet, avoid them altogether.

History of the Rules of Professional Responsibility

The American Bar Association (ABA) promulgated its first canons of professional ethics in 1908.¹ The next seventy-five years saw significant changes in the developing rules of professional responsibility.² The structure and purpose of those rules was inextricably entwined with the development of the ABA.³ The ABA finally approved the current rules of professional responsibility in 1983.⁴

After the ABA approved the current rules of professional responsibility the Judge Advocates General of the various branches of the military took steps to create one standard for their subordinate attorneys. The Army was the first service to adopt the ABA Model Rules of Professional Conduct,⁵ promulgating *Department of the Army Pamphlet 27-26* on 31 December 1987.⁶ The Navy adopted a modified version of the Model Rules in November 1987, but did not include the comments that accompanied the 1983 ABA Model Rules.⁷ The current Army Rules⁸ apply to all attorneys certified by The Judge Advocate General, lawyers employed by the Army, and civilians practicing in courts-martial.⁹ Practicing attorneys within the military must view the recent case developments in professional responsibility in conjunction with the current rules of professional responsibility if they are to truly understand the current state of the law, to identify potential issues and to protect and to train their own subordinate counsel.

Recent Developments in Professional Responsibility Case Law

Many of the recent developments in the area of professional responsibility are driven by the intrinsic nature of military practice. The CAAF and service courts addressed a variety of issues over the last year. They further delineated the parameters of the attorney-client relationship in a military setting, to include both courts-martial and legal assistance. They also addressed candor towards military tribunals, the conduct of the military judge, and the ever-present ineffective assistance of counsel issue.

1. ABA CANONS OF PROFESSIONAL ETHICS (1908).

2. For an interesting article detailing the development of the current rules of professional responsibility, see Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989).

3. For an in depth analysis of the early history of the American Bar Association, see John A. Matzko, *The Early Years of the American Bar Association, 1878-1928* (1984) (unpublished Ph.D. dissertation, University of Virginia) (on file with the University of Virginia Law School).

4. MODEL RULES OF PROF'L CONDUCT (1983). See Ingold, *supra* note 2, at 4 & n.20 (citations omitted); see also Roger N. Walter, *An Overview of the Model Rules of Professional Conduct*, 24 WASHBURN L.J. 455 (1985).

5. Ingold, *supra* note 2, at 1 n.1.

6. U.S. DEP'T OF ARMY, PAM. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (31 Dec. 1987).

7. Ingold, *supra* note 2, at 1 n.1.

8. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

9. *Id.* paras. 1, 7.a, and Glossary.

*United States v. Spriggs*¹⁰ addressed the circumstances that might sever the attorney-client relationship between a U.S. Army Trial Defense Service (TDS) counsel and his client. Captain (CPT) James Maus served as a qualified TDS attorney in 1995.¹¹ The Army detailed CPT Maus to represent SSG Spriggs at a special court-martial that same year.¹² The court acquitted SSG Spriggs, and he remained on active duty.¹³ On 9 April 1996, CPT Maus entered terminal leave status and began a civilian career as an attorney in El Paso, Texas.¹⁴ SSG Spriggs later faced additional charges at a general court-martial, to include specifications alleging that SSG Spriggs committed perjury during his 1995 court-martial.¹⁵

SSG Spriggs discussed the charges at issue in his 1996 court-martial with CPT Maus on 21 and 23 May 1996. At that time CPT Maus was working for his civilian law firm, but was still in a terminal leave status.¹⁶ CPT Maus told SSG Spriggs that he would represent him if he could. Military law enforcement officials apprehended SSG Spriggs on 23 May. SSG Spriggs requested that they contact his attorney, Mr. Maus. CID attempted to do so and left a message with Mr. Maus's secretary.¹⁷

On 24 May 1996 the Senior Defense Counsel (SDC) at Fort Bliss detailed CPT Novak to serve as SSG Spriggs's TDS counsel for a pre-trial confinement hearing. He also notified CPT Novak that he would be detailed to represent SSG Spriggs

beyond the pre-trial confinement hearing if CPT Maus was not deemed available. CPT Novak met with SSG Spriggs on that same day, and discussed the pre-trial confinement hearing and the issue of who would represent SSG Spriggs. SSG Spriggs told CPT Novak he wanted CPT Maus. CPT Novak told SSG Spriggs that although CPT Maus was now a civilian, SSG Spriggs might be able to make a request for individual military counsel (IMC)¹⁸ since CPT Maus was still a member of the individual ready reserve (IRR).¹⁹

In a Uniform Code of Military Justice, Article 39(a)²⁰ session, SSG Spriggs accepted CPT Novak as his detailed counsel, and made an IMC request for CPT Maus.²¹ Since CPT Maus was now in the individual ready reserve (IRR), the convening authority for the court-martial forwarded SSG Spriggs's request to the reserve commander at the Army Reserve Personnel Center. That commander contacted Mr. Maus who indicated he could not take time away from his new job at a private law firm to try this case. Accordingly, the reserve commander denied SSG Spriggs's IMC request.²² He was subsequently convicted at trial.

The Army Court of Criminal Appeals (ACCA) held that SSG Spriggs did not demonstrate that he established a qualifying attorney-client relationship with CPT Maus. They also noted that even if he had demonstrated the existence of such a relationship, the separation of CPT Maus from active duty constituted good cause for termination of any such relationship in the circumstances of this case. The ACCA further held that

10. 52 M.J. 235 (2000).

11. Members of The Judge Advocate General's Corps are qualified and certified to serve as defense counsel if they meet the requirements of Article 27(b), Uniform Code of Military Justice, which requires that all trial and defense counsel detailed for a general court-martial must:

be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and . . . must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

UCMJ art. 27(b)(1) (2000).

12. The secretary of each service within the Department of Defense (DOD) prescribes regulations that provide for the manner in which counsel are detailed for each general and special courts-martial. They also prescribe the regulations authorizing certain members of the DOD to detail counsel for general and special courts-martial. See *id.* art. 27(a)(1).

13. *Spriggs*, 52 M.J. at 241.

14. *Id.* As the court explained:

On April 9, 1996, CPT Maus began a period of terminal leave (now officially designated "transition leave"), a program which allows soldiers with accumulated leave to transition into civilian life before their formal date of separation By taking terminal leave, CPT Maus was able to relinquish his full-time military duties and begin a new career in the private sector.

Id. (citing U.S. DEP'T OF ARMY, REG. 600-8-10, PERSONNEL ABSENCES: LEAVES AND PASSES, para. 4-21 (1 July 1994)).

15. *Id.* at 243.

16. *Id.* at 241.

17. *Id.* at 242.

18. See U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-7 (20 Aug. 1999) (detailing the procedures for filing and granting a request for an individual military counsel).

CPT Maus was not available to serve as SSG Spriggs's IMC, and affirmed his conviction.²³

The CAAF affirmed, holding that Spriggs had not met the threshold burden of proving whether he had an ongoing attorney-client relationship with the TDS counsel from his first court-martial.²⁴ Since Spriggs did not prove an ongoing attorney-client relationship, the TDS counsel's release from active duty constituted good cause for severing the relationship. The CAAF left open the question of whether release from active duty would terminate the attorney-client relationship under all circumstances.²⁵

Defense counsel nearing release from active duty should fully and clearly explain to their clients the potential impact of that change in status. Senior Defense Counsel should consider this issue when making detailing decisions. In any event, detailed counsel can rely upon the reasoning in *Spriggs* when explaining to their clients the potential viability of an IMC request, and the process that must be followed before a com-

mander of an attorney in the IRR can grant an IMC request for that person.

Candor Towards the Tribunal

In *United States v. Golston*,²⁶ the CAAF addressed the duties and responsibilities owed by a former legal assistance attorney when, while serving as a trial counsel, he realizes that one of the witnesses for the defense is his former legal assistance client. These duties concern protecting privileged communications from the former attorney-client relationship and candor towards the tribunal. The CAAF determined that there was no issue regarding privileged communications, and instead addressed the requirement of candor towards the tribunal.

Specialist Golston was charged with indecent acts with two minor children. During arraignment the trial counsel stated that no member of the prosecution had acted in any way which might tend to disqualify them in this court martial.²⁷ After

19. *Spriggs*, 52 M.J. at 242. Article 38, UCMJ, states, in part, that an accused:

has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under paragraph (7)).

UCMJ art. 38(b)(2000).

20. Article 39(a) states:

At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules.

UCMJ art. 39(a).

21. *Spriggs*, 52 M.J. at 242.

22. *Id.* at 243.

23. *Id.* at 246.

24. *Id.* at 245.

25. *Id.* at 246.

26. 53 M.J. 61 (2000).

arraignment, the trial counsel realized that the wife of the accused, a potential defense witness, was a former legal assistance client.²⁸ He knew that his former representation of Mrs. Golston might raise an appearance of impropriety on his part if she testified at trial.²⁹ The trial counsel tried to avoid this issue by turning over the cross-examination of Mrs. Golston to his assistant trial counsel. He told his assistant trial counsel why he could not cross-examine her and did not help the assistant trial counsel in preparing for her cross-examination. Unfortunately, he did not inform the military judge about his former attorney-client relationship with the accused's wife.³⁰

Mrs. Golston testified on behalf of her husband at trial, stating that one of the alleged victims had a crush on him.³¹ During cross-examination, the assistant trial counsel brought up a prior incident where Mrs. Golston had been accused of theft. The trial counsel, as a legal assistance attorney, had represented Mrs. Golston concerning that same incident. After the case recessed for the day, Mrs. Golston realized her former relationship with the trial counsel and told her husband's trial defense counsel that the trial counsel had represented her with regard to the theft incident. 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.³² 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.³³ The court specifically noted the failure of the trial counsel to affirmatively raise this issue to the court and opposing counsel.³⁴ The court found, however, that the accused was not prejudiced by trial counsel's failure to disclose the possible conflict of interest.

Practicing attorneys should note that while the case was not overturned, the court clearly held that the conduct of the trial counsel was inappropriate. Military attorneys performing multiple duties in small offices should ensure that they have an adequate tracking system to identify who they have represented. Judge advocates who first work in a jurisdiction as a legal assistance attorney should take particular care to ensure that they are not placed in a similar situation. Finally, trial counsel must be aware of their continuing duty of candor towards the tribunal.³⁵ That duty concerning potential reasons for disqualification does not end at arraignment, but exists throughout the trial, and the burden is on the trial counsel to make certain that duty is met.

Prosecutorial Conduct

In *United States v. Diffoot*,³⁶ the CAAF considered how far trial counsel may go in making arguments calculated to inflame the passions or prejudices of the jury.³⁷ At issue was whether trial counsel could, during closing arguments, make comments and observations about the accused's ethnicity in order to argue

27. *Id.* at 66. See MANUAL FOR COURT'S-MARTIAL, UNITED STATES, R.C.M. 901(d) (2000) (requiring the trial counsel to announce the legal qualifications and status of the members of the prosecution and any actions by the trial counsel that might tend to disqualify them in that particular court martial).

28. *Golston*, 53 M.J. at 66.

29. *Id.*

30. *Id.*

31. *Id.* at 62.

32. *Id.* at 66. On direct examination by the military judge the assistant trial counsel responded clearly on this precise question:

MJ: Well, Captain Wilson, where did you get the information upon which you cross-examined Mrs. Golston?

ATC: Sir, I have the Military Police Report that includes two statements by Mrs. Golston, and that was provided to me by Captain Hellmich; and I based my cross-examination on those two statements as well as the case file for the case that we're not hearing.

Id.

33. *Id.*

34. *Id.*

35. See generally AR 27-26, *supra* note 6, R. 3.3. This provision states:

A lawyer shall not knowingly make a misstatement of fact or law to a tribunal, offer evidence the lawyer reasonably believes is false, or, in an ex parte proceeding, failed to inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

Id.

36. 54 M.J. 149 (2000).

for a conviction based upon guilt by association. The defense argued that such comments constituted plain error and violated the accused's Article 59(a) rights.³⁸ It is interesting to note that this case involved an empty chair because the accused had been arraigned and then fled the jurisdiction of the court prior to trial. The CAAF does not comment on what impact the absence of the accused might have had on their decision, but in her dissent Chief Judge Crawford noted that the accused returned himself to military custody after trial, admitting to his guilt.³⁹

At trial, the trial counsel made several different statements during closing argument that argued for conviction of the accused based on his association with known criminals.⁴⁰ He identified other bad Marines as the "evil Juarez, Soriano and Maria Cervantes."⁴¹ He mocked the argument of defense counsel, sarcastically claiming that the relationship of the accused with these criminals was wholly unrelated to the current case.⁴² He then identified the accused, claiming that such a thing as guilt by association is allowed, and that the panel should rely upon the fact that these "bad, evil Marines" were the "amigos" of the accused and he should be convicted because of his association with them.⁴³ The defense counsel did not object, and the military judge failed to correct the trial counsel *sua sponte*.⁴⁴

The Navy-Marine Court of Criminal Appeals (NMCCA), in an unpublished opinion, held that the arguments of trial counsel in *Diffoot*, while improper, did not rise to the level of plain error necessary to warrant a new trial.⁴⁵ The CAAF disagreed, reversing the lower court and remanding the case for a new trial. They determined that the comments by trial counsel, viewed together and in the context of the entire record of trial, did materially prejudice appellant's substantial rights.⁴⁶

The CAAF specifically noted that the military justice system does not allow for conviction based on an accused's race or associations.⁴⁷ They went on to quote Judge Wiss in *United States v. Witham*,⁴⁸ where he wrote, "Racial discrimination is anathema to the military justice system. It ought not - and it will not - be tolerated in any form." Trial counsel and chiefs of justice would do well to note the tenor of the CAAF's decision in this case. Although the accused absented himself from trial, and returned afterwards to admit his guilt, the CAAF condemned this type of argument and went out of their way to reiterate that ethnicity and the associations of an accused have no place within the court room.

In *United States v. Baer*,⁴⁹ the court considered an instance where trial counsel utilized the "golden rule" argument, diverting the jury from its duty to decide the case on the evidence.⁵⁰ The accused and three co-conspirators agreed to lure the victim, Lance Corporal (LCpl) Juan Guerrero, into one of their homes to rob him. They invited him to the home of LCpl Michael Pereira on the pretext of repaying an overdue loan. Lance Corporal Guerrero drove to LCpl Pereira's home, expecting to pick up his money and then return to his barracks. Almost immediately after entering the home, all three co-conspirators attacked him at the same time, including the accused. They beat him with their fists and a baseball bat, kicked him and then zapped him with a "stun-gun." He lost consciousness. They bound his mouth, hands, arms, and legs with heavy duct tape, wrapped his body in a canvas car cover, and put him into the back of a Chevy Blazer. The accused then stole stereo equipment and other items from LCpl Guerrero's car. They took him to a remote part of Oahu Island and summarily executed him with one shot to the head.⁵¹

37. See MODEL RULES OF PROF'L CONDUCT R. 3-5, 3.8c (1983) [hereinafter MODEL RULES].

38. Article 59(a) provides: "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (2000).

39. *Diffoot*, 54 M.J. at 155 (Crawford, J., dissenting).

40. *Id.* at 150.

41. *Id.*

42. *Id.*

43. *Id.* at 150-51.

44. *Id.*

45. *Id.* at 149.

46. *Id.* at 151.

47. *Id.* at 152. See *United States v. Green*, 37 M.J. 380, 385 (C.M.A. 1993) (race); *United States v. Sitton*, 39 M.J. 307, 310 (C.M.A. 1994) (associations).

48. 47 M.J. 297, 303 (1997)

49. 53 M.J. 235 (2000).

50. See MODEL RULES, *supra* note 37, R. 3-5.8(d) (prohibiting 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).

During closing argument the trial counsel argued as follows:

Imagine him entering the house, and what happens next? A savage beating at the hands of people he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. Imagine being Lance Corporal Guerrero sitting there as these people are beating him Imagine. Just imagine the pain and the agony. Imagine the helplessness and the terror, I mean the sheer terror of being taped and bound, you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.⁵²

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.⁵³ When improper argument is made, it must be viewed in context to determine whether it substantially affected the right of the accused to a fair and impartial trial.⁵⁴ The CAAF found no such impact here and affirmed the conviction.

Trial counsel faced with the potential for emotional and potentially inflammatory arguments should take care to keep their arguments within the bounds outlined by *Baer*. Counsel should remember that the facts in these types of cases are usually sufficient, in and of themselves, to generate an appropriate verdict. The strategy for advocates is to draw out those facts during argument in a manner that does not allow the defense to raise the golden rule argument on appeal.

In *United States v. Kulathungam*,⁵⁵ the trial counsel and court reporter altered the record of trial without the consent of the military judge and without informing defense counsel. The

accused plead guilty to larceny and other related offenses. The judge accepted his pleas, but forgot to enter findings on the record.⁵⁶ The defense counsel noticed this error, but for tactical reasons remained silent. The court reporter first brought it to the attention of the trial counsel during transcription of the record of trial. The court reporter and trial counsel agreed to insert findings into the record of trial without informing the judge or opposing counsel and then did so.⁵⁷ When the military judge discovered the actions of the trial counsel and court reporter, he ordered a post-trial 39(a) session and entered findings into the record consistent with his earlier actions.

The accused raised the issue of unfair prejudice on appeal.⁵⁸ The CAAF found that the trial counsel committed misconduct by altering the record of trial in this manner. However, based on the accused's provident guilty plea, the CAAF determined that the accused was not prejudiced by the trial counsel's misconduct. Current trial counsel should read this case and commit to memory the actions of the trial counsel when faced with this type of issue, ensuring that they never attempt this type of activity. Ultimately counsel, as officers of the court, are responsible for their actions. The fraudulent nature of the trial counsel's misconduct strikes at the very heart of his duties as an officer of the court. Counsel's duty of candor towards the tribunal and special duties as a prosecutor do not end when sentence is announced.⁵⁹

*Military Judge Impartiality*⁶⁰

In *United States v. Burton*,⁶¹ the CAAF addressed whether or not tough questioning by the military judge vitiates the military judge's impartiality. Marine Staff Sergeant Burton elected to make a sworn statement during his sentencing hearing for wrongful use of cocaine. He begged the military judge to not award a punitive discharge, citing his ten years of exemplary service.⁶² The trial counsel cross-examined him on this issue, bringing out the fact that SSG Burton currently served as a career planner and had previously worked as a corrections non-

51. *Id.* at 235-36.

52. *Id.* at 237.

53. *Id.* at 238.

54. *Id.*

55. No. 99-0967, 2001 CAAF LEXIS 289 (Mar. 16, 2001).

56. *Id.* at *3.

57. *Id.* at *4.

58. *Id.* at *1.

59. See AR 27-26, *supra* note 6, R. 3.8.

60. ABA CODE OF JUDICIAL CONDUCT Canon 3 (1972) (A judge shall perform the duties of judicial office impartially and diligently).

61. 52 M.J. 223 (2000).

commissioned officer (NCO) in the Camp Lejeune brig.⁶³ The military judge questioned the accused about his work as a corrections officer in the brig. He challenged Burton to explain why he should be given any leniency when privates and lance corporals are punitively discharged for cocaine use.⁶⁴ The military judge kept questioning Burton, asking him what kind of message it would send if he did not award Burton a discharge in light of the fact that young Marines are discharged for the same offense. He then sentenced Burton to a punitive discharge.

The accused argued on appeal that the military judge crossed the line during his questioning, abandoning his impartiality. The CAAF noted that a military judge has wide latitude to ask questions.⁶⁵ The CAAF noted that although a “biased or inflexible judge is disqualified, a tough judge is not.”⁶⁶ They pointed out that the accused never complained about the impartiality of the military judge at trial. They also noted that it was not improper for the military judge to ask the accused to reconcile the impact of his escaping a punitive discharge when such a verdict might well create a double standard, one for NCOs and another for junior enlisted personnel.⁶⁷ The CAAF then held that a reasonable person would not doubt the impartiality of the military judge.⁶⁸

Defense counsel should take note of this case and ensure that they make the appropriate objection on the record concerning any possible bias of the military judge when this type of questioning occurs. Failure to do so will most likely result in a waiver on appeal. In the next case discussed, defense counsel did object, but with a very different result.

In *United States v. Sowders*,⁶⁹ the military judge divested himself of his impartiality when his questioning forced specu-

lation on the part of the accused. The court-martial convicted the accused, contrary to his pleas, of larceny from the Recruit Exchange.⁷⁰ The facts of this particular case included two other alleged members of a conspiracy to steal money from the exchange. Both individuals testified against the accused, who then took the stand to proclaim his innocence. The trial counsel effectively cross-examined the accused on the issues surrounding the case, and then the military judge asked a series of questions designed to attack the credibility of the accused’s story, forcing the accused to often answer the military judge with relatively unsatisfactory answers, such as “I don’t know.”⁷¹

In determining that the military judge had abandoned his impartiality, 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 and the fact that defense counsel objected to the military judge’s questions. They looked to the possibility of cumulative error based upon the length and degree of questioning by the military judge.⁷² The service court concluded that the military judge abandoned his impartial role.⁷³ The court set aside both the findings and the sentence.

Ineffective Assistance of Counsel

In *United States v. Grigoruk*,⁷⁴ the defense counsel failed to use a child psychologist, or any other expert, to challenge complainant’s credibility in a prosecution for sex offenses. The CAAF held that this failure raised a sufficient claim of ineffective assistance of counsel to require additional inquiry.⁷⁵ Grigoruk was charged with sexual molestation of his stepdaughter. He wanted the convening authority to allow the defense to employ Dr. Underwager, a child psychologist, as an expert witness for the defense. The defense requested the expert, and the

62. *Id.* at 224.

63. *Id.* at 225.

64. *Id.*

65. *Id.* at 226.

66. *Id.*

67. *Id.*

68. *Id.* at 227.

69. 53 M.J. 542 (N-M. Ct. Crim. App. 2000).

70. *Id.* at 543.

71. *Id.* at 544-45.

72. *Id.* at 551.

73. *Id.* at 552.

74. 52 M.J. 312 (2000).

75. *Id.* at 315.

military judge ordered the government to produce Dr. Underwager or a suitable substitute. The government did so, and defense counsel consulted with Dr. Underwager in preparation for trial and had Dr. Underwager available as a potential witness at trial. The defense never called Dr. Underwager or any other doctor.⁷⁶

The CAAF opined that the case was a classic credibility contest with the accused denying anything happened and a complete lack of physical evidence supporting sexual abuse.⁷⁷ After conviction, Grigoruk asked his defense counsel why Dr. Underwager was not called to rebut the allegations of the stepdaughter. Defense counsel explained that he did not call Dr. Underwager because trial counsel had evidence that would make the doctor look like a hired gun.⁷⁸

The CAAF held that the appellant had met the threshold requirement of demonstrating possible ineffective assistance of counsel for failing to call Dr. Underwager as a defense expert.⁷⁹ Accordingly, CAAF remanded the case to ACCA to obtain additional evidence, including an affidavit from trial defense counsel explaining his failure to call a defense expert.⁸⁰

Defense counsel should take note of the CAAF decision in this case and take the appropriate steps to accurately document these types of trial decisions. Such documentation might include memorandums for record explaining the issue to the client and documenting both the client's understanding of the risks involved in calling the witness, as well as the client's agreement on trial decisions. While the CAAF normally defers to the defense counsel on tactical decisions, it is clear that in close cases, where credibility of witnesses is a key issue, the CAAF will consider the reasonableness of counsel's decisions. In addition to reconsidering defense decisions concerning calling

witnesses, the CAAF also considered the reasonableness of defense counsel's decision to send a client to military medical personnel for evaluation and treatment.

In *United States v. Paaluhi*,⁸¹ another case involving experts and defense counsel, a trial defense counsel erroneously interpreted the possible psychotherapist-patient privilege in the military. The command placed Gunnery Sergeant Keith R. Paaluhi in pretrial confinement after his daughter told child protective services that her father had sex with her. The local TDS office detailed a defense counsel to represent him at that time.⁸² During preparation for trial the defense counsel contacted Lieutenant (Lt) Suzanne Hill, a Navy Medical Service Corps officer and clinical psychologist. Lieutenant Hill was assigned to the local military medical clinic. The defense counsel stated that he anticipated a guilty plea and sentencing case when he contacted Lt Hill. He did not ask the convening authority to assign Lt Hill to assist the defense team.⁸³ He convinced Lt Hill to meet with the accused. He then advised his client to cooperate with Lt Hill.⁸⁴

Lieutenant Hill faxed a document to the confinement facility titled "Initial Personal History Questionnaire." The accused received that document while in the brig on 31 May 1996. The questionnaire included a "Statement of Understanding Regarding Limits of Confidentiality within Military Mental Health Departments." That statement indicated that disclosures related to "suspected child abuse" must be turned over to "medical, legal or other authorities." Lieutenant Hill ensured that the accused read and signed that statement before she started her interviews.⁸⁵ During their meetings, the accused told Lt Hill that he had been having sex with the victim for the last five years. He did not give her any details. The military judge denied the defense's pretrial motion to suppress all of the

76. *Id.* at 314.

77. *Id.*

78. *Id.*

79. *Id.* at 315. The court cited to the standard for determining effectiveness of counsel established in *United States v. Strickland*, 466 U.S. 668 (1984), stating that:

In *United States v. Polk*, 32 M.J. 150, 153 (1991), our Court adopted this three-pronged test to determine if the presumption of competence has been overcome: (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"? (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and (3) If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result[?]

Id.

80. *Id.*

81. 54 M.J. 181 (2000).

82. *Id.* at 183.

83. *Id.* at 182-83.

84. *Id.*

85. *Id.*

accused's statements to Lt Hill. Lieutenant Hill testified at appellant's court-martial that appellant told her that he had been having sex with the victim for the last five years.⁸⁶

The accused was convicted, contrary to his pleas, of rape, sodomy with a child under the age of sixteen years, and two specifications of indecent acts with a child under the age of sixteen years.⁸⁷ On appeal he raised two issues, one concerning the existence of the patient-psychotherapist privilege within the military, and the second alleging ineffective assistance of counsel. The court held that the privilege did not exist.⁸⁸ They then focused on the ineffective assistance of counsel claim.⁸⁹

The court began by determining that the actions of defense counsel could not fall under the rubric of "tactical decisions."⁹⁰ They focused specifically on counsel's erroneous decision to rely upon a possible patient-psychotherapist privilege, noting that the U.S. Supreme Court had not yet rendered its opinion in *Jaffe v. Redmond*⁹¹ at the time that defense counsel decided to send his client to the military therapist. Additionally, they considered the fact that the defense counsel advised his client to discuss matters with Navy medical personnel without being aware of the local Naval Medical Department's limited confidentiality policy.⁹² Finally, they considered the fact that defense counsel failed to request that Navy medical personnel be assigned as members of the defense team. While the CAAF recognized that the intent of the defense counsel was to prepare a good sentencing case, they held that did not obviate his requirement to zealously and competently represent his client. They discussed the lack of evidence that would have been available to the government if they had not been able to enter the confession of the accused given to the Navy therapist upon the advice of counsel.⁹³

The CAAF reversed the lower court's decision and set-aside appellant's conviction and sentence because defense counsel

rendered ineffective assistance by improperly evaluating military privilege law. The confession secured by the Navy psychologist came about as a direct result of the defense counsel's advice. It was this confession that secured Paaluhi's conviction for the government. Without this confession, there might have been reasonable doubt as to his guilt.⁹⁴ The CAAF held that this possibility negated the lower court's ruling of harmless error and remanded the case back to the convening authority.⁹⁵

Paaluhi highlights the need for defense counsel to fully understand the unique nature of military practice, to ensure that they follow the rules concerning privilege. It highlights a defense counsel's responsibility to independently research possible pitfalls carefully before proceeding. A review of the relevant case law on privilege, as well as an understanding of local medical department regulations, would have kept the counsel in *Paaluhi* from directing his client to give information to a therapist that was clearly not protected.

Conclusion

The cases concerning professional responsibility over the last year highlight both the CAAF's reluctance to second-guess the tactical decisions made by counsel and their willingness to do so when justice demands it. Defense counsel should consider these cases when making tactical trial decisions, particularly where the use of experts is involved. They should heed the lessons of *Paaluhi* and *Grigoruk*, taking care not only to think before they act, but also to act with a reasoned, informed purpose. Trial counsel should take to heart the issues in *Baer* and *Diffoot*, ensuring that as they strive for justice that they do not lose sight of integrity. The court will continue to peer over the shoulder of counsel and into the courtroom. Counsel should make sure that they approve of what they will see.

86. *Id.*

87. *Id.* at 182.

88. *Id.* See *United States v. Rodriguez*, 52 M.J. 444 (2000).

89. *Paaluhi*, 54 M.J. at 183.

90. *Id.* at 184.

91. 518 U.S. 1 (1996).

92. *Paaluhi*, 54 M.J. at 183.

93. *Id.* at 185.

94. *Id.*

95. *Id.*