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The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value

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I. INTRODUCTION

"This [attorney-client] 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."¹

A squadron commander wants to know if a member of her unit visited the Area Defense Counsel (ADC) for advice. A doctor suspected of malpractice thinks the base claims officer is "his lawyer" and should keep his confidences. A legal assistance client comes to the base law center to consult about a divorce and makes criminal admissions to his attorney about abusing his wife. A Marine sees a defense counsel for advice on nonjudicial punishment offered under Article 15² of the Uniform Code of Military Justice (UCMJ) for being absent without leave³ (AWOL)—during the consultation, he tells the attorney he is being sought in connection with an ATM card theft. He is later prosecuted by the same counsel for that theft. The Air Force Office of Special Investigations (AFOSI) seizes an Air Force officer's home computer—he demands it back, claiming it contains privileged documents prepared at the

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request of his attorney. A wing commander wants to pursue a clearly illegal course of action and tells his staff judge advocate (SJA) he is "going around these stupid regulations to make the 'right thing' happen." A trial counsel wants to compel an ADC to testify about an AWOL client’s whereabouts. An accused marks his incriminating financial files "attorney-client privilege" and hides them in his automobile. AFOSI finds and seizes the files anyway. And the list goes on.

These examples are drawn from case law and the personal experiences of the authors. In each scenario, the attorney-client privilege, one of the legal profession’s core values, comes squarely into play. This article grapples with these and other examples of the purpose, limits, and uses of the privilege. We examine these issues with an eye toward the practical application of the privilege to daily military legal practice generally and to Air Force practice in particular. As these examples illustrate, the attorney-client privilege touches every aspect of our profession. The axiom that a lawyer must keep client confidences inviolate is so fundamental to the effective practice of law that it enjoys nearly universal apprehension and acceptance among lawyers and laymen alike.

This article examines the historical development of the attorney-client privilege and then explores the privilege generally before tackling some specific areas where the privilege commonly arises in military practice. We explore important aspects of the privilege from three different perspectives: (1) a prosecution perspective—saving court-martial cases involving alleged compromise of attorney-client privileged material by trial counsel and/or investigators, (2) a defense perspective—using the privilege to protect information about the whereabouts of a client and the contents of a defense counsel’s appointment schedule, and, (3) a general military practice perspective—the potential conflicts of interest which may arise when the privilege is factored into a diverse military practice involving advice to command, claims litigation, military legal assistance, and the plethora of other issues handled by installation-level judge advocates daily.

II. THE ATTORNEY-CLIENT PRIVILEGE GENERALLY

A. Common Law Development

"The first duty of an attorney is to keep the secrets of his clients."

A review of the common law roots and scope of the attorney-client privilege will be helpful before proceeding further. The exact origins of the attorney-client privilege are somewhat foggy. It may have origins reaching

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back to the Roman Empire.\footnote{See Geoffrey C. Hazard Jr., A Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1070 (1978) (Professor Hazard dates the privilege to the Roman Civil Code, but does not cite any authority).  See also Comment, Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers, 25 Buff. L. Rev. 211, 213-14 (1975).} 5 Fragments of the privilege date back to sixteenth century Elizabethan England, when evidentiary privileges arose as the testimony of witnesses became the principal basis of jury verdicts and compulsory process was introduced.\footnote{J. Wigmore, Evidence in Trials at Common Law § 2290, at 542 (McNaughton rev. 1961) (hereinafter Wigmore).  See also, Act for Punishment of Such as Shall Procure or Commit Any Wilful Perjury, 1562, 5 Eliz. 1, ch. 9, § 12 (cited in Development in the Law—Privileged Communication: Part I. Introduction: The Development of Evidentiary Privileges in American Law, (Part 1 of 8), 98 Harv. L. Rev. 1450 (May 1985)) (noting the penalty and possible civil actions imposed on those who refused to attend after service of process and tender of expenses). Although only available to the Crown at first, compulsory process was later extended to civil parties and criminal defendants. See, e.g., Act for Regulating of Trials in Cases of Treason and Misprision of Treason, 1695, 7 Will. 3, ch. 3, § 7 (extending right to have compulsory process to defendants accused of treason) (cited, supra in 98 Harv. L. Rev. 1455).} 6 The noted scholar Dean John Wigmore wrote: “The history of this privilege goes back to the reign of Elizabeth I, where the privilege appears as unquestioned. It is therefore the oldest of the privileges for confidential communications.”\footnote{Id., Wigmore at 542.} 7 The English privilege did not arise to protect the interests of the client, but from a desire to uphold “the oath and the honor of the attorney” to abide by his implied “solemn pledge of secrecy.”\footnote{Id. at 543 (emphasis in original).} 8 Cases upholding the attorney-client privilege appear as early as 1577.\footnote{See Berd v. Lovelace, 21 Eng. Rep. 33 (1577); Dennis v. Codrington, 21 Eng. Rep. 53 (1580).}

Two seventeenth century English decisions allowed a “counselor at law” to refuse to testify against “their cause.”\footnote{Hazard, supra note 5, citing Walfron v. Ward, Style 449 (K.B. 1654) (“[A] ‘counselor at law’ is not bound to ‘make answer for things which may disclose the secrets of his Client’s cause’) and see Bulstrode v. Letchmere, Freem. 5 22 Eng. Rep. 1019 (Ch. 1676). (“[C]ounselor at law shall not be bound to answer concerning any writings which he hath seen, nor for any thing which he knoweth in the cause as counsellor.”).} 10 In each case, the “cause” involved an attorney’s testimony against a client. In 1743, an English court in Annelsey v. Anglesea,\footnote{Id. at 1229.} 11 narrowed the privilege to exclude protection in instances where an attorney engages in criminal activity,\footnote{Id. at 1230.} 12 where information was not gained as a result of the particular pending action,\footnote{Id.} 13 or where information was not essential to the matter for which the attorney was consulted.\footnote{Id.} 14 By the latter part of the 1700s, ownership of the privilege had shifted to the client, and the law recognized that “[i]n order to promote
freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.\textsuperscript{15}

In the early 1800's the scope of the English privilege became ever more expansive. In one case, an attorney was prohibited from testifying to facts learned of his own observation in a criminal trial, including instances where he observed a criminal fraud.\textsuperscript{16} In another instance, an attorney was precluded from being examined about a message he delivered to the opposite party in a transaction.\textsuperscript{17} The Court of Chancery went so far as to hold that an attorney could not be questioned as to whether he had received a discovery notice served by an opposing party.\textsuperscript{18}

By the early 1800's, English courts had developed a nascent common law of evidentiary privileges and American judges tentatively looked to this emerging law to help them decide privilege questions. The first American treatise on the subject—Judge Zephaniah Swift's Digest of the Law of Evidence—was published in 1810.\textsuperscript{19} The author reiterated the attorney-client and spousal privileges, but dismissed, as unsupported by the law, physicians' and clergymen's claims to similar privileges. Neither the United States Congress nor state legislatures added anything of substance to the evidentiary privileges from the 1790's to the early 1800's.\textsuperscript{20}

American cases dealing with the attorney-client privilege did not appear until the 1820's, but several post-Revolutionary War courts found the privilege rooted in both the law of evidence (protecting disclosures)\textsuperscript{21} and the law of agency (where a fiduciary relationship between a lawyer and client exists).\textsuperscript{22} Early American criminal courts and legal scholars viewed the privilege as an outgrowth of the Fifth Amendment privilege against self-incrimination.\textsuperscript{23} Later, the Sixth Amendment right to effective assistance of counsel began to appear as an additional rationale. These rights-based rationales are known as the "non-utilitarian" justifications.\textsuperscript{24} Some post-World War II decisions gave greater weight to this school of thought and continued to

\begin{footnotes}
\footnote{Wigmore, supra note 6, § 2291.}
\footnote{Robson v. Kemp, 170 Eng. Rep. 499 (K.B. 1798).}
\footnote{Spencley v. Schullenburgh, 103 Eng. Rep. 138 (1806).}
\footnote{Z. Swift, A Digest of the Law of Evidence (Hartford 1810 & photo. reprint 1972) (cited in Development of Evidentiary Privileges, 98 Harv. L. Rev. 1450, supra note 6, at 1457). (Judge Swift sat on the Supreme Court of Errors of Connecticut).}
\footnote{See generally, Development of Evidentiary Privileges, supra note 6, at 1457.}
\footnote{Hazard, supra note 5, at 1070.}
\footnote{See Restatement (Second) of Agency §§ 395-396 (1958). An agent is prohibited from disclosing information revealed in confidence by the principal or acquired by the agent in the course of the agency relating to matters in which the agent has been employed.}
\footnote{See Deborah S. Bartel, Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege, 60 Brook. L. Rev. 1355, 1362-1363 (1995).}
\end{footnotes}
see the privilege as an extension of the right against self-incrimination. However, many courts and scholars also believed the privilege should be extended beyond the bounds of Fifth Amendment in order to facilitate frank communications between attorney and client on all matters, criminal and civil. This “utilitarian” view is the prevailing majority view today.

Many of the common law rules of attorney-client privilege familiar to us today were recognized by the Supreme Court during the nineteenth century. For example, in a case decided in 1888, Hunt v. Blackburn, the Court recognized the principle that an attack on the competence of the attorney waives the privilege to the extent necessary to allow the attorney to defend on the charge. Nine years later in Golver v. Patten, the Court held that, “in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will . . . are not privileged.”

American courts also initially entrusted the privilege to the attorney and not the client, following in the English tradition. It was not until the mid-1800’s that American courts fashioned the prevailing rule that the client is the holder of the privilege and the attorney is obligated to claim it on his behalf, unless it is waived. For nearly a century, between the mid-1800’s and the end of the Roosevelt era, little changed in the extent to which the courts recognized the privilege. Following World War II, there was a largely unsuccessful codification movement, as we shall examine below, which ultimately provided the source of our modern military rule as well as insight into the Supreme Court’s view of how the privileges should be applied.

The Supreme Court of the United States has long recognized that the scope of the privilege is “governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.”

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25 See e.g., Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951) and James A. Gardner, A Re-Evaluation of the Attorney-Client Privilege, 8 VILL. L. REV. 279, 316-338 (1963).
26 See Bartel, supra note 24, at 1362-1363 and see Hatton v. Robinson, 31 Mass. (14 Pick) 416, 422 (1833).
27 See Bartel, supra note 24, at 1364.
29 Id. at 470.
30 165 U.S. 394, 406 (1897) (The Court noted that the privilege would survive the testator in a claim by a third party, but not between devisees, where none could rightfully claim a privilege to the exclusion of the others).
31 See Bartel, supra note 24, at 1362.
32 In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996). See also, Max Radin, The Privilege of Confidential Communications Between Lawyer and Client, 16 CAL. L. REV. 487, 488 (1928).
33 See, e.g., King v. Barrett, 11 Ohio St. 261, 263 (1860).
34 See infra, Part II.A.2.
35 See Wolfe v. United States, 291 U.S. 7 (1934) (citing Funk v. United States, 290 U.S. 371 (1933)).
again, less than two years ago, in *Swidler and Berlin v. United States.* As we see below, this language is echoed, nearly verbatim, in Federal Rule of Evidence (FRE) 501, which states the general rule of privilege in modern federal practice. Thus, the privileges applied in the federal courts today still derive from common law rules.

1. The Modern Common Law Rule

Stated in contemporary terms, the modern privilege is designed to encourage full and open communication between client and attorney to allow the client to make disclosures without fear that the attorney will be forced to reveal the information confided to her. Dean Wigmore explained the common law elements of the attorney-client privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 adviser, (8) except the protection be waived.

Many jurists have remarked that the attorney-client privilege must be confined to its narrowest limits, however. They argue—as in the case of other exclusionary rules which operate to deprive the trier of fact of material evidence—that the exclusion of relevant evidence must not exceed in scope the policy it is designed to serve. As the Court of Military Appeals stated in an early opinion dealing with the rule:

Indeed, the concept that the privilege 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 inoperative to shield with secrecy confidences made

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37 524 U.S. 399 (1998) (holding that the attorney-client privilege succeeded the death of White House Counsel Vince Foster, when the Office of Independent Counsel sought discovery of statements made by him to his attorney while investigating the "Travelgate" scandal of the Clinton Presidency).


40 WIGMORE, supra note 6, § 2292 (emphasis in original). See also *Prichard v. United States,* 181 F.2d 326 (6th Cir. 1950), aff'd, 339 U.S. 974 (1950) (In *Prichard,* the Court was forced to utilize 28 U.S.C. 2109's provisions (four Justices recused themselves)—the Court lacked a quorum and believed itself unable to hear the case by the next term, so the case was affirmed as if by an equally divided Court); and *Palatini v. Sarian,* 83 A.2d 24 (N.J. Super. Ct. App. Div. 1951). The privilege has also been held to exist irrespective of whether litigation has commenced or is contemplated. See, e.g., *Phillips v. Delaware,* 194 A.2d 690 (Del. Super. 1963).

41 Marrelli, supra, note 1, at 281.
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.

2. Statutory Developments

Before the Federal Rules of Evidence were enacted in 1975, the question of what evidentiary law the federal courts were to apply in deciding privilege issues was far from settled. Federal courts decided privilege questions sporadically and inconsistently in both the criminal and civil arenas. In 1851, the Supreme Court held that, in criminal cases, federal courts were to apply the common law rules of evidence in effect at the time the federal courts in a given state were created. In Wolfle v. United States and Funk v. United States, the Court overruled this standard and held that federal courts were henceforth free to apply "common law principles as interpreted . . . in light of reason and experience."44

By 1948, the Supreme Court admitted that its "infrequent sallies" into the field of evidence were incapable of transforming the "grotesques structure" of existing evidence law into a "rational edifice."45 The confusion surrounding evidentiary law in the federal courts eventually prompted a movement to enact uniform federal rules of evidence. At the urging of the American Bar Association (ABA), the Supreme Court's advisory committee worked for six years to codify the common law privileges. On 20 November 1972, the Court, acting pursuant to the Rules Enabling Acts,46 promulgated the Federal Rules of Evidence. Chief Justice Warren E. Burger transmitted them to Congress on 5 February 1973 recommending they be allowed to automatically become law after the mandatory ninety-day waiting period specified in the Rules Enabling Acts.47

FREs 501-513 sought to codify the federal law of privilege and to that end, the proposed rules recognized nine discrete privileges, including communications between attorney and client, under proposed Rule 503. The proposed privilege rules were the single most controversial part of the proposed FREs and were virulently attacked by members of Congress and many other critics. Opponents claimed, among other things, that the privilege

42 Id. at 281-82 (citations omitted).
43 See United States v. Reid, 53 U.S. (12 How.) 361, 363 (1851). (For states admitted to the Union after 1789, the relevant law was that in effect at the time of admission. See Logan v. United States, 144 U.S. 263, 302-303 (1892)).
44 See Wolfle, supra note 35.
45 Michelson v. United States, 335 U.S. 469, 486 (1948).
rules were incomplete, inconsistent, and incoherent. Of particular note, many critics commented that the advisory committee, which consisted entirely of attorneys, had enacted a comprehensive attorney-client privilege rule while limiting or removing privileges for other professions. Fearing a long battle over the enumerated privilege rules, Congress ultimately deleted them and substituted a single, general rule of privilege—Rule 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.\(^4\)

The drafters of Rule 501 intended that state privilege law would apply in diversity cases and that federal question cases would use three general sources of privilege law: the Constitution, acts of Congress, and federal common law developed “in the light of reason and experience.”\(^4\) In practice, federal courts in federal question cases often look to state law for guidance in the area of privilege and commentators have argued that in the absence of strong federal policies to the contrary, federal courts should adopt state privilege law where it favors admissibility. Rule 501, however, does not mandate such a practice and thus leaves privilege law open to continuing common law development by the federal courts.\(^5\)

Thus, the United States does not have a single “law of privileged communications” but rather two distinct and often divergent bodies of law: (1) In state courts and in federal cases applying state law, the law of evidentiary privilege is a diverse collection of rules, developed mostly by statute, sometimes by common law, and, (2) In federal cases in which state law is not binding, federal courts have begun to develop a federal common law of evidentiary privileges “in the light of reason and experience.”\(^6\) This discussion of the common law is particularly important, because the federal law of privilege, including its frequent resort to state law, is applicable and useful in military practice. Particularly in areas where our military rules and case law are not yet well developed. Thus, as noted below, while the military has a number of explicit rules regarding privileges, Military Rule of Evidence 501(a)(4) also recognizes privileges provided for in:

\(^4\) Id.
\(^5\) Id.
\(^6\) *See Development of Evidentiary Privileges, supra* note 6, at 1463-1471.
The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

As noted below, military courts have often turned to these common law authorities to support their holdings on privilege issues.

B. Modern Military Law

The modern military attorney-client privilege takes two related but distinctly different forms: (1) An evidentiary privilege defined by Military Rule of Evidence 502 and military case law, which prevents an opponent from discovering and using privileged communications in preparing for litigation or compelling their disclosure at trial, and (2) an ethical duty, allowing a claim of privilege which is generally broader in scope than its evidentiary cousin, and is defined by various state and military rules of professional conduct. These latter sources vary slightly among the several states and the military services, and are primarily based on the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice.52

1. The Evidentiary Privilege

In pertinent part, Military Rule of Evidence 502 states:

(a) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer and the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

(b) Definitions. As used in the rule:

(1) A "client" is a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from the lawyer. . .

(2) A "lawyer" is a person authorized . . . to practice law. . .

(3) A "representative" . . . is a person . . . assigned to assist a lawyer. . .

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the

52 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 5-42.00, at 188 and § 5-52.00 at 190-94 (2nd ed. 1999) (hereinafter GILLIGAN & LEDERER).
rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.  

Under section (c) of the Rule, the privilege may be claimed by the client, guardian or conservator of the client, personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer may also claim the privilege on behalf of the client.  

Rule 502(d) enumerates several well-known common law exceptions to the privilege. For example, communications clearly contemplating the future commission of a crime or fraud are not protected. Rule 502(d)(3) notes that "communications relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer" may be revealed to the extent necessary to pursue or defend such claims. Other, more rarely used, exceptions are also included.  

As noted, Military Rule of Evidence 502 was adapted from proposed FRE 503. The Military Rules of Evidence were promulgated by Executive Order as Part III of the MCM in 1980. However, the attorney-client privilege was already well established in military law before the Military Rules of Evidence or even the UCMJ57 were adopted. Prior to 1980, the privilege was explicitly recognized by the MCM and thoroughly grounded in military case law, which generally recognized the privilege to at least the same extent established by the federal common law. The United States Court of Appeals for the Armed Forces recently recognized this in United States v. Romano, as the court reaffirmed that communications made in confidence to an attorney for the purposes of obtaining legal advice are privileged, unless the privilege is waived by the client.  

The Military Rules of Evidence also contain separate rules codifying the doctrine of waiver by voluntary disclosure, suppression of privileged matter which the holder is erroneously compelled to disclose or which is disclosed without opportunity to claim the privilege, and forbidding comment.

54 Id. at MIL. R. EVID. 502(c).
55 Id. at MIL. R. EVID. 502(d)
58 See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, 1921, Chap. XI, ¶ 227 at 191 (1921 ed.) and MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, ¶ 151 at 285 (1951 ed.) (The UCMJ became effective on 31 May 1951).
59 United States v. Romano, 46 M.J. 269 (1997), citing WIGMORE, supra note 6, § 2293.
60 MIL. R. EVID. 510.
61 MIL. R. EVID. 511.

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by either side upon a claim of privilege by an accused or any other person at trial.62

As noted above, the FREs do not contain a codified rule of attorney-client privilege, relying instead on the general rule of privilege stated in FRE 501 and federal case law. In 1980, the Supreme Court held, in Trammel v. United States,63 that the Federal Rules of Evidence “acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges in federal criminal trials.”64 The Court once again reiterated that “these privileges are governed by the principles of common law as they may be interpreted . . . in the light of reason and experience.”65 Although Trammel chiefly involved an examination of the spousal privilege, the Court defined the purpose of the attorney-client privilege as, “rest[ing] on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”66

Military case law continues to make relevant contributions to the development and interpretation of the privileges as well. In United States v. Ankeny67 the Court of Military Appeals reemphasized that “it is black letter law that a military accused has a privilege to prevent unauthorized disclosure of his confidential communications to his attorney.”68 In Ankeny, civilian defense counsel for Navy Lieutenant Ankeny inadvertently revealed information (to an Assistant Staff Judge Advocate to the General Court-Martial Convening Authority) about a previously unknown offense. The accused was charged with and convicted of the newly discovered offense. The Navy-Marine Corps Court of Military Review reversed Lieutenant Ankeny’s conviction69 and the Court of Military Appeals affirmed that decision based on the violation of the attorney-client privilege by civilian defense counsel.70

62 MIL. R. EVID. 512.
64 Id. at 45.
65 Id. (The Court further noted that Congress manifested an affirmative intention not to freeze the law of privilege; rather, its purpose was to “provide the Courts with the flexibility to develop rules of privilege on a case-by-case basis.” Id. at 47, citing 120 Cong. Rec. 40891 (1974) (Remarks of Representative Hungate)).
66 Id.
68 Id. at 15-16.
69 28 M.J. 780 (N.M.C.M.R. 1989).
70 Ankeny, 30 M.J. at 17 (noting that the court “seriously doubt[ed] that Congress and the President intended the military justice system to simply stand by when a military accused’s ship is accidentally scuttled by its captain in the lull before battle.” (internal quotes and footnote omitted)). Id.
Neither federal nor state courts are generally bound by state rules of professional responsibility or by the ABA Model Rules, Codes, or Standards. However, these rules provide important guidance for courts in determining whether a case is, or may become, tainted by ethics violations. Ethics rules are also professionally binding on attorneys when adopted by state licensing authorities or military departments. In Air Force practice, the Air Force Rules of Professional Conduct (Air Force Rules) and Air Force Standards for Criminal Justice (Air Force Standards) are binding on all Air Force attorneys and paralegals—military, civilian, and foreign-national. The Air Force Rules make clear that, when there is a conflict between state licensing rules and the Air Force Rules, the Air Force Rules will govern. The theory being that, since our practice is purely federal, our rules control under the Supremacy Clause of Constitution. The Air Force Rules and Standards are not punitive, but violations may by addressed administratively, or through action to withdraw certification under Article 27(b), UCMJ, or to withdraw designation as a judge advocate.

The Air Force Judge Advocate General's (TJAG) authority to prescribe the Air Force Rules and Standards comes from a number of sources, including: (1) his statutory duty to supervise the administration of military justice under Article 6(a), UCMJ; (2) authority granted by the President in Rule for Courts-Martial (RCM) 109; and, (3) his general statutory authority to “perform such

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73 Id. at Air Force Rule 8.5. See also AFI 51-201, Administration of Military Justice, ¶ 1.3 (3 October 1997) (making the Air Force Rules and Standards applicable to all Air Force attorneys).
74 Id.
75 See 1 GILLIGAN & LEDERER, supra note 52, at § 5-52.00.
76 See Air Force Rules, Preamble at 1.
78 R.C.M. 109, MCM (2000 ed.), reads, in pertinent part:

Rule 109. Professional supervision of military judges and counsel
(a) In general. Each Judge Advocate General is responsible for the professional supervision and discipline of military trial and appellate military judges, judge advocates, and other lawyers who practice in proceedings governed by the code and this Manual. To discharge this responsibility each Judge Advocate General may prescribe rules of professional conduct not inconsistent with this rule or this Manual. Rules of professional conduct promulgated pursuant to this rule may include sanctions for violations of such rules. Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the

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other legal duties as may be directed by the Secretary of the Air Force."

Additionally, the Air Force Court of Military Review has concluded that military judges have "the inherent power to resolve issues of ethical obligations of counsel."80

The Air Force Rules and Standards codify many of an Air Force attorney’s ethical duties to his client. With regard to the attorney-client privilege, the Air Force Rule states, in pertinent part:

Rule 1.6. Confidentiality of Information
(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation, and except as stated in paragraph (b).

Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension. Procedures to investigate complaints against military trial judges and appellate military judges are contained in subsection (c) of this rule.

(b) Action after suspension or disbarment. When a Judge Advocate General suspends a person from practice or the Court of Appeals for the Armed Forces disbars a person, any Judge Advocate General may suspend that person from practice upon written notice and opportunity to be heard in writing.

79 10 U.S.C. § 8037(c)(2) (2000). The duties relative to the professional conduct of Air Force attorneys are found in a number of regulatory sources, including, but not limited to: (1) AFI 51-102, The Judge Advocate General's Department (19 July 1994) (Paragraph 2.4 gives TJAG the power to designate qualified judge advocates under 10 U.S.C. § 8067(g); to certify military judges and trial and defense counsel under 10 U.S.C. §§ 826-827; and to enforce "ethical standards in Air Force military legal practice, including receiving, investigating and disposing of allegations involving breaches of ethical or professional standards applicable to Air Force attorneys"), and, (2) AFI 51-103, Designation and Certification of Judge Advocates (1 March 1996) (spelling out the procedures and standards for designating and certifying judge advocates, including members of the Air Reserve Component (both guard and reserve), and clarifying that TJAG may withdraw designation or certification for a number of reasons, including failure to maintain professional and ethical standards.).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

1. To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapons system; or

2. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client.

The Air Force Standards provide further guidance for military justice practitioners:

Standard 4-3.7. Advice and Service on Anticipated Unlawful Conduct

d. A defense counsel shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (e).

e. A defense counsel may reveal such information to the extent the lawyer reasonably believes necessary:

(i) To prevent the client from committing a criminal act that the defense counsel believes is likely to result in imminent death or substantial bodily harm, child sexual and/or physical abuse, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft or weapons system; or

(ii) To establish a claim or defense on behalf of the defense counsel in a controversy between counsel and client, to establish a defense to a criminal charge or civil claim against counsel based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a defense counsel's representation of the client.

(iii) To prevent the client from attempting suicide or causing serious bodily harm to herself or himself; or

(iv) To assist Air Force authorities in locating the client when those authorities believe the client may attempt suicide or cause serious bodily harm to herself or himself.

These ethical rules create much broader duties for Air Force attorneys to protect client confidences, as well as any information relating to representation of a client. This point is critical to resolving many of the issues discussed in this article, but particularly those discussed in Part IV, below, regarding the sanctity of a military defense counsel's schedule and revealing information about the whereabouts of a client.

81 Air Force Rules, ¶ 1.6, supra note 72.
III. HANDLING ALLEGED AND ACTUAL CASES OF ATTORNEY-CLIENT PRIVILEGE COMPROMISE

“Lawyers enjoy a little mystery, you know. Why, if everybody came forward and told the truth, the whole truth, and nothing but the truth straight out, we should all retire to the workhouse.”

Cases involving alleged prosecution interference with the attorney-client relationship by inadvertent compromise of attorney-client privileged information are increasingly common. In a world where laptop and even handheld computers may contain vast stores of records, a routine search and seizure can readily lead to such a claim. Other, low-tech methods of compromise still persist as well. In this section we outline three scenarios, adapted from actual Air Force cases, in which the compromise issue reared its head. Next we analyze the extant rules and case law for possible solutions to these cases. Finally, we offer practical guidance on handling such cases when they arise.

A. How it Happens—Three Scenarios

(1) At the request of his attorney, an accused prepares a chronology of events leading up to his apprehension on fraud charges. The chronology contains potentially incriminating admissions, and an electronic copy resides on his home computer, which he also uses to run the business at the heart of the charges against him. The computer also contains several pieces of attorney-client privileged correspondence. The computer is seized by AFOSI investigators as evidence in the fraud case against the accused. Corporate counsel for the accused’s company demands that all privileged material be returned. When a special master is appointed to review the documents, he finds several documents appearing to qualify as attorney-client privileged correspondence on the computer’s hard drive and seals them with instructions that trial counsel should not examine them. The chronology is not among those papers and the accused never specifically requests its return. Paper copies of the chronology are printed from the computer’s hard drive by AFOSI computer investigators, but the documents are misplaced and never used to advance the investigation.

Later, on the eve of trial, the chronology is delivered directly to defense counsel by an AFOSI agent. Defense counsel shows the documents to trial counsel (who has not seen them before), claims the entire case is tainted by a violation of the attorney-client privilege, and moves to dismiss all charges, or

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in the alternative, to suppress all evidence gathered after the date the computer
was seized, and to disqualify the prosecution team. 83

(2) An accused is tried and acquitted of assault, but convicted of other
minor charges at a general court-martial (GCM). He remains on active duty.
Later, the victim reports to police that the accused forced her to write perjured
statements and give perjured testimony at his trial. Investigators of the Naval
Criminal Investigative Service (NCIS) search the accused’s apartment, and
seize all of his personal papers, looking for drafts of the perjured statements
written in the accused’s hand. Among the papers seized are notes made by the
accused before, during, and after his trial; drafts of his clemency matters; and
other correspondence to and from his defense counsel in that case. This
potentially privileged evidence remains in the hands of investigators for nearly
a year. They use some of the documents as handwriting exemplars, but do not
otherwise use them to advance their case, and do not provide them to trial
counsel. The accused never asks the government to return the allegedly
privileged matters.

In preparation for the accused’s second GCM (for subornation of
perjury), circuit trial counsel visits NCIS offices and inspects their files. She
finds some items seized from the accused that appear to be draft clemency
matters from his first trial. She reports this immediately to defense counsel,
who further examines the evidence in the possession of NCIS and discovers
other potentially privileged documents (mixed with other documents and
evidence), which have been languishing in the NCIS evidence locker for over a
year. Defense counsel recognizes some of it as incriminating and some of it as
potentially privileged. Trial counsel does not examine these materials. At
trial, the defense moves to dismiss all charges, or in the alternative, to suppress
all evidence seized from the accused and disqualify the prosecution team. 84

(3) The subject of a fraud investigation gets wind that his office is
about to be searched. He calls his attorney, who tells him (he later claims) to
mark all the files involved in the investigation (files which he created in the
course of his government duties) as “attorney-client privilege, [ADC’s name],”
and to remove them from his office. Investigators, armed with a search
authorization, find the files in the trunk of the subject’s car and seize them. A
special master is appointed to examine the materials and finds that none of
them appears to be privileged. 85

83 Based on United States v. Captain Michael P. Sprague, ACM 32791, aff’d mem. (A.F.C.C.A.
84 Based on United States v. Senior Airman Robert W. Pinson III, ACM 32963 (currently
pending decision before A.F.C.C.A.).
85 Based on United States v. Master Sergeant Michael W. Hawkins, ACM 33087 (A.F.C.C.A
6 November 2000).
B. The Developing Law

As yet, there are no published military precedents precisely on point with scenarios (1) and (2) above. Nevertheless, the military judge in each case was able to fashion sufficient remedies using Military Rules of Evidence 501-502 along with relevant federal and military case law.

1. Establishing the Privileged Nature of the Compromised Material

As mentioned above, Military Rule of Evidence 502 creates an evidentiary privilege, which protects confidential attorney-client communications from compelled production and prevents their use in courts-martial or other proceedings. If the privileged communication is improperly disclosed it continues to retain its privileged character. In military cases involving the alleged compromise of attorney-client privileged communications, the accused must show, as a predicate matter, that the communication in question falls within the protections of Military Rule of Evidence 502. In cases involving documents created by the accused, she must also show that they were prepared at the request of her attorney, and were actually, or intended to be, communicated to the attorney.

If the communication in question does not meet these qualifications, it receives no special protection, and is treated like any other admission of a party-opponent. Additionally, evidence not otherwise privileged does not become privileged merely by marking it as such, or even by transferring it to the possession of an attorney. Suspects may not shield themselves from the fruits of valid, authorized searches by the naked claim that the items to be seized are privileged. Thus, we may easily dispose of scenario (3), above. The

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86 See 1 Gilligan & Lederer, supra note 52, § 5-42.00.
87 For example, without the client’s actual or implied consent or under circumstances other than those covered by the exceptions enumerated in MIL. R. EVID. 502(d).
88 See Weil v. Investment/Indicators, 647 F.2d 18 (9th Cir. 1981).
89 See United States v. Rhea, supra note 80. In Rhea, defense counsel were in possession of an incriminating calendar, prepared by the alleged victim, detailing sexual exploits with the accused. The calendar was among the items that the accused had taken from his step-daughter’s room after she moved out, which he subsequently gave to his defense counsel. No part of the calendar had been prepared by the accused or defense counsel for trial—the calendar was simply evidence of the accused's crimes. After consulting with their respective state bar ethics committees, and holding an ex parte meeting with the military judge, defense counsel gave the calendar to the prosecution. The incriminating calendar was held not to be attorney work-product, and was thus not covered by the attorney-client privilege. This comported with the general rule that the instrumentalities of a crime are subject to disclosure to the prosecution. Stolen items and weapons are most often the subject of such cases and nearly always fall outside of the protections of the privilege. See also 1 Gilligan and Lederer, supra note 52, § 5-53.00.
files in question were simply not attorney-client privileged materials. In fact, they did not even belong to the accused, as they were government property.  

2. Finding a Workable Standard

Military Rule of Evidence 501, the general rule of military privilege, defines a claim of privilege to include: refusal to be a witness or disclose any matter; refusal to produce any object or writing; and, the right to prevent another from being a witness or disclosing any matter or producing any object or writing which is privileged. Thus, if an adverse party improperly comes into possession of privileged information, the party holding the privilege may prevent its introduction into evidence at trial. The key, as with all inadmissible evidence, is that court-martial members must be shielded from knowledge of the evidence, and military judges must disregard it in judge-alone trials. In other words, much like other suppressed or inadmissible evidence, neither it, nor its “fruits” can be used against the accused.

Defense counsel in attorney-client privilege compromise cases may be tempted to urge the military judge to analogize the case to an immunity situation under Kastigar v. United States. Under Kastigar and the provisions of RCM 704(a)(2), a prosecutor who is aware of the substance of testimony or other information given by an accused under a grant of testimonial immunity, is barred from prosecuting the accused, and another prosecutor must prepare and try the case without any knowledge of, or access to, the evidence gathered under the grant of immunity. This is difficult, at best.

If the judge were to apply a Kastigar-type standard in attorney-client privilege compromise cases, the government would presumably have the burden to show, by clear and convincing evidence, that its case was not tainted by use of the compromised attorney-client privileged material by its use in the investigation, preparation, or trial of the case, and that the evidence to be used at trial was derived from a legitimate source wholly independent of the “compelled” evidence (the compromised communications). As most litigators know, this has proven to be an enormous, if not impossible, task in many immunity cases and would likely be so in a compromise case as well.

The defense in scenarios (1) and (2), above, might argue that, as there is no military precedent on point, the Kastigar immunity standard is as good as any. However, this is not the case. There is, in fact, substantial precedent available in Supreme Court precedents and other federal case law. There are

90 See Hawkins, supra note 85. The issue was not even raised by the defense at trial. Presumably, due to the obviously nonprivileged nature of the documents. Author Lieutenant Colonel Thompson was the special master appointed to review the materials in this case.
92 406 U.S. 441 (1972).
93 See RCM 704, Discussion.
also some helpful military cases, but none are exactly on point with our facts. Despite diligent research, no trace can be found of any court, civilian or military, trial or appellate, applying the Kastigar standard to an attorney-client privilege compromise situation. Rather, as the cases below illustrate, the accused has the burden of raising a reasonable inference of prejudice from any compromise after which, the government must convince the judge of the appropriateness of their actions by a preponderance of the evidence.

*United States v. Mansfield* is an instructive military case. At his retrial for murder, Staff Sergeant (SSgt) Mansfield argued that, since he had to attack his ineffective defense team on appeal, he was “compelled” to waive his attorney-client privilege, and was thus placed in an unfair position at his second trial. He asserted that the prosecution team obtained an unfair advantage when they became aware of many attorney-client confidences during the appeal from the accused’s first conviction. Much of the previously privileged information related to a mental responsibility defense the accused wanted to assert. The information allowed prosecutors at the second trial to cross-examine the defense expert more effectively and the accused was once again convicted and sentenced to life imprisonment.

While the cases are factually dissimilar, Staff Sergeant Mansfield found himself in substantially the same place as the accused in both scenarios (1) and (2), above: Possible attorney-client privileged material was in the hands of the government, and the accused had not “willingly” given it to them (because he believed the waiver rules unfairly forced him to sacrifice one right to protect another). Significantly, the defense in *Mansfield* analogized the situation to an immunity case and argued for application of the Kastigar standard. The Air Force Court of Military Review flatly refused to apply that standard to the attorney-client privilege issues in the case. While the issue was ultimately resolved under a theory of waiver, the case is relevant to our inquiry because there are elements of constructive waiver in the scenarios above. For example, in both scenarios (1) and (2), significantly long periods of time passed during which the defense team failed to ensure that the government was aware it possessed privileged materials. Additionally, in each case the privileged materials were not well protected by the accused and were commingled with unprivileged materials.

The Supreme Court dealt with the issue of prosecutorial intrusion into the attorney-client relationship in *Weatherford v. Bursey*. This federal civil rights case arose from a criminal prosecution, but is still valid guidance for military practitioners. In *Weatherford*, an undercover agent, who was arrested with the accused after they had ransacked a Selective Service office together, maintained his “cover” and pretended to be a co-accused. In this capacity, he

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95 *Id.*
96 *Id.* at 984.
attended meetings with the accused’s attorney, but never passed any of the
information gained in those meetings to prosecutors. He was later called as a
witness against the accused, but did not testify regarding any matters learned at
the attorney-client meetings. The accused was convicted, but later sued for
civil rights violations. The Court held that, since the intrusion was
unintentional, related to legitimate law enforcement work, and not a deliberate
attempt by the prosecution to learn about defense plans or trial strategies, the
accused’s Sixth Amendment rights were not violated, absent a showing of
prejudice. In dicta, the Court indicated that perhaps if intentional misconduct
had been involved, then a showing of prejudice would not be necessary.

*Shillinger v. Haworth* is another federal case which provides
enlightening discussion of the standard for establishing a Sixth Amendment
violation when the prosecution possesses attorney-client privileged
information. After a very thorough analysis of *Weatherford* and the leading
cases in virtually every federal circuit, the opinion articulates a rule whereby
intentional prosecution misconduct is firmly distinguished from those
intrusions that occur as an unintended consequence of otherwise legitimate law
enforcement activity. The court found that the accused’s rights had been
intentionally violated when the prosecutor gathered information from a guard
who was assigned to watch the accused while he met with his counsel. The
trial court then allowed the prosecution to make use of this evidence to cross-
examine the accused about being “coached” by his lawyer. The decision of the
court was to remand for fact-finding as to the “extent of the intrusion and the
proper remedy” should the illegally obtained evidence and any “fruits” of it be
suppressed.

The *Shillinger* court relied heavily upon *United States v. Morrison* where the Supreme Court articulated the following standard: “Cases involving
Sixth Amendment deprivations are subject to the general rule that remedies
should be tailored to the injury suffered from the constitutional violation and
should not unnecessarily infringe on competing interests.” The Court made
clear that evidence obtained through intentional and improper intrusion into a
defendant’s relationship with his attorney, as well as any “fruits of [the
prosecution’s] transgression,” must be suppressed in proceedings against
him. If the taint is pervasive enough, then prosecution by a new prosecutor
might be necessary. Dismissal of the case is reserved for only the most

98 Id. at 556-561.
99 Id. at 560-561 n.6.
100 70 F.3d 1132 (10th Cir. 1995).
101 Id. at 1142.
102 Id. at 1142.
103 Id. at 1143.
104 449 U.S. 361 (1980).
105 Id. at 366.
106 Id.
serious, extreme cases, as when the prosecution loses potentially exculpatory evidence. As we mentioned earlier, before the court reaches any of this analysis, the accused bears the burden of showing that the material in question is in fact privileged.

Not surprisingly, neither the Military Rules of Evidence nor case law suggests dismissal of charges or disqualification of trial counsel as an appropriate remedy for inadvertent exposure to attorney-client privileged evidence. Prosecutors are often aware of inadmissible, incriminating evidence and are nevertheless allowed to prosecute such cases when the evidence is found to be inadmissible. Disputes about illegally obtained confessions or illegally seized evidence often arise in criminal cases. If the evidence or its "fruits" are suppressed, that does not prevent further trial of the case by the prosecuting attorney who argued for its admission. Furthermore, when an accused makes an offer for a pretrial agreement, the prosecution knows by implication that the accused believes he is guilty of the charge(s) to which he has offered to plead guilty. While this evidence of pretrial negotiations cannot be used against the accused at trial, trial counsel is not disqualified from acting in the case merely because she is aware of the pretrial agreement offer.

3. Waiver

When privileged material does fall into the hands of the government, trial counsel should carefully consider whether the accused waived the privilege with respect to any or all of the evidence by his actions or inaction. Clearly, any material voluntarily made public by the accused (e.g., in letters to Congressman or clemency matters delivered to a convening authority) would lose their privileged nature by operation of Military Rule of Evidence 510. Additionally, there may be issues of constructive waiver based upon the way the material was stored and what actions the accused took to put the government on notice that it was in possession of privileged material after the search. Factors such as the reasonableness of the precautions taken to prevent disclosure and the promptness of the measures taken to rectify the disclosure are clearly relevant under the facts of scenarios (1) and (2).

In both scenarios, even if the information is found to be attorney-client privileged, the accused may well have waived his right to claim the privilege by failing to raise the issue at the time the evidence was seized or for over

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108 California v. Trombetta, 467 U.S. 479 (1984), notes this possibility.
110 The military equivalent of "plea bargaining." (Procedures for pretrial agreements in the Air Force are set out in AFI 51-201, supra note 73, at ¶ 6.A.).
111 MIL. R. EVID. 410 (Inadmissibility of pleas, plea discussions, and related statements).
112 See generally, RCM 1105, MCM, Part II, at II-147-148 (Matters submitted by the accused).
114 See Gray v. Bicknell, 86 F.3d 1472 (8th Cir 1996), United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994), and Mansfield, supra note 94.
twelve months after its seizure. Another important fact in scenario (2) was that only one page of the material was marked “attorney-client privilege.” The evidence was also found mixed in with an equal amount of clearly nonprivileged material, some of which did not even appear to belong to the accused. Thus, the accused did not take active steps necessary to protect the documents or put others on notice as to their nature. These facts all weigh in favor of waiver, and against a finding that there was any intentional or malicious intrusion into the attorney-client relationship.

4. Appropriate Remedies

Relying on Weatherford, the Navy-Marine Corps Court of Criminal Appeals in United States v. Tanksley established a four-part test to use in cases of government intrusion into the attorney-client relationship in violation of the Sixth Amendment. The Tanksley Court announced the prongs of that test as follows:

(1) Was evidence used at trial by the Government produced directly or indirectly by the intrusion? (2) Was the Government intrusion intentional? (3) Did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion? and (4) Was the information used in any other way to the substantial detriment of the accused?

In scenarios (1) and (2) there is no evidence that the government intended to interfere with the attorney-client relationship. In fact, in the underlying cases there was substantial evidence that as soon as the issue was made known to the government, they took extraordinary steps to prevent potential interference with the attorney-client relationship. For, example in both cases, a special assistant trial counsel was appointed specifically to examine the questioned evidence and argue against the defense motions relating to it. After the motions were decided, that counsel had no further role in the case.

The prosecution also made a very strong case that none of the privileged information was ever used in any way to advance the investigation or trial preparation of these cases. This was not difficult as the testimony at trial in both cases confirmed that the evidence had been kept by investigators for nearly a year, where it lay unnoticed by either side in the case. Neither the

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investigators nor the trial counsel used the substance of the confidential communications in the documents to advance the investigation or preparation of the case.

In the cases upon which scenarios (1) and (2) are based, the trial judge applied the *Weatherford* standard of unintentional intrusion to decide the issue. Under that test, the defense had to show actual prejudice or at least a reasonable inference of prejudice, before the prosecution had any burden to disprove taint. The defense was not able to show prejudice in either case, and in each the court found no prejudicial Sixth Amendment intrusion. However, in scenario (1), the chronology in question was incriminating and created some concern for the court. Trial counsel testified that they had never seen the document. The AFOSI agent involved testified that he may have looked at it, but that he had not used it to advance his investigation. Nevertheless, the court ruled that, to remove any perception of taint, the agent would not be able to testify about any evidence he personally developed in the case after the date upon which he first possessed the document. The government also had to show an independent source for any such evidence, if they desired to admit it in some other fashion. The agent was also barred from further assistance to the trial team during their trial preparation.

Ultimately, in scenario (2), only four out of more than one hundred documents were held to be privileged and even those privileged items were of virtually no value to the prosecution. They were not incriminating, and they were only seen by prosecutors for a very brief time before they were delivered to defense counsel. Any intrusion on the rights of the accused was very slight, unintentional, and easily remedied. In each of our scenarios the trial court found the appropriate remedy to be suppression. Neither disqualification of counsel, other than the special assistant trial counsel, nor dismissal were held to be appropriate remedies under these facts and the law.

C. Practical Guidance for Handling Compromise Cases

When confronted with a situation where alleged attorney-client privileged matter may have been compromised—typically by inadvertently falling into government hands—the following practical guidance may assist staff judge advocates, trial counsel, and investigators in containing the damage to the case or investigation and resolving the issue expeditiously. This section offers advice on methods to avoid compromise altogether and to effectively handle these situations if they occur.

1. Preventive Measures—Initial Considerations

Many attorney-client privilege compromises may be prevented by educating investigators and attorneys to be sensitive to the issue. This helps in three ways: (1) total avoidance of possession of privileged information
initially; (2) early recognition of seized privileged matter, thereby avoiding tainting the case in any significant way; and, (3) accurate recognition of what steps to take to resolve the situation without compromising the case, when a suspect declares that matter being seized is privileged.

The key to prevention is recognizing the many ways compromises may occur. A number of examples in the foregoing scenarios and cited cases are illustrative. A major area of concern is obviously the execution of searches and seizures. These can take the form or searching a person, place, or thing, but they may also involve various forms of electronic surveillance (including telephone taps, interception of email, and interception of Internet traffic). Situations, as illustrated in the Weatherford case, where an informant may be present during a confidential attorney-client meeting, should always raise a red flag for prosecutors. It is also possible that a malicious third party may come into possession of privileged matter, and send it to investigators or prosecutors. Finally, as shown in Ankeny, a defense counsel may inadvertently reveal privileged matter without the client’s permission or without realizing it is happening.

2. Preventive Measures—Searches and Seizures

The most common scenario where compromise arises in military criminal practice is in search and seizure situations. The first consideration ought to be the place or thing to be searched. For as noted, some locations or objects are much more likely than others to contain privileged information. In the military context, if the offices of an attorney, clergyman, or psychotherapist are to be searched (hopefully, a rare occurrence), many of the files and electronic media in the office may be privileged. This is especially true in the search of an attorney’s office, because most of the files will contain either client confidences or attorney work-product (discussed fully in Part IV, infra). Thus, great care should be used in these situations. In the civilian sector, the gravity and implications of such searches have been the subject of both congressional and executive concern. In fact, the Attorney General of the United States has published guidelines for federal officers who want to obtain documentary evidence from disinterested third parties (persons who are not themselves the subject of the investigation) who may also be the holders of confidential information.

117 See Coplon, supra note 25.
118 Supra note 97.
119 Supra note 67.
120 See MIL. R. EVID. 513.
121 See 28 C.F.R. § 59.4(b). These guidelines indicate that search warrants should not be used to obtain or review documentary materials which contain confidential information on patients, legal clients, or parishioners, unless other, less intrusive means would substantially jeopardize the investigation and then, only if the application for the warrant has been recommended by the local United States Attorney and approved by the appropriate Deputy Assistant Attorney

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Caution is required when searching businesses, home offices, or storage areas (including rented lockers) which appear to contain personal or business records. Particular objects warranting caution include business or corporate files and computers, private personal computers, personal digital assistants (like the hand-held PalmPilot™-type computer organizers, cellular telephone memories, magnetic media (disks, tapes, memory cards, etc.), and paper documents which are marked as privileged or which appear to relate to litigation or the legal affairs of the suspect.

If investigators know or suspect, as in the case of an attorney’s office, that they are likely to come in contact with privileged matter, they must develop a plan to handle these materials properly. There are several approaches discussed below in the subsection on handling compromises. A solid first step is to devise a plan for screening the materials and removing any privileged documents after the search. Ideally, this plan should be described in the documents used to obtain the search authorization. This makes clear that the investigators are acting in good faith, and that the government recognizes the need to protect any privileged material which is discovered.

3. When Privileged Matter Has Been Seized: “What Do We Do Now?”

If the issue has been raised, either through the assertions of the accused or defense counsel, or simply because there is reason to believe that seized material may be privileged, then quick action is imperative. If no compromise has occurred (no investigator or member of the prosecution has seen, or improperly gained knowledge of, any privileged matter), the job ahead is easier, but the procedures are very similar. When there has been a compromise, or the government is in possession of suspected privileged matter, but no one has seen it yet, the most immediate objective is to control any damage the privileged matter might do to the investigation or the case (if it is already at the trial stage). As in basic first aid, the first thing to do is stop the bleeding.

If some material has been compromised, be sure to handle it separately, so later reviewers will know precisely what was seen and by whom. Anyone who has seen the suspected privileged material should immediately write a statement detailing what they saw and under what circumstances, but should not give the statement to anyone at that point. No person who has seen such material should do further work on the case (including discussion of what they saw) until a determination as to the privileged nature of the material can be made.

General. See also, 42 U.S.C. §§ 2000aa-11(a) (2000). As discussed in Part IV, infra, an Air Force analog to this rule may be found in TJAG Policy Letter 24, which indicates that an ADC’s office may only be searched after coordination with their commander, the Commander of the Air Force Legal Services Agency.
If appropriate, defense counsel should be notified as soon as possible to begin an assessment of the material's privileged nature and materiality. While this is not a practical choice if an investigation is still ongoing, as notifying defense counsel will probably compromise the investigation, it should be considered in all other cases. When the problem arises at the trial stage, however, as in the Pinson case, it is critical to notify defense counsel of the problem at once, as trial counsel did in that case. This shows good faith on trial counsel's part and gets the defense counsel started on the path of deciding how to react and what may or may not be privileged. This gets the issue focused and helps move it toward resolution.

Have a neutral third party (who will be available to testify at trial, but who is not part of the investigation or trial team) take possession of the material and make a copy of it. This step is very important, because the integrity and chain of custody of the original documents or electronic media must be maintained. In the case of electronic media, be sure to work with properly trained personnel (preferably an AFOSI computer crimes investigator) to make sure the original evidence is not damaged or altered. With paper documents, any neutral person may make the copies and seal the documents. A paralegal not currently assigned to military justice duties is an excellent choice.

4. Using Special Masters and Special Assistant Trial Counsel

As the next step, have the Special Court-Martial Convening Authority (SpCM) appoint an independent reviewing officer (usually called a "special master") to review the material. This person should be an attorney, preferably with experience or training in privileges under military law. The more neutral and detached this officer is the better. Using criteria similar to that for selecting an Article 32, UCMJ investigating officer is an excellent approach. However, this is not required, as long as it is understood that the attorney selected will not be able to prosecute the case later (other than to argue motions involving the alleged privileged material, as in the scenarios above). A civilian attorney may act as special master, but this may result in duplication of effort if a military attorney must later be appointed to argue the motions as just mentioned.

Store the sealed original documents in an evidence locker, clearly marked: "Potential Attorney-Client Privileged Material—Do Not Open Without Authorization of the [SpCM] Staff Judge Advocate." The sealed copies should be placed in another envelope with the special master's appointment letter. Attachments to the letter should include: (1) statements from anyone who has seen the documents; (2) information regarding the

122 Supra note 84.
circumstances under which they were obtained (including copies of any search
authorizations used); and, (3) any statements or information regarding an
assertion of privilege by the accused concerning the documents.

Deliver the envelope with the copies and other information to the
special master with a list of duties and instructions contained in the
appointment letter, along with a due date by which to complete his review or
by which to request an extension. Be sure to instruct him that his final report
should not reveal the contents of any privileged communication, and that any
documents he believes are privileged should be sealed, clearly marked, and
attached to his report, along with those that he believes are clearly not
privileged, which should be sealed and separately attached. If there are
defense counsel involved in the case, the special master may wish to contact
them and attempt to have them identify any document believed to be
privileged. Such actions can go a long way toward locating and narrowing the
list of documents truly falling under a claim of privilege.

If the special master is highly confident that none of the material is
privileged, then trial counsel may use it, and litigate its confidential nature at
trial if raised by the accused. Of course, if the special master’s determination
is later found to be incorrect by the military judge, then trial counsel may be
disqualified, and the case may even be too tainted to proceed to trial, if
irreparable prejudice has occurred (very unlikely). However, if the special
master finds that there is some presumptively privileged material, neither
investigators nor trial counsel should be allowed access to this material.

If motions regarding the government’s use or possession of this
material are raised by the defense at trial, then a special assistant trial counsel
(SATC) should be appointed to litigate these issues. The SATC, and any
other attorneys, investigators, or support personnel assigned to assist him and
given access to the privileged material, will then become part of the “taint
team,” which will likely be disqualified from further participation in the case,
once the privilege issues have been litigated. This assumes, of course, that the
materials in question are found to be privileged. As mentioned, there is no
prohibition on using the special master as the SATC, but if there is any
possibility that the special master may need to testify about interactions he had
with counsel and others during his review of the evidence, then a different
attorney should be appointed as the SATC.

If the government knows from the start that issues of privilege will be
involved in the case (as when a defense counsel’s office is searched) then
forming a taint team from the start may be advisable. This team would be
composed of investigators, attorneys, and paralegals assigned to conduct the
search and work the privilege issues exclusively from day-one. The taint team

124 Author Lieutenant Colonel Thompson was the special assistant trial counsel in both
Sprague, supra note 83 and Pinson, supra note 84. A civilian special master was also
appointed during Sprague. In Pinson, the issue developed too quickly and unexpectedly to use
a special master, as the privileged documents were discovered on the eve of trial.

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can then pass non-privileged information to the investigators and prosecutors in the case. If this procedure is followed there is no need to appoint a special master, as the taint team fulfills this function. This more aggressive day-one taint team approach is favored by United States Attorneys, but has drawn some criticism from federal courts in civilian cases.125

5. Computer Seizures—"Handle With Care"

As mentioned at the beginning of the article, in our technology-rich society, investigators searching for incriminating documents or photographs are as likely to seize a personal computer and its storage media as they were to seize the “papers and effects” of yore. These electronic records are typically not examined until after they are seized. Thus, privileged matters may not be readily evident upon seizure. Cases involving computer seizures require special handling. A single computer’s hard drive may hold literally millions of files so review of such evidence can be excruciating and very time consuming. It is also extremely easy to alter or damage such evidence. A trained computer crime investigator, working in tandem with a special master or taint team is critical in cases where the seized media may contain privileged information.

The use of special masters in such cases has been approved in a number of federal cases. For example, in United States v. Abbell,126 a case involving the search of the accused’s law office, the court approved the appointment of a special master to decide privilege claims related to the electronic documents seized. The court required that the computer-generated and stored data retrieved in the search be searched using information retrieval software and a list of search terms, and that the search program be implemented “without resort to reviewing each computer stored document in order to cull those documents deemed responsive to the search.”127 Copies of the documents retrieved by this additional electronic search were then provided to the special master and defense counsel to allow disposition of privilege issues prior to their examination by the prosecution team.128

125 See United States v. Neill, 952 F. Supp. 834, 841 (D.D.C. 1997) and United States v. Hunter, 13 F. Supp. 2d 574, 583 n.2 (D. Vt. 1998) (review by a magistrate judge or special master “may be preferable” to using a taint team) (citing In re Search Warrant, 153 F.R.D. 55, 59 (S.D.N.Y. 1994)). Although no clear standard has emerged, the federal courts have typically held that evidence screened by a taint team will be admissible only if the government shows that its procedures adequately protected the accused's right and no prejudice occurred. See, e.g., Neill at 840-42 and Hunter at 583.
127 Id. at 521.
128 This technique was used by the civilian special master in Sprague, supra note 83, and did locate several pieces of privileged correspondence, but the search terms used failed to locate the privileged materials which later surfaced and were the subject of litigation in the case because it was not readily apparent that those documents had been created at an attorney's request. See also Hunter, supra note 125, but cf. Black v. United States, 172 F.R.D. 511, 514
As mentioned above, unless trial counsel is very confident that the materials in question are not privileged or that the privilege has been waived, then the prudent course is to appoint a SATC to litigate the privilege issues. While the SATC is preparing the case, she should not share offices with trial counsel and must scrupulously protect all alleged privileged material from disclosure to the trial team, the SJA, or anyone else not entitled to know of their contents. As a matter of appearances, and to avoid inadvertent disclosures, the SATC should also avoid most, if not all, social contact with trial counsel until the conclusion of the trial.

Preparation and argument of a successful privilege motion requires a detailed knowledge of privilege law, careful examination of the evidence (to determine whether it really is privileged), and an exhaustive search for witnesses who may provide the basis for arguments that, for example: (1) there has been a waiver of the privilege (such as when the accused reveals the same information to others in a non-privileged setting); (2) the information was never privileged to begin with (e.g., no attorney-client relationship or information intended for communication to a third party, etc.); or, (3) a lack of prejudice or taint to the government's case (such as when the information was not seen or used in the investigation or trial of the case). Privilege motions therefore often involve one side or the other calling a host of non-traditional witnesses to the stand.

Witnesses on the motion may include, for example, the trial counsel (to testify as to use and taint); trial defense counsel, former defense counsel, civilian counsel, and the accused (to establish the privileged nature of the information, and to counter waiver arguments); Article 32 investigating officers (to testify as to whether they were exposed to privileged information); investigators, paralegals, and other supporting witnesses; and the SJA and special master (to explain how the compromise case was handled, and who may have seen the privileged materials involved). As with all good trial preparation, detailed interviews are critical, but the SATC must be cautious (especially with trial counsel or investigators) not to reveal any privileged material to which trial counsel or agents may not have been exposed previously. Thus, use of non-leading questions regarding what was seen and how it has been used (if at all) in case preparation is the best approach.

(S.D. Fla. 1997) (ordering an alternative protocol for judicial resolution of privilege issues after recognizing that the special master procedure established in Abbell contributed to a thirty-month delay in the case). There are also a number of useful government publications available to prosecutors for handling cases involving computer crime. See generally, COMPUTER CRIME INVESTIGATOR'S HANDBOOK, HEADQUARTERS, AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS, OFFICE OF THE STAFF JUDGE ADVOCATE (2000) and SEARCHING AND SEIZING COMPUTERS, UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, COMPUTER CRIME INTELLECTUAL PROPERTY SECTION, http://www.cybercrime.gov/searching.html#CrmCode.
Since waiver of the privilege is always a potential issue in these cases, the SATC should search hard for friends and associates of the accused, and find out whether he revealed any of the privileged information (as is often the case) in a non-privileged setting. As we have seen, if there has been an actual compromise, then a major issue will be disproving the existence of taint. Depending upon the approach the court takes, this may involve showing an independent source for each piece of evidence in the case. The SATC should prepare for this eventuality as best she can by becoming intimately familiar with all aspects of the investigation and preparation of the case prior to and after the compromise of the privileged material.

Finally, after the privilege motions are litigated and ruled upon, if any evidence is found to be privileged, the SATC should ask the court for detailed findings and instructions regarding what may be given to the trial counsel, what should be destroyed, and what is to be sealed and attached to the record of trial. In these cases where the SATC is disqualified from further participation, she should also cut off further interaction with the trial team until after the conclusion of the trial. Applying these hints, and some common sense, cases of inadvertent attorney-client compromise may be successfully salvaged in most instances.

IV. PROTECTING A CLIENT'S IDENTITY, WHEREABOUTS, AND THE FACT OF CONSULTATION—ETHICAL, EVIDENTIARY, AND POLICY GROUNDS

"One of our real successes has been the Area Defense Counsel program, now in existence for more than five years. No one told the Air Force to do it—the Chief of Staff decided the defense function should be independent in fact and in appearance."129

A. General Considerations

Consider the following scenarios: (1) The prosecution in a court-martial creates a conflict of interest between an ADC and his client by naming the ADC as a prosecution witness and additionally asserting that the ADC is not a "defense counsel" under the Sixth Amendment. Trial counsel wants to use the ADC's testimony regarding the whereabouts of the accused on a given date to help establish the elements of an AWOL offense; and, (2) A wing SJA considers an ADC's appointment schedule open to command review and advises commanders and first sergeants that the ADC is required to tell them if one of their squadron personnel has visited the ADC office, including the date and time of the client's visit.

These scenarios go to the heart of the policy issue of the independence of the ADC function in the Air Force, and raise legal and ethical questions

129 Letter from HQ USAF/JA (5 March 1980) (copy on file with author (Captain Kastenberg)).
about the extent to which the attorney-client privilege encompasses information regarding a client's identity, dates of consultations with counsel, and whereabouts at given times. Of course, there comes a point in most representations when the defense counsel will need to seek his client's approval to reveal the fact of the representation. This can be critical to protecting many of the client's rights. For example, defense counsel will usually want to place the government on notice that an accused is a "represented person," and that counsel must be notified before any interrogation of his client is attempted.\footnote{See, e.g., MIL. R. EVID. 305(e).}

However, when such disclosures are compelled before the defense counsel or his client are prepared to make them in the interests of the client, issues of effective assistance of counsel and conflict of interest come into play. We believe that, absent a court order compelling counsel to testify against his client,\footnote{See, e.g., United States v. Lewis, 38 M.J. 501 (A.C.M.R. 1993), aff'd, 42 M.J. 1 (1995) (Trial defense counsel could not invoke attorney-client privilege to refuse to give information regarding allegations of ineffective representation, because the Army Rules of Professional Conduct permit disclosure when compelled by law, as in this case where the appellate court ordered defense counsel to provide affidavits in response to the accused's allegations).} he has ethical, evidentiary, and policy grounds to resist disclosing this information. The following discussion explores each of these grounds in detail.

**B. The Ethical Duty to Protect Information Relating to Representation**

The purpose of a court martial is truth-finding within the bounds of the law. The military courts recognize a hierarchical scheme of rights, duties, and obligations in our criminal practice. The highest source of these is the Constitution, followed by the UCMJ, MCM, Department of Defense regulations, service regulations and policies, ethical rules, and the common law.\footnote{See, e.g., United States v. Lewis, 38 M.J. 501 (A.C.M.R. 1993), aff'd, 42 M.J. 1 (1995) (Trial defense counsel could not invoke attorney-client privilege to refuse to give information regarding allegations of ineffective representation, because the Army Rules of Professional Conduct permit disclosure when compelled by law, as in this case where the appellate court ordered defense counsel to provide affidavits in response to the accused's allegations).} Implicit in this scheme is that while a lower source in the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with the higher source.\footnote{See, e.g., United States v. Romano, 46 M.J. 269, 274 (1997). \textit{See also}, S.Rep. No 486, 81\textsuperscript{st} Cong., 1\textsuperscript{st} Sess. 32 (1949) and United States v. Lopez, 35 M.J. 35, 39 (C.M.A. 1992).} In the daily practice of a military defense counsel, this scheme must be extended to non-criminal cases such as nonjudicial punishment under Article 15, UCMJ,\footnote{Romano, 46 M.J. at 274.} and adverse administrative actions.\footnote{10 U.S.C. § 815 (2000).} The Air Force Rules of Professional Conduct are an excellent example of an agency-level policy which creates a greater duty to maintain confidentiality than that available under the Military Rules of Evidence or case law.

\footnote{Examples include: administrative discharge actions, administrative grade reductions, selective reenlistment actions, boards of inquiry, medical evaluation boards, flying evaluation boards, de-credentialing actions, etc.}
Thus, information held by a defense counsel regarding a client's identity, whereabouts, and the fact that they have consulted an attorney must be kept confidential under Air Force Rule 1.6's attorney-client ethical privilege, which is very broad in scope—covering not just confidential communications, but any "information relating to the representation." While there are exceptions to Air Force Rule 1.6, enumerated above, informing a commander about an ADC office visit by a member of her unit is not among these exceptions. By the 1970's most state ethics committees agreed that a client's identity was protected confidential information under ethical rules.

Additionally, if the ADC's calendar is not kept confidential—through testimony, revealed attorney work-product, or unwitting investigative assistance—he may well act contrary to the interests of his client, and even be called as a witness against him. In the military context, where a point of pride is maintaining both the perception and the reality of an ADC's independence, the case for protecting an accused's whereabouts and identity (at least initially) is even stronger. The Air Force Rules and Standards are largely silent on the question of when a defense counsel may reveal the whereabouts of his client. However, an exception was recently added which emphasizes that a defense counsel may reveal information to assist authorities in locating her client in order to prevent the client's suicide. Significantly, other than in this Air Force Standard, the rules do not otherwise require an attorney to report the whereabouts of her client. By this silence, one presumes the drafters left such language out intentionally, as it could easily have been included, if the intent was to allow or require defense counsel to assist the government in locating and apprehending an accused who was merely AWOL.

Significantly, in United States v. Rogers, the Air Force Court of Criminal Appeals recently acknowledged a defense counsel's ethical obligations, under Air Force Rule 1.6, not to reveal information to commanders about the visits of clients to the ADC office. Senior Airman Rogers was a client who "did not return promptly from his appointments with the defense counsel." Defense counsel and his staff refused to confirm for command the presence of Senior Airman Rogers at his appointments. The court stated: "We understand that normally '[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . . .' Air Force Rules of Professional Conduct Rules 1.6(a) (10 Feb. 98). Thus, the defense counsel may have believed he had a duty not to answer the commander's query." The court then proceeds to specify the

136 *Air Force Rules*, ¶ 1.6, *supra* note 72 (emphasis added).
138 See *Air Force Standard* 4-3.7(e)(iii) and (iv).
practical consequence of this refusal, but makes no express or implied judgment that defense counsel's belief in this regard was incorrect.140

C. The Evidentiary Privilege

While there is no military precedent under Military Rule of Evidence 502 on the issue of disclosing a client's whereabouts or identity, a number of federal and state cases have held that the evidentiary privilege protects communications regarding the identity or whereabouts of a client, when this information is the last link in the chain of evidence leading to the conclusion that the client has committed the crime at issue or when revelation of the client's identity would simultaneously reveal confidential communications between lawyer and client.141 The ABA's position is that in certain cases, the client's identity is the most critical part of the attorney's representation of a client,142 but has also expressed the view that the issue of privilege with respect to a client's whereabouts remains unsettled.143 Likewise, many state and federal cases have held that this information is not privileged in many cases.144 However, there is a clear distinction between what a defense counsel must keep confidential under ethical rules, and information that may be compelled in court, in the interest of justice.

Nevertheless, the matter of whether a client's identity is privileged remains far from settled.145 Although an accused's whereabouts may not, in

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140 Id. at 818.
141 See, e.g., In re Grand Jury Proceedings, 946 F.2d 746 (11th Cir. 1991) and Brett v. Berkowitz, 706 A.2d 509 (Del. 1998).
143 Id. at § 55:309-312 and see generally, ABA Informal Opinion 1453, Lawyer's Duty to Client and Court (10 April 1980) (noting advising client to surrender is commendable, but no further action compelled by Model Code) and ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, ETHICS OPINIONS 1986-1990 § 901:3012, quoting Committee on Professional Ethics of the Illinois State Bar Association, Missing Client: Confidentiality, Opinion 89-13 (4/9/90) (noting that a "lawyer whose client has disappeared may reveal this fact when requesting a continuance at a status call only if required by court order or the law to do so.").

Such cases have stirred up great public debate about the morality of this application in the confidentiality principle where criminal investigations or families of victims urge disclosure. At the heart of the matter is whether the client's name qualifies as a confidence. . . . For the lawyer, these situations raise a difficult conflict between the duty to reveal information requested by a court and the duty to protect the client's identity as a confidence. . . .

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and of itself, be a communication, information relating to the client's whereabouts usually comes in the form of a communication between the accused and attorney, and it is certainly information relating to the representation. Whether the courts afford protection to this information ultimately depends upon the facts of each case. The courts must weigh a number of constitutional considerations in deciding whether such information is protected by the evidentiary privilege. For example, in United States v. Schell, the United States Court of Appeals for the Fourth Circuit held that both due process and the attorney-client privilege are violated when an attorney represents a client and then participates in the prosecution of that client. Additionally, the Sixth Amendment guarantee to conflict-free counsel comes into question any time a defense counsel is asked to divulge a client's whereabouts.

### I. Sixth Amendment Issues—Generally

Any notion that ADCs are not defense counsel for the purposes of the Sixth Amendment should be dispelled by the holding of the United States Court of Appeals for the Armed Forces in United States v. Russell. Several state courts note while the attorney-client privilege is not per se of constitutional origin, the privilege nonetheless has important constitutional implications. That such non-enumerated rights enjoy equal standing with enumerated rights is a common feature in the American legal landscape.

In Richmond Newspapers, Inc. v. Virginia, the Supreme Court held certain unarticulated rights implicit in the enumerated guarantees. Clearly, whether the attorney is right or wrong, the chances are he will be cited for contempt.

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Id. at § 308 (internal citations and quotations omitted).

146 775 F.2d 559 (4th Cir. 1985).

147 Id. at 565-566.

148 48 M.J. 139, 140 (1998) (noting that the Sixth Amendment guarantees for pretrial assistance of counsel apply to all military accused) and United States v. Fluellen, 40 M.J. 96, 98 (1994) (noting that the Sixth Amendment guarantees for trial and post trial effective assistance of counsel apply to all military accused).


151 Id. The court noted:

The rights of association and privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel appear nowhere in the Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.
where the prosecution denies an accused the fullest scope of the attorney-client privilege, the accused's Sixth Amendment rights are violated because he or she is deprived of an active advocate.\textsuperscript{152}

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."\textsuperscript{153} The Sixth Amendment does not, however, directly address the question of conflicted counsel nor does it address whether the United States is responsible for supplying a counsel to an indigent accused. The latter point was solved in the litany of cases beginning with \textit{Gideon v. Wainright}.\textsuperscript{154} But what of the question of conflict-free counsel?

Even before \textit{Gideon}, the Supreme Court had held that "[t]he 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired,"\textsuperscript{155} In 1978, as well, the Supreme Court examined issues as to whether and to what extent every defendant may waive their "constitutional right to the assistance of an attorney unhindered by a conflict of interests" in \textit{United States v. Holloway}.\textsuperscript{156} A longstanding doctrine holds that the right of conflict-free counsel is a fundamental procedural right of any accused. In \textit{Penson v. Ohio}, the Court held that "of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have."\textsuperscript{157} Further guidance is found in the United States Court of Appeals for the Ninth Circuit's decision in \textit{United States v. Patricia Hearst}.\textsuperscript{158}

\textbf{2. Sixth Amendment Issues—The Right to Conflict-Free Counsel}

In \textit{Hearst}, noted criminal defense attorney, F. Lee Bailey, signed a book contract with G.P. Putnam & Co.\textsuperscript{159} In an effort to shield himself from

\begin{flushright}
\textit{Id.}
\end{flushright}

\textsuperscript{152} See, e.g., \textit{Anders v. California}, 386 U.S. 738, 744 (1967).

\textsuperscript{153} \textit{U.S. Const. Amend VI.}

\textsuperscript{154} 372 U.S. 335 (1963).

\textsuperscript{155} \textit{Glasser v. United States}, 315 U.S. 60 (1942).

\textsuperscript{156} 435 U.S. 475, 483 n.5 (1978).

\textsuperscript{157} 488 U.S. 75, 84 (1988). \textit{See also} \textit{Gideon v. Wainright}, 372 U.S. 335, 344 (1963) where the Court noted:

\begin{quote}
The right of one charged with a crime may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.
\end{quote}

\begin{flushright}
\textit{Id.}
\end{flushright}

\textsuperscript{158} 638 F.2d 1190 (9th Cir. 1980).

\textsuperscript{159} \textit{Id.} at 1191. (G.P. Putnam & Co. is a New York based publishing firm.).
ethics charges, Bailey’s contract was contingent upon Hearst’s approval.\textsuperscript{160} Hearst eventually gave approval to Bailey as part of a fee arrangement for an appeal if one became necessary.\textsuperscript{161} However, Hearst later declared she was forced into signing Bailey’s book rights as part of the fee arrangement for Bailey’s trial work.\textsuperscript{162}

Hearst alleged Bailey failed to seek a continuance because public interest would eventually cool to her trial, and other would-be authors would get a “head start” on the increasingly media-famous attorney.\textsuperscript{163} She further charged Bailey’s trial tactics, including encouraging Hearst to testify created a public record unconstrained by the attorney-client confidentiality rules.\textsuperscript{164} Hearst finally accused Bailey of refusing to seek a change of venue outside of San Francisco because that city afforded optimum media exposure.\textsuperscript{165} Both the United States and Bailey denied his book interest played any role in his tactical decisions and the federal district court denied Hearst a hearing on the issue.\textsuperscript{166} The United States Court of Appeals for the Ninth Circuit remanded on the basis that Bailey might have breached the attorney-client relationship in becoming a conflicted counsel.\textsuperscript{167} It is noteworthy that the court did \textit{not} definitively find that Bailey had become conflicted, merely that his actions raised the specter of a conflicted counsel.

Shortly after the district court trial in \textit{Hearst}, but before the case came to the Ninth Circuit, the Supreme Court decided \textit{Cuyler v. Sullivan}.\textsuperscript{168} In \textit{Cuyler}, the Court held that where a defense counsel is in a conflict of interest with his client, the conflicted defense counsel is not a counsel within the Sixth Amendment. The Ninth Circuit in \textit{Hearst}, (with the benefit of \textit{Cuyler}) held that differentiating conflicts are immaterial to an individual’s right to a conflict-free counsel. That is, whether a defense counsel breaches ABA Rules by signing a book contract, represents multiple adverse clients, or is forced to testify against the client, the salient point is that the counsel falls outside the Sixth Amendment’s requirements for effective assistance of counsel.

Both \textit{Hearst} and \textit{Cuyler} stand for the proposition that the potential for conflicted counsel gives rise to a Sixth Amendment violation. If, as a matter of policy, ADCs are forced to open their schedules for command review, answer questions as to whether and when certain clients visited the office and what assistance they received; then, claims of conflict of interest and of interference with the attorney-client relationship will be rife.

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 1192.
\textsuperscript{163} \textit{Id.} at 1193.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Id.}

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 1192.
\textsuperscript{163} \textit{Id.} at 1193.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{Id}.

\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} at 1192.
\textsuperscript{163} \textit{Id.} at 1193.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.}

\textsuperscript{168} 446 U.S. 335, 343-344 (1980).
The unarticulated constitutional right to conflict-free counsel has long been recognized by military law. The Court of Military Appeals has steadfastly held that, under both the Sixth Amendment and Article 27, UCMJ, a military accused is guaranteed effective assistance of counsel at the pretrial stage, during the trial, and post-trial.\footnote{10 U.S.C. § 827 (2000).}

3. Fifth Amendment Issues—Generally

As noted above, in addition to its Sixth Amendment implications, the attorney-client privilege also helps preserve the right against self-incrimination enumerated in the Fifth Amendment. The Fifth Amendment provides, in pertinent part: “No person . . . shall be compelled in any criminal case to be a witness against himself.” If a defense counsel is forced to divulge information regarding his appointments with clients, it is not difficult to envision a situation where the government may be able to use that information to identify suspects in unsolved crimes, show consciousness of guilt, or even generate new charges against the accused for AWOL or false official statements\footnote{See generally, United States v. Fluellen, 40 M.J. 96, 98 (C.M.A. 1994) and United States v. Carter, 40 M.J. 102 (C.M.A. 1994).} (such as when a client says he was at the ADC office, when in fact he was not). If the defense counsel is then called to be a witness against his client on these charges, he would be providing testimony to incriminate his own client. Such action also creates a conflict situation, forcing defense counsel to withdraw from the case.

4. Fifth Amendment Issues—The Work-Product Doctrine

The work-product doctrine—through the attorney-client privilege—has been held to bar prosecution discovery of notes, statements, or documents relating to defense counsel’s case preparation.\footnote{10 U.S.C. § 907 (2000), art. 107, UCMJ.} The practice of prosecutors delving into a defense counsel’s investigation and preparation of a case, interviews of witnesses, and defense strategic decisions has been found intolerable in state and federal courts. For example, New York’s Court of Appeals in People v. Belge,\footnote{See, e.g., Spears v. State, 401 N.E.2d 331 (Ind. 1980), reh’g, 403 N.E.2d 828 (Ind. 1981), and Hergenrother v. State, 425 N.E.2d 225 (Ind. App. 1981). Note that in all three of these decisions, the courts found harmless error in the trial court’s erroneous requirement that the defense produce witness statements. See also, e.g., Richardson v. District Court of Eighth Judicial Dist., 632 P.2d 595 (Colo. 1981) and State v. Sandstrom, 595 P.2d 324 (Kan. 1979).} held that the work-product privilege is essential if the accused is to maintain his Fifth Amendment protections against self-incrimination. Interestingly, in Belge, the court looked to the attorney-client

\footnote{169 83 Misc. 2d 186 (Onondaga County Court 1975), aff’d mem., 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), aff’d per curiam, 359 N.E.2d 377 (N.Y. 1976).}
privilege as well as examining the applicability of the work-product doctrine to the right against self-incrimination. In United States v. Nobles\textsuperscript{174} the Supreme Court of the United States noted that, “although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital.”\textsuperscript{175} The court further found the privilege extended beyond the attorney’s work-product to “those who work with him to prepare the defense.”\textsuperscript{176} In a military setting, this would include the defense paralegal, any defense investigators, and civilian counsel and their staff.

For example, in People v. Sanders\textsuperscript{177} and People v. Collie,\textsuperscript{178} the California Court of Appeals held that the prosecution was not entitled to discover information gleaned from defense investigator interviews and notes obtained from defense witnesses. California courts, in both McMullen v. Superior Court of Los Angeles County\textsuperscript{179} and in Jones v. Superior Court of Nevada County\textsuperscript{180} also held that the work-product privilege barred prosecutorial discovery of the names and opinions of persons contacted or employed by the accused in violation of the right against self-incrimination. The McMullen Court reasoned that, inter alia, the defense was not required to supply the prosecution with names and opinions of persons who could testify against the accused’s affirmative defenses.\textsuperscript{181} Finally, in Ruiz v. Superior Court of San Francisco, the court held the work-product doctrine prohibited the prosecution from discovering statements, locations, and identities of defense witnesses interviewed, but who would not be testifying.\textsuperscript{182} Reasoning that the accused’s defense counsel could also fit into this non-testifying witness construct, the California court arguably would protect that relationship, as well. A review of case law in this area indicates that military courts frequently avail themselves of federal and state decisions regarding attorney-client privilege issues to perhaps a greater degree than in any other subject matter.

5. The Work-Product Doctrine in Military Law

As noted earlier, the seminal case which recognizes the attorney work-product doctrine under military law is United States v. Romano, which held that attorney work-product is a privileged communication, but did not

\textsuperscript{174} 422 U.S. 225 (1975).
\textsuperscript{175} Id. at 238.
\textsuperscript{176} Id. at 240.
\textsuperscript{177} 905 P.2d 420, 443 (Cal. Ct. App. 1995).
\textsuperscript{179} 85 Cal Rptr. 729 (Cal. Ct. App. 1970).
\textsuperscript{180} 372 P.2d 919 (Cal. 1962).
\textsuperscript{181} See Jones, 372 P.2d at 922.
expressly define the parameters of the privilege.\textsuperscript{183} \textit{United States v. Rhea}\textsuperscript{184} and \textit{United States v. Province}\textsuperscript{185} further define the parameters of the military work-product privilege.

The facts of \textit{Rhea} indicate that Master Sergeant (MSgt) Robert Rhea, while stationed in Germany, pressured his teenage step-daughter to engage in sexual intercourse on numerous occasions.\textsuperscript{186} This occurred over a two-year period and ended only when the step-daughter became engaged to wed another.\textsuperscript{187} MSgt Rhea was tried for sexual abuse of his step-daughter and was convicted at a general court-martial.\textsuperscript{188} The crucial evidence against him was his step-daughter’s calendar, which dated their numerous sexual episodes. The calendar was not originally in the possession of the prosecution. It was found by MSgt Rhea in his daughter’s room and given, along with other materials, to

\textsuperscript{183} Romano, 46 M.J. 269, supra note 59. The court’s opinion contains an excellent account of the history and purposes of the work-product privilege:

Since the seminal case on work-product privilege, Hickman v. Taylor, 329 U.S. 495 (1947), a civil case, the work-product rules have been applied to criminal cases. See, e.g., Goldberg v. United States, 425 U.S. 94 (1976) (application of the work-product privilege to the statement of witnesses) and United States v. Nobles, 422 U.S. 225 (1975). The theory behind the work-product rule is that, after an attorney has spent time preparing the case, assembling and sorting the facts, deriving a theory and theme for the case, and planning the strategy to be employed, the opponent, without some overriding interests, may not needlessly interfere with the thought processes used in creating the documents. Nobles, 422 U.S. at 238. As the Court noted in Nobles: “At its core, the work-product doctrine shelters the mental processes of the attorney...” Id.

Whatever the outer boundaries of the rule, it certainly applies to memoranda which set forth the attorney’s theory and theme of the case. National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Because of the broad disclosure rules in the military, many of the privilege issues presented to other courts have been answered. For example, RCM 701(a)(1)(A) and (C), Manual, supra, require that trial counsel reveal witness statements. In any event, it is questionable whether witness statements reveal the attorney’s thought processes in such detail as to require protection. Foremost, open discovery avoids unnecessary trials and enables an accused to make informed decisions as to his or her options. Absent a disclosure requirement, documents specifically compiled and prepared with a reasonable anticipation of trial will be encompassed within the privilege if they encapsulate the attorney’s thought processes.

\textit{Id.} at 274–275 (internal citations omitted).

\textsuperscript{184} Rhea, supra note 80.


\textsuperscript{186} Rhea, supra note 80, at 993. His step-daughter was approximately seventeen years old when the intercourse began.

\textsuperscript{187} Id.

\textsuperscript{188} Id. at 991. MSgt Rhea’s adjudged and approved sentence was sentenced to a bad conduct discharge, five years in confinement, total forfeitures, and reduction to airman basic.

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his defense counsel, who did not recognize its incriminating nature. Once
the significance of the calendar became clear, and defense counsel discovered
that they were in possession of it, they became concerned that they had
evidence of a crime. They consulted their respective state licensing
agencies. They also requested an ex parte hearing with the military judge. The military judge ordered the two defense counsel to turn the calendar over to
the prosecution. After the defense counsel complied with the judge’s ruling
MSgt Rhea dismissed his counsel and was assigned new defense counsel. MSgt Rhea then filed an Extraordinary Writ with the Air Force Court of
Military Review, seeking to suppress the prosecution’s introduction of the
calendar into evidence—the writ was denied. On appeal, MSgt Rhea argued
he was denied effective assistance of counsel when his original defense counsel sought an ex parte hearing with the judge and complied with his order
to turn the calendar over to the prosecution.

On appeal, the Air Force Court of Military Review found that the
calendar was not attorney work-product within the meaning of the Fifth
Amendment. The notations on the calendar were made by a prospective
witness, not the defense counsel or the accused. Moreover, the court held
that defense counsel has an obligation to the court to divulge the existence of a
criminal instrument. Indeed, the court commended the conduct of defense
counsel in doing so.

The Court of Military Appeals affirmed the lower court’s decision
and cautioned defense counsel in future similar situations to adhere to such an

189 Id. at 994. The calendar came into the defense counsel’s possession after the defense
counsel instructed MSgt Rhea to gather any “books, letters, papers, or other sorts of things,”
the step-daughter had left behind for establishing a motive to fabricate allegations against
MSgt Rhea. Id.
190 Id.
191 Id. The ex parte hearing was held at the suggestion of the state bars in question.
192 Id.
193 Id. Additionally, the original military judge recused himself from the case and a new judge
was appointed.
194 Id. (Writ denied sub nom. Rhea v. Starr, 26 M.J. 683 (A.F.C.M.R. 1988)).
195 Id.
196 Id. at 996. The court held that “[t]he attorney-client privilege prevents a lawyer from being
compelled to produce a client’s document which pre-dates the attorney-client relationship only
if the client himself would be privileged from producing the document. Id. The court relied on
State ex rel. Hyder v. Superior Court of Maricopa County, 625 P.2d 316 (Ariz. 1981),
McCORMICK’S HANDBOOK ON THE LAW OF EVIDENCE, ch. 10 § 89, at 184-85 (2nd ed. 1972);
and WIGMORE, EVIDENCE (McNaughton Rev. 1961) § 2307.
197 The court further noted not all papers in an attorney’s possession are immune under the
privilege and writings not otherwise privileged do not become so by merely giving them to an
attorney. See, e.g., Fisher v. United States, 425 U.S. 391, 396 (1976) and In re Ryder, 381
F.2d 713 (4th Cir. 1967).
198 Rhea, supra note 80, at 996.
199 Id. at 995.
ethical course of representation.\textsuperscript{201} The court favorably noted that while MSgt Rhea's defense counsel complied with the military judge's order, they properly protected the interests of their client by not communicating to the prosecution the origins of the calendar.\textsuperscript{202} Thus, the defense counsel did not authenticate the calendar or in any way advance the prosecution's case beyond complying with the ethical mandates imposed by their state bars and the orders of the military judge.

Three fundamental rules emerged from \textit{Rhea}: (1) Instrumentalities of a crime are generally not protected by the privilege, (2) attorney work-product must originate from the attorney or the client, at the attorney's direction, and (3) where a defense counsel believes he or she is in possession of a criminal instrument, the defense counsel should do nothing more than notify the military judge via ex parte hearing and not assist the prosecution in any way with their case preparation. There is nothing in the facts or holding of \textit{Rhea} which addresses records kept by the defense counsel, such as his appointment calendar. If the defense counsel's calendar contains information regarding representation and case preparation (such as the dates and times of witness interviews and client meetings), there is no reason to believe the holding in \textit{Rhea} would exclude those records from the protections of the work-product privilege.

The second work-product case, \textit{United States v. Province},\textsuperscript{203} is a Navy-Marine Corps Court of Criminal Appeals case. Marine Private First Class (PFC) Richard D. Province II was convicted on 9 April 1992 of two unauthorized absences pursuant to his pleas before a military judge sitting alone.\textsuperscript{204} Three years later, PFC Province asserted that his trial defense counsel was ineffective by making an "unauthorized disclosure" of information to the prosecution. Specifically, trial defense counsel discovered a copy of PFC Province's "straggler's orders" (which he had received from his client) and provided them to the prosecution.\textsuperscript{205} The "straggler's orders" had been

\begin{footnotes}
\item[201] \textit{Id.} at 419. The court held, "defense counsel [are] not free to tell the prosecution how the calendar came into their possession, for to do so would violate [an accused's] privilege that his lawyer reveal the "communication" implicit in the act of bringing the calendar to the lawyer's office." \textit{Id.}
\item[202] \textit{Id.}
\item[203] \textit{Province}, 42 M.J. 821, supra note 185.
\item[204] \textit{Id.} at 823. The accused had been AWOL for five years, including the periods of Operations DESERT SHIELD and DESERT STORM; he was sentenced to a bad conduct discharge, confinement for ninety days, forfeiture of $100.00 pay per month for four months, and reduction to the lowest enlisted grade. \textit{Id.}
\item[205] \textit{Id.} Defense counsel explained, via affidavit, that his purpose in giving the trial counsel copies of the "straggler's orders" was two-fold: First, after consulting his state ethics rules, he believed he had a duty to release these documents in discovery. Second, he believed PFC Province's guilty plea providence inquiry would be confusing without the straggler's orders. The straggler's orders were produced by the accused's command. In the normal course of things, trial counsel would have provided them to the defense, but for some reason trial counsel did not have a copy of the orders in his records.
\end{footnotes}
issued by the Department of the Navy pursuant to a lawful instruction and not created by the defense counsel or his client. The accused was originally charged with one specification of AWOL. Upon receipt of the "straggler's orders," the prosecution added an additional specification, and the accused pled guilty to both specifications. Ironically, the original specification was dismissed by the service court on other grounds, and only the additional charge remained to support the sentence.

Applying the test articulated by the Supreme Court in Strickland v. Washington the court rejected the ineffective assistance of counsel claim. Discussing whether the "straggler's orders" constituted a confidential communication, the court noted that confidential disclosures, while generally privileged, are not absolute. Significantly, the court also opined that "it is unlikely that documentary materials created by a Government agency are ever protected by the privilege." The court held that the documents were therefore discoverable.

The court then applied the ethics rules governing confidential communications between lawyer and client. Applying Navy Rule 1.6 of Judge Advocate General Instruction 5803.1 (26 October 1987), the court recognized the long-standing rule of confidentiality for both communications and derivative work-product. The court also noted the rules governing candor toward the tribunal. They held that: (1) the "straggler's orders" were discoverable, (2) the orders were not a work-product, and (3) hiding the existence of the orders from the tribunal would itself be unethical. The court also noted that if PFC Province prevailed on his claim, it would encourage defense counsel to "race the police to seize critical evidence."

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206 Id. at 825. See, e.g., Article 1127, United States Navy Regulations (14 September 1990).
207 Province, supra note 185, at 825. Dismissal of the original charge was not an issue raised or granted during PFC Province's appeal to United States Court of Appeals for the Armed Forces. Nevertheless, the court, in dicta, expressed doubt about the lower court's rationale. 45 M.J. at 362 n.2.
208 466 U.S. 668, 687 (1984). To prevail on a claim of ineffective assistance of counsel, the claimant must demonstrate his counsel's performance was deficient and that this deficiency deprived him of his right to a fair trial. Specifically, appellant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.
209 Province, supra note 185, at 825.
210 Id., citing Fisher, supra note 197.
211 Province, 42 M.J. at 826, citing People v. Swearingen, 649 P.2d 1102, 1105 (Colo. 1982).
212 Province, 42 M.J. at 826-27.
213 Comparable to Air Force Rule 1.6.
214 Province, supra note 185, at 826-27.
215 Id. The court did not approve of the defense counsel's methods, however. It would have been preferable, in their view, to give the documents to the military judge, so the prosecution would not know their origins. PFC Province's defense counsel not only delivered the "straggler's orders" to the prosecution, but in doing so also revealed portions of his conversations with PFC Province to the prosecution. Id. at n.6.
The United States Court of Appeals for the Armed Forces reviewed Province approximately two years later and noted that the government should have already had the "straggler’s orders" in their possession and implied a lack of due diligence on the part of trial counsel. The court further held that the "straggler’s orders" would only have been discoverable, if the prosecution had asked for them under RCM 701(b)(3). Because the prosecution did not do this, the defense had no affirmative duty to disclose them. The court said the case "presented a close call," and that each case depended on its unique circumstances. While affirming the findings and sentence, the court urged defense counsel to use caution in these situations and continue to seek guidance from state bar licensing authorities and through ex parte communications with the detailed military judge.

Some commentators have argued that physical evidence in the defense counsel’s possession should be protected under the privilege in order to avoid a tension between the accused's constitutional rights. However, in light of Rhea and Province, this is clearly not the law in military practice. Nonetheless, while physical evidence of a crime is generally not covered by the attorney-client privilege or the work-product doctrine, information relating to representation clearly is protected absent a court order to the contrary. Thus, even when counsel must make discovery of physical evidence, they should do so in a way calculated to least harm their client’s interests.

6. Fifth Amendment Issues—Reporting a Missing Client

An instructive federal case regarding the duty to report the whereabouts of a missing client is United States v. Del Carpio-Contrina, in which the district court held that, under certain circumstances, a lawyer is not obligated to tell the court that his client has “jumped bail.” Mr. Del Carpio-Contrina was indicted by a grand jury on charges of conspiracy to possess cocaine, with

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217 Id. at 363.
218 Id.
219 Id. As guidance, the court recommended the following cases: Cluchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985) (defense investigator required to turn over receipts that led to incriminating evidence because the agent removed the receipts from their resting place and thus could not claim attorney-client privilege); People v. Meredith, 631 P.2d 46 (Cal. 1981), (defense investigator required to turn over robbery/murder victim’s wallet to police discovered as a result of client’s confidential communication because investigator took possession of it rather than leaving it undisturbed); People v. Lee, 83 Cal. Rptr. 715 (Cal. Ct. App. 1970) (lawyer must turn over physical evidence of a crime to the prosecutors, the evidence itself is not privileged); and see Rhea, discussed supra note 80.
intent to distribute. After his indictment, he bonded out. During this period, Mr. Del Carpio-Contrina was represented by an appointed counsel. He moved to substitute his appointed counsel for Mr. Joel DeFabio. The substitution was granted on 26 July 1989. Shortly after the substitution was granted, Mr. DeFabio, on several occasions, attempted to contact Mr. Del Carpio-Contrina. Mrs. Del Carpio-Contrina notified Mr. DeFabio that her husband had packed a suitcase and left the general area of their residence. On 1 September 1989, the court held a “calendar call.” At no time prior to the calendar call did Mr. DeFabio relay information regarding his client’s whereabouts to either the court or the prosecution. In fact, it was Mr. DeFabio’s associate counsel—appearing on Mr. DeFabio’s behalf—who notified the court of Mr. Del Carpio-Contrina’s disappearance. The district court then ordered Mr. DeFabio to show cause why he failed to notify the court of his client’s disappearance. On 6 September 1989, Mr. DeFabio complied with the show cause order, stating he “was never certain of his client’s failure to appear,” and, “under both the attorney-client privilege and ethical rules governing attorneys, he had no duty to notify the court of his client’s disappearance.”

The district court analyzed Florida attorney ethics rules to discern whether Mr. DeFabio had violated any standard of conduct. The court found that he had “in effect, walked a very fine line.” The district court noted, “it is admittedly difficult for a lawyer to know when the criminal intent will actually be carried out, for the client may have a change of mind.” The court also noted that a mere suspicion of criminal wrongdoing does not trump the ethics rules governing confidentiality.

Finally, although the court held that Mr. DeFabio had an affirmative duty to notify the court of his client’s status once it became clear his client had

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222 Id. at 97. The court noted that in determining whether an ethical violation has occurred, one looks to the controlling ethical principles of the forum state for guidance. Id. Obviously, under Air Force practice, the Air Force Rules are the primary guidance, followed by the individual attorney’s state rules. See, e.g., TJAG Policy Number 26, ¶ 3, supra note 72. Federal courts have clear statutory authority to review the conduct of attorneys who practice before them. See, e.g., Greer’s Refuse Serv., Inc. v. Browning-Ferris Indus., 834 F.2d 443, 446 (11th Cir. 1988).

223 Id. Of important note, Mr. DeFabio was represented by the National Association of Criminal Defense Lawyers and their official position was that defense counsel had no duty to notify a court of their client’s whereabouts.

224 Id. at 99. The court noted that the professional ethics committee opinion issued in this case found that a Florida attorney did have an affirmative duty to inform a court when his client jumps bail. However, Florida’s professional ethics committee withdrew this opinion in 1989 upon receiving advice from the ABA. Id.

225 Id. citing Fla. Rule 4-1.6, Comment.

no intention of coming to trial, it declined to impose sanctions on Mr. DeFabio.\footnote{Del Carpio-Contrina, supra note 221, at 99.} The court went on to stress that it is essential to the adversary system that a client’s ability to communicate freely and in confidence be maintained inviolate.\footnote{Id.} It further emphasized when an attorney unnecessarily discloses the confidences of a client, the attorney creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation.\footnote{Id., quoting Wilcox, supra note 226, at 122.} \textit{Del Carpio-Contrina} thus appears to indicate that a defense counsel’s information regarding the general whereabouts of his or her client is normally a matter of privileged information.

7. Choose Your Poison! An Impermissible Fifth and Sixth Amendment Tension?

In the trial of \textit{United States v. Branker},\footnote{418 F.2d 378 (2nd Cir. 1969) \textit{(citing} Simmons v. United States, 390 U.S. 377 (1968) in which the Supreme Court stated that situations like this create “an undesirable tension” and that it found “intolerable that one constitutional right should have to be surrendered in order to assert another.” Simmons, 390 U.S. at 394).} the prosecution introduced defendant’s statement in an earlier proceeding that his financial condition required appointment of counsel.\footnote{Id. at 380-81.} The United States Court of Appeals for the Second Circuit held that, because the defendant’s testimony used to secure his right to counsel was later used to convict him, an impermissible constitutional tension had been created.\footnote{Id. See also, United States v. Anderson, 567 F.2d 839, 841-42 (8th Cir. 1977).} Work-product doctrine aside, abrogating the attorney-client privilege by forcing a defense counsel to give incriminating evidence against his client, may likewise improperly force the accused to choose between his Sixth Amendment right to counsel and his Fifth Amendment right against involuntary self-incrimination. Compelling an ADC to open her calendar to command scrutiny has much the same effect in certain cases, and makes the ADC less effective than her civilian counterparts.

We should be mindful that in the military environment the potential for this “impermissible tension” is even higher. The Supreme Court has called the military “a society apart.”\footnote{Goldman v. Weinberger, 475 U.S. 503 (1986).} We have higher standards and we live and work in an environment where obedience to orders is required and essential to our mission. Military defense counsel, attorneys as well as officers, are usually junior in grade to most commanders and the base SJA. It may be tempting for a senior officer to “order” an ADC to reveal details about his calendar. SJAs should discourage such temptations and encourage commanders to understand the reasons why such conduct is inimical to our system of military justice.
The clients of civilian defense counsel, by contrast, receive legal advice without fear that the fact of their visit to the attorney will be made public knowledge without their consent. No one will attempt to tell the civilian defense counsel that he "must" reveal details of his representation in violation of ethics rules and perhaps to the detriment of his client's interests. This leads to a discussion of important policy considerations for defense counsel, SJAs, and commanders in dealing with these issues.

D. Policy Considerations

For over twenty-five years, the Air Force Judge Advocate General's Department has stressed the importance of its Area Defense Counsel program, including the perception and reality that our defense services system is fair, free from command influence, and completely independent of the prosecution function. Indeed in 1994, on the 20th Anniversary of the Air Force Area Defense Counsel program, Major General Nolan Sklute, then-Air Force TJAG, emphasized the "critical role a truly independent defense program plays in the fair administration of military justice" and stressed that ADC's "must be able to ensure our system is fair and that it proves its fairness at every turn."234 General Merrill A. McPeak, then-Air Force Chief of Staff also stated on that occasion that he "knew from first-hand experience that the Air Force provides superb legal defense services."235 Of course, like all judge advocates, military defense counsel are Air Force officers first, subject to the Uniform Code of Military Justice, and responsible to live the Air Force Core Values of integrity, service, and excellence. Moreover, military defense counsel are uniquely able to serve their clients precisely because they are officers trained in military missions, customs, courtesies, and traditions.

The independence of the Air Force Area Defense Counsel function is recognized in a number of Air Force policy and regulatory documents. For example, TJAG Policy Number 24236 requires coordination with the commander of Air Force Legal Services Agency (AFLSA/CC) whenever any government search of an ADC's office or a subpoena of a military defense counsel is being contemplated.237 This policy makes it abundantly clear that the offices and records of the ADC are rightly viewed as having special status. It states, in pertinent part:

In 1990, the ABA House of Delegates adopted an amendment to Rule 3.8 of the Model Rules of Professional Conduct. Rule 3.8(f) prohibits a prosecutor from seeking or issuing a subpoena to another lawyer to present evidence about a past or present client, unless the subpoena is "essential,"

235 Id.
237 AFLSA/CC is the commander of all Air Force defense counsel. Id. at ¶ 3.
and there is no other feasible alternative to obtain the information. Further, the rule requires the prosecutor to obtain prior judicial approval for the subpoena, after an opportunity for an adversarial proceeding.

2. In adopting the amendment to Rule 3.8, the ABA struck a chord familiar to those of us who are concerned about the administration of military justice. The Area Defense Counsel Program was established primarily to correct the perception (or misperception) among Air Force members that their detailed counsel could not zealously defend them, because “beating the prosecutor” would ruin the defense counsel’s career. As we know, the Area Defense Counsel Program has been largely successful in putting to rest any fears about defense counsel independence. Because of this, and in light of the ABA’s concerns, we must vigorously resist any unnecessary actions which could create a perception among service members that the attorney-client relationship can be breached, and confidences disclosed whenever “the legal office” wants them to be. 238

TJAG Policy Number 28 further reinforces the independence of the military defense counsel by noting that the ADC Program

is one of the great strengths of the Air Force military justice system and will continue to be so long as the defense function is, and is perceived to be, independent. The military justice system is only as good as the independence and capability of the defense. The message of the importance of the defense must be stated frequently and sincerely. 239

Air Force JAG Department training materials have also dealt with these issues. Advocacy Continuing Education (ACE) materials, published by the Air Force Legal Services Agency’s Government Trial and Appellate Counsel Division in January 1995, point out that “prosecutors have been previously admonished to refrain from actively undermining the defense counsel attorney-client privilege and from coercing or cajoling a defense counsel into revealing confidences which are not authorized.” 240 The policy also warns defense counsel not to reveal privileged confidences which may lead to prosecution or additional charges against a client: “If more charges are brought against an accused because of unauthorized disclosures by the defense counsel, the defense counsel may face an ethics violation claim, and the government may face an issue of ineffective assistance of counsel or incompetent evidence, both of which can reverse a conviction on appeal.” 241 Finally, the materials state that, “trial counsel should not intentionally attempt to get a defense counsel to


241 Id.
reveal confidential information. If more charges are brought against an accused because of unauthorized disclosures by the defense counsel, the defense counsel may very likely face an ineffective assistance of counsel complaint . . . no good end comes to the use of unauthorized disclosures of confidential information. It is better to recognize the issue up front and try to avoid it.”

As discussed above, if a defense counsel is called to be a witness against his client on charges stemming from a client's failure to go to, or promptly return from, the ADC office, he assists in incriminating his own client. This also creates a conflict of interest situation, where defense counsel will likely be forced to withdraw from the case. Even if this result is legally sound, an undesirable perception is created: “Johnny had a military lawyer. He missed an appointment at his lawyer's office. The lawyer quit and turned evidence against him for AWOL. You can't trust a military lawyer.” This begs the question: Is it really worth pursuing an “open calendar” policy for the ADC? Do such negative perceptions really balance the positive interests?

Ethical and evidentiary considerations aside, from a policy standpoint, if an ADC follows a base-wide “open skies” policy with respect to his appointment schedule, he may harm perceptions regarding his independence and give credence to the myth that the ADC is merely an extension of the SJA’s staff, who cannot be trusted with a client’s confidences or to pursue his client’s best interests. It is a fundamental tenet of our profession that many clients, especially criminal suspects, wish the fact that they have consulted with defense attorneys to be kept confidential. This is particularly true of those clients making initial visits to a defense counsel for advice about an undiscovered offense or who are worried that they may be about to commit an offense and want professional legal advice and counsel.

By contrast, Air Force Rule 1.13 demands that confidences received by SJAs from commanders must be treated as privileged to the greatest extent allowed by law. An SJA would quickly lose the confidence of his wing commander, if he was found to have “loose lips.” There are, of course, exceptions to the rule, when the commander wants to pursue a course which is contrary to the interests of the SJA’s “real client,” the Air Force. By contrast, the ADC has an even greater duty of confidentiality, as his is a traditional client, whom he is bound to represent “with courage and devotion, to the utmost of his learning and ability, and according to the law” and who qualifies, without reservation for the full protections of the attorney-client privilege, in both its ethical and evidentiary forms.

This analysis is certainly not intended to imply that an ADC should permit his office to be used as a convenient excuse for clients to skip duty. ADC’s should actively discourage this practice to assist clients in avoiding

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242 Id.
243 See supra note 72, Air Force Standard 4-1.1 (Role of Defense Counsel).
additional legal entanglements, such as those discussed above, and to maintain credibility with command. Likewise, the ADC should obviously never lie about whether a client visited his office. A bright line policy of refusing to give any information regarding representation without client consent or court order is both prudent and required by the Air Force Rules and Standards. Of course, as the Air Force Court of Criminal Appeals pointed out in Rogers,

defense counsel must understand that actions have consequences. We are still a military organization, and a commander has a right, even a duty, to know where his troops are. Counsel should not be surprised, therefore, that a commander who cannot confirm the whereabouts of a subordinate with a penchant for disappearing, feels compelled to take sterner measures to insure that the subordinate returns to duty in a timely fashion, or that a commander requires defense counsel to meet with a client inside the confinement facility instead of at the attorney's office.244

Defense counsel would be well advised to explain the significance of this ruling to Houdini-like clients with "a penchant for disappearing."245

E. Summary

Information relating to representation of a military client and the confidences of that client, including his whereabouts, are matters which are broadly protected by the Air Force Rules and state rules of professional conduct, and to a lesser extent, by Military Rule of Evidence 502 and case law. When the attorney-client privilege is abrogated, it raises constitutional issues under both the Fifth and Sixth Amendments. An accused's whereabouts is, absent the fraud exception, covered by the attorney-client privilege. Violation of the privilege forces an accused to chose between his Fifth and Sixth Amendment rights, creating an impermissible constitutional tension, and contravening long-standing common law norms.

The Air Force Area Defense Counsel Program is a model of independence, integrity, and outstanding service to clients. Proper respect for the attorney-client privilege will help keep it that way. All of those engaged in the practice of military criminal justice would do well to heed the Supreme Court's hoary, but venerable admonition against trammeling the rights of an accused:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that

244 Rogers, supra note 139, at 818.
245 Id. at 819 (The court held that there was no Article 13, UCMJ (10 U.S.C. § 813 (2000) violation of unlawful pretrial punishment where a commander imposed additional restrictions, including escorts, whenever the accused left his place of duty.).

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justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.246

As noted at the beginning of this article, the attorney-client privilege is at the very core of our profession—it is a fundamental tenet of our profession that a client’s confidences and information relating to a client’s representation are safe with his attorney and will be shielded by law from the prying eyes of the prosecution and others hostile to a client’s interests. This privilege is central to maintaining the public trust in our profession. The privilege is perhaps even more important in military criminal practice. As good as our system of military justice is, it still suffers from some largely false perceptions about unlawful command influence, confusion about the area defense counsel’s chain of command, and a tendency to view the SJA as chief prosecutor on the installation, rather than as the officer entrusted with administering justice fairly and efficiently across the installation. If a military member’s decision to seek the advice of defense counsel is routinely revealed to representatives of command, and if defense counsel are called upon to testify against their current and former clients in any but the most extraordinary cases, then perceptions, and perhaps reality, will be heading in the wrong direction. Part of our mission must be to strive to assure that representation by military defense counsel carries the same benefits incident to attorney-client privilege available from the civilian defense bar.

Air Force defense counsel have worked hard for over twenty-five years to maintain the independence of their offices. SJAs should support their ADCs in this effort and discourage subordinate judge advocates and others on base from routinely taking actions which may cause the independence of the ADC to come into question. There are few military cases that address the issue, but the discussion in this article will undoubtedly add substance to the debate.

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"Whenever you wish to do anything against the law, Cicely, always consult a good solicitor first."

This section deals with the attorney-client privilege in the general practice of military law. Its focus is primarily on dealing with conflicts of interest which may arise from the many "hats" a military attorney wears as legal adviser to command, claims officer, legal assistance attorney, government ethics counselor, and trial and defense counsel, among others. Our manifold practice is unique in the law and presents many conflict of interest situations unknown to civilian practitioners. For example, a county or state district attorney does not normally see clients regarding private, civil law matters, and thus rarely has to consider whether his office might prosecute one of his clients at some future point.

Also, while legal assistance is a free service for military members, dependents, and retirees (some of whom are also civilian government employees), rules of professional conduct and representation standards still apply to these consultations. They are "real" attorney-client relationships. Some of these same clients may later file grievances, complaints, or lawsuits against the Air Force, or themselves be the subjects of investigation or disciplinary proceedings. The same legal office which advised these clients in the first instance may then be assigned to defend the interests of the Air Force or prosecute criminal charges against them for alleged criminal acts. Next, this article will explore some of the more common conflict of interest situations in military practice; examine the interplay of these situations and the attorney-client privilege; and, examine solutions available under various policy-level rules, statutes, and case law.

A. The Air Force as Client

In daily practice, most Air Force attorneys are assigned to represent the Air Force through its authorized officials. Providing personal legal assistance or acting as detailed or individual military defense counsel (where the attorney has a traditional "human" client with full attorney-client privilege) is the exception, rather than the rule. Sometimes confusion arises when government officials and individual military members seek advice from "the JAG" on a variety of official matters. These "clients" may view the judge

247 GEORGE BERNARD SHAW, Sir Howard, in Captain Brassbound's Conversion, act 1. THE COLUMBIA DICTIONARY OF QUOTATIONS, supra note 82.
249 Id. at Air Force Rule 1.13(f).
advocate as their personal legal adviser for all matters, personal and professional, and believe that all communications made to the attorney are always covered by the attorney-client privilege, and will thus be kept confidential.

While many statements made between or among government officials and government attorneys do qualify as privileged communications, government attorneys are assigned to provide legal advice to government officials only on official matters, and are more analogous to corporate attorneys who represent the corporation as opposed to any one of its officers. Government officials lose the protection of the attorney-client privilege when the communication in question clearly contemplates "the future commission of a fraud or crime." Additionally, when an official "is acting, intends to act or refuses to act in an official matter in a way that is either a violation of the person’s legal obligations to the Air Force or a violation of law which might reasonably be imputed to the Air Force," the lawyer must act in the best interest of the Air Force.

In these situations, the attorney must initially make clear to the official that the Air Force is his true client and that his first duty is to the organization, not the individual official. Once that is made clear to the official, however, the attorney must "take measures to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." However, in no event may the attorney participate or assist in illegal activity, even if ordered to do so by a superior officer. Of course, most commanders and other government officials readily accept the advice of their military attorneys, and are content to accomplish the mission within the bounds of the law. In these more common situations, military attorneys must guard the confidences of their government-official

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250 For example, in the military justice context, MIL. R. EVID. 502(a) protects these exchanges as long as the communication is both confidential and "made for purpose of facilitating the rendition of professional legal services to the client."

251 See 1 GILLIGAN AND LEDERER, supra note 52, § 5-53.00.

252 MIL. R. EVID. 502(d)(1).

253 See Air Force Rule 1.13, supra note 72 and discussion.

254 Id. at Air Force Rule 1.13(d).

255 Id. at Air Force Rule 1.13(b). The rule provides extraordinary and progressive measures to be taken before an official’s confidences may be revealed, including, but not limited to: (1) advising the client that the action, planned action or refusal to act is contrary to law or regulation, (2) advising the person of Air Force policy on the matter, (3) advising the person that his or her personal legal and professional interests are at risk, (4) asking the person to reconsider, (5) suggesting a separate legal opinion, (6) advising the person that the lawyer is ethically obligated to preserve the interests of the Air Force, (7) consulting with senior Air Force lawyers, (8) seeking the assistance of lawyers at the same or a higher level of command to discuss available options to avoid violation of the law by the Air Force.

256 Id. at Air Force Rule 1.13(c).
"clients" to the largest extent allowed by law, in order to maintain the confidence of these officials and the interests of the Air Force.\textsuperscript{257}

B. The Role of the Legal Assistance Attorney

1. Background and Policies

Legal assistance entails providing legal advice to service members, their dependents, and other entitled persons on limited civil law matters, such as wills, powers of attorney, domestic relations, debtor and creditor problems, landlord-tenant issues, etc. The scope of Air Force legal assistance is limited by regulation.\textsuperscript{258} In most cases, the advice and representation is limited to matters which do not require representation in civilian court, and which do not qualify as matters within the charter of the ADC. Legal assistance services, while broad, do not extend to making claims against the United States, adverse administrative actions against the client, or criminal matters of any kind.\textsuperscript{259} The limited scope of these representations, however, does not limit the scope of the attorney-client privilege. The program provides clients an invaluable service they may not otherwise be able to afford. For the Air Force, legal assistance serves as both a preventive law program and a means for ensuring combat readiness. It is a critical morale and readiness program. As the cases below show, the attorney-client privilege applies fully to confidences given to legal assistance attorneys, including confidences taken in violation of policies limiting the scope of legal assistance. This is important to maintaining client confidence in the program.

Legal assistance attorneys should direct clients to an area defense counsel when they realize the servicemember is making an inculpatory statement likely to end up in some type of disciplinary action against the individual. Air Force policy regarding the scope of legal assistance and its relationship to the attorney-client privilege is regulated by Air Force Instruction 51-504 and TJAG Policy Number 18. The latter specifies:

The legal assistance officer is prohibited from receiving confidences in any case in which the person requesting assistance is, or probably will be, the subject of military or civilian criminal action or other military disciplinary action. In such cases, the judge advocate is limited to assisting the individual to obtain civilian or proper military counsel. In cases where the person seeking legal assistance is or may be the subject of court-martial charges, other disciplinary action, or adverse personnel action (discharge, promotion delay, etc.), such person should be referred to the staff judge advocate or area defense counsel. Referral to the staff judge advocate is

\textsuperscript{257} Id.
\textsuperscript{258} See AFI 51-504, Legal Assistance, Notary, and Preventive Law Programs (1 May 1996), \textsuperscript{259} Id.
AFI 51-504 further defines the scope of permissible legal assistance:

1.2. Scope. Legal assistance consists of providing advice on personal, civil legal problems to eligible beneficiaries. For any other legal concern, the Air Force remains the client. On such matters, do not provide advice to or enter into an attorney-client relationship with individuals.

1.2.1 Limits.
Do not enter into an attorney-client relationship on these issues:
- Issues involving personal commercial enterprises (unless such advice is related to the Soldiers' and Sailors' Civil Relief Act [SSCRA]).
- Criminal issues under the Uniform Code of Military Justice (UCMJ) or any state or federal criminal law.
- Standards of conduct issues.
- Law of armed conflict issues.
- Official matters in which the Air Force has an interest or is involved in the final resolution.
- Legal issues or concerns raised on behalf of another person, even if the other person is eligible for legal assistance.
- Drafting or reviewing real estate sales or closing documents, separation agreements or divorce decrees, and inter vivos trusts. If the SJA determines that an attorney in the office, whether active duty or reservist, has the expertise to draft or review these documents, then the SJA may authorize that attorney to do so.
- Representation of the client in a court or administrative proceeding.

These policies and regulatory rules cover situations where an accused, or potential accused, is known and identified by the legal assistance attorney or screening personnel prior to formation of the attorney-client relationship. Despite these policies, legal assistance and screening personnel do not always immediately recognize potentially conflicted clients or problems which exceed the scope of legal assistance. Many clients are understandably reluctant to say anything of substance about their legal problems until the door to the attorney’s office is closed and the consultation has started. Thus, proper referral to the ADC or other agencies does not always occur before the point at which a client might reasonably believe an attorney-client relationship has been formed. Additionally, situations arise where a sudden, unexpected criminal admission is made during an otherwise permitted attorney-client consultation. There are also cases where the legal assistance attorney later learns that her client has become an accused, and discovers that the criminal matter is substantially related to the civil matter about which the member previously consulted the attorney.

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260 TJAG Policy Number 18, ¶ 2(b) (4 Feb 1998).
261 AFI 51-504, supra note 258.
These situations present issues of attorney-client privilege and conflicts of interest. Can the legal assistance attorney be called to testify against an accused client? What about acting as trial counsel at the accused's court-martial? These questions are explored below.

It is clear that attorneys providing legal assistance are bound by the Air Force Rules of Professional Conduct and that the attorney-client privilege applies to these consultations. AFI 51-504 explicitly acknowledges this:

1.6. Ethical Responsibilities and Rules. SJAs administer the legal assistance program in strict compliance with the Air Force Rules of Professional Responsibility.

1.6.1. Only attorneys give legal advice.
1.6.2. Information received from a client during legal assistance, attorney work-products, and documents relating to the client are legally confidential. Release them only with the client's express permission, pursuant to a court order, or as otherwise permitted by the Air Force Rules of Professional Responsibility.
1.6.3. Judge advocates and civilian attorneys who perform legal assistance must have private offices.
1.6.4. Legal assistance attorneys must avoid creating the impression that they represent the Air Force's interests in resolving the client's concerns or that the Air Force has an interest in the outcome of the matter. When writing letters on a client's behalf, do not use Air Force letterhead. Include a statement in the letter making it clear the Air Force does not represent the client in resolving the matter.
1.6.5. Legal assistance attorneys may not interfere with an existing attorney-client relationship.

2. Conflicts Generally—Representation Adverse to Former Client

In Kevlik v. Goldstein, a case which has been favorably cited by a number of military courts, the United States Court of Appeals for the First Circuit held that trial judges have a duty to supervise the conduct of attorneys appearing before them in matters affecting the preservation of client confidences. The Kevliks were plaintiffs in a civil suit against the Town of Derry, New Hampshire. The case arose out of allegations of police brutality. In November 1980, James Kevlik was stopped for drunk driving while traveling through Derry. He was not ultimately charged with drunk driving, but he and his passengers, Jan Kevlik and John Southmayd, were arrested, allegedly beaten by the Derry police, and allegedly denied proper medical care.

262 Id. at ¶ 1.6.
263 724 F.2d 844 (1st Cir. 1984).
264 Id. at 847. Military judges have the same duty regarding the conduct of attorneys appearing in courts-martial. See, e.g., Rhea, supra note 80, at 994-995; see generally, United States v. Ramos, 42 M.J. 392, 396 (C.M.A. 1995) and United States v. Greaves, 46 M.J. 133, 139 (1997) (addressing the inherent authority of the military judge to control the conduct of a court-martial).
The Kevliks and Southmayd were charged with assault and resisting arrest, and all were acquitted.265

Southmayd had consulted an attorney named Robert McNamara about his criminal case, who took his confidences, made one court appearance, and then withdrew from the case, informing Southmayd that he had a conflict of interest, since he also represented the Derry Police Department’s insurer. At the conclusion of his criminal case, Southmayd obtained other counsel and successfully and independently of the Kevliks subsequently settled his civil claim against the Town of Derry without filing suit. The Kevliks filed suit against the Town of Derry, and McNamara’s firm represented the defendant town. The Kevliks moved to disqualify McNamara’s firm, because they were privy to privileged attorney-client information from Southmayd, a key plaintiff’s witness.266

The court held that, despite its withdrawal from Southmayd’s case, an attorney-client privilege still existed between Southmayd and McNamara’s law firm. It found that these conflicting representations were a violation of the Model Code of Professional Responsibility, and upheld the district court’s decision to disqualify McNamara's firm. The court reminds us of the basic rule that, “an attorney should be disqualified from opposing a former client if, during his representation of that client, he obtained information relevant to the controversy at hand.”267

While the primary issue in Kevlik was compromise of the attorney-client privilege, the case also raised the issue of the “one-firm” rule, applicable in most civilian jurisdictions, which imputes knowledge of attorney-client privilege information to every member of a law firm, and thus prevents any member of a law firm from representing a client with interests adverse to those of any other client represented by the firm.268 The rule is not applied in Air Force practice. Air Force Rule 1.10, Imputed Disqualification, states: “Air Force attorneys who work in the same military law office are not automatically disqualified from representing a client even if other Air Force attorneys in that office would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.”269 However, as in Kevlik, all attorneys, including military counsel are prohibited from representing clients with interests adverse to those of a former client in the same or a substantially related matter.270 In the following case, we see a Marine defense counsel push the conflicts envelope to its outermost edges as he prosecutes a former client on the same matter for which he earlier delivered

265 724 F.2d at 845-846.
266 Id.
267 Id. at 850.
268 See, e.g., American Can Company v. Citrus Feed Company, 436 F.2d 1125, 1128-29 (5th Cir. 1971).
269 Air Force Rule 1.10. The other rules cited deal with various forms of conflict of interest.
270 Id. at Air Force Rule 1.7.
"counseling" to the accused. While not strictly a legal assistance situation, it is closely analogous.

3. The Legal Assistance Attorney as Prosecutor

In United States v. Hustwit, Marine Private (PVT) Glenn Hustwit was both advised by and later prosecuted by, the same counsel on the same matters. Private Hustwit sought advice from Captain Foreman, a Marine Corps defense counsel, regarding a pending nonjudicial punishment action for a number of AWOL offenses under Article 86, UCMJ. Both PVT Hustwit and Captain Foreman provided affidavits to the Navy-Marine Court of Military Review indicating that no substantive discussions took place regarding the nonjudicial punishment. PVT Hustwit claimed, however, and the court found as fact, that PVT Hustwit additionally told Captain Foreman that the Naval Criminal Investigative Service (NCIS) was looking for him in connection with an ATM card theft.

Ultimately, PVT Hustwit was taken to a special court-martial on charges of AWOL and larceny, and Captain Foreman turned up not to defend, but to prosecute him. When PVT Hustwit informed his defense counsel about the prior consultation with Captain Foreman, he told PVT Hustwit "not to worry about it" and his defense counsel did not raise the issue at trial. The court held that the issue was waived during trial, and that no substantial relationship existed between Captain Foreman and PVT Hustwit. While many might disagree with the court's decision in the case, at least on grounds of perception, the opinion includes a thorough discussion of the rules applicable to such cases.

As the opinion correctly points out, "an attorney-client relationship is formed when a service member obtains legal advice of any kind from an individual representing himself as a legal advisor." This attorney-client relationship and the ethical duty to maintain client confidences remains intact even if the attorney has violated the orders of superiors to limit the scope of the representation, and thereby subjects himself to discipline. The court also

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273 Id. at 610. According to PVT Hustwit, Captain Foreman advised him not to speak with any NCIS agents, and told him they would meet again later. This second meeting never occurred. Id.
275 Hustwit, supra, note 270, at 610-611.
276 Id. at 612-16. These rules essentially form a three pronged test: The accused must prove: (1) a former relationship; (2) a substantial relationship between the subject matter of the former representation and the issues of the subsequent case; and, (3) prejudice to the accused in the form of later adverse employment against the accused.
277 Id. at 612.
278 Id. at 612-13.
points out that once a confidential relationship exists, the attorney may not act in any manner inconsistent with the client's interests.\textsuperscript{279} The court then cites precedent for resolving such cases:

> The critical inquiry... centers normally... on the possibility that the accused may be prejudiced by the presence of a personal interest in the outcome of the case on the part of the prosecutor, or the latter's possession of privileged information or an intimate knowledge of the facts by reason of a professional relationship with the accused. If—after a consideration of all the circumstances—possibility of prejudice may be said to exist, the prosecutor must be disqualified.\textsuperscript{280}

The \textit{Hustwit} Court ultimately held that "the practicalities inherent in normal military lawyer assignment rotation without a showing of specific prejudice (particularly when the appearance of conflict is recognized and then waived), militate against a per se rule of disqualification when it is not required in the interests of military justice."\textsuperscript{281} The court found that the accused was not prejudiced, because Captain Foreman "did not acquire any confidential information."\textsuperscript{282} The record was void of any evidence that PVT Hustwit's prior consultation with Captain Foreman adversely affected his interests or provided an advantage to the government. The court also found that, even under a per se disqualification standard, the accused had waived the issue by bringing it to the attention of his defense counsel and later stating on the record that he was satisfied with his defense counsel. The court presumed that he would have expressed dissatisfaction had he been concerned with his counsel's instructions "not to worry about" his perceived conflict of interest with Captain Foreman.

While \textit{Hustwit} involved only military justice matters, it is still instructive for legal assistance attorneys who need to be constantly vigilant to warn clients up-front as to the scope of legal assistance and to avoid accepting confidences relating to criminal matters.

\section*{4. The Legal Assistance Attorney as Witness}

There are no reported military cases of a legal assistance attorney being called as a witness against a former client. \textit{Hustwit} is closely analogous, as is \textit{United States v. Rust}\textsuperscript{283} discussed below, which involves a claims officer's

\begin{footnotesize}
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\item \textsuperscript{279} Id. at 613.
\item \textsuperscript{280} Id. at 615, \textit{citing} United States v. Stringer, 16 C.M.R. 68 (C.M.A. 1954).
\item \textsuperscript{281} \textit{Hustwit}, 33 M.J. at 615.
\item \textsuperscript{282} Id. at 613. The court apparently did not find the accused's revelation that he knew NCIS was looking for him amounted to a "confidence," even though it was arguably related to his unauthorized absences.
\item \textsuperscript{283} 38 M.I. 726 (A.F.C.M.R. 1993) (Dr. Rust was originally sentenced to a dismissal, a $5000.00 fine, and a reprimand), \textit{aff'd on other grounds and reh'g granted}, 41 M.J. 472 (1995)) (The United States Court of Appeals for the Armed Forces affirmed the lower court's finding of prejudicial error by the military judge during the original sentencing hearing and
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investigation, rather than a traditional legal assistance consultation. The simple rule is that legal assistance visits are attorney-client consultations, and consistent with rules cited throughout this article, the confidences of those clients must be kept confidential. As the article has noted, these confidences are protected even if the attorney takes them in violation of the established scope of legal assistance. The attorney must keep them confidential even if it means he will be disciplined for taking them in the first place. As the analysis and examples showed earlier in Part III of the article, if a legal assistance attorney improperly divulges confidential information to the prosecution, he could severely damage the government's case or even preclude prosecution of the accused. At the very least, such disclosures greatly complicate the case, and the attorney may subject himself to discipline, perhaps even disbarment, for this most serious of ethics violations.

In United States v. Gandy, the Air Force Court of Military Review stated the basic premise 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.'" The court also noted, "this does not mean that one who formerly represented one of the parties to the litigation is thereafter disqualified as a witness."

This makes the point that not every consultation conflicts the attorney from ever testifying against a former client. Aside from the usual exceptions (fraud, future crime, etc.) to the attorney-client privilege rule discussed throughout this article, if the matter is unrelated to the previous representation, the attorney may be called as a witness or may even prosecute the accused. However, this situation should be avoided wherever possible because of the

upheld their order for a rehearing), aff'd on f.rev, 1996 CCA LEXIS 275 (ACM 29629) (1996) (at the rehearing on sentence, Dr. Rust received a fine of $5000.00 and a reprimand), aff'd mem. 48 M.J. 5 (1997).  
284 See, e.g., Hustwit, supra note 270.  
285 Id.  
286 See Part III, supra.  
288 Id. at 357, citing United States v. Alu, 246 F.2d 29 (2d Cir. 1957).  
289 Id., citing United States v. Steiner, 134 F.2d 931 (5th Cir. 1943) and WHARTON, CRIMINAL EVIDENCE § 809 (2d ed.). Wharton noted:

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.

Id.
appearance of conflict it creates: "Last week he did my will; this week he's going to bury me!"

C. The Role of Ethics Counselor

Judge advocates are regularly assigned to function as ethics counselors under various provisions of the Joint Ethics Regulation (JER), which is the "single source of standards of ethical conduct and ethics guidance, including direction in the areas of financial and employment disclosure systems, post-employment rules, enforcement, and training." This function is not a traditional legal assistance function. Ethics counselors represent the government, not the member or employee, and they may not form attorney-client relationships during these counseling sessions. Many ethics counseling "clients" do not understand this distinction, however, as United States v. Schaltenbrand, a federal criminal case, demonstrates.

Eugene Schaltenbrand, a Colonel in the Air Force Reserve, was convicted in federal district court of violating 18 U.S.C. Section 208(a), which prohibits federal employees from working on projects in which they have a financial interest, and of violating 18 U.S.C. Section 207(b), which prohibits former federal employees from representing private parties before the government on matters they previously worked on for the government.

Between February and May 1987, Colonel Schaltenbrand was brought on active duty nine times for "short periods of duty." During this period and while on active duty status, he traveled to Peru and Mexico to conduct site surveys for C-130 aircraft. He also sought retirement employment with a private contractor, Teledyne Brown Engineering (TBE). TBE officials expressed interest in hiring him but cautioned him to discuss with the Air Force any potential conflicts of interest "which might arise." On 21 September 1987, TBE offered Colonel Schaltenbrand a job.

On 24 September 1987, Colonel Schaltenbrand went to an Air Force legal office for "legal assistance." He filled out a standard legal assistance questionnaire which indicated his discussions during legal assistance were

290 JOINT ETHICS REGULATION, DEPARTMENT OF DEFENSE 5500.7-R, through Change 4, August 6, 1998, at ¶ 1-100 et seq. (Before the JER came into existence, Air Force Regulation 30-30, Standards of Conduct, covered this area.).
291 930 F.2d 1554 (11th Cir. 1991).
292 Id. at 1556.
293 Id.
294 Id.
295 Id.
296 Id.
297 Id. at 1557.
298 Id. (Sometime before May 1987, Colonel Schaltenbrand sent his resume to TBE.).
299 Id.
300 Id.
protected by the attorney-client privilege. He then met with two “legal assistance attorneys” from the base office and they engaged in an hour-long discussion. However, the attorneys indicated to Colonel Schaltenbrand they could not answer questions regarding conflict of interest issues because they were representatives of the government and instead handed him printed materials on conflicts of interest issues. One day later, Colonel Schaltenbrand accepted TBE’s employment offer. He continued to participate in active duty recalls during the time of his employment with TBE.  

Ultimately, his employment activities led to a criminal investigation in which the two attorneys who had counseled him explained to investigators the nature and specifics of their meeting with Colonel Schaltenbrand. No consent was ever given to have the two attorneys disclose any information from their meeting. During an evidentiary hearing, Colonel Schaltenbrand’s defense attorneys attempted to suppress any evidence derived from the unauthorized disclosures. Their motion was denied and he was convicted, in part, based on the testimony of the two ethics counselors cum “legal assistance” attorneys.

On appeal, the circuit court applied the black letter law of attorney-client privilege. The opinion noted that the party invoking the privilege has the burden of proving that: (1) an attorney-client relationship existed, (2) the particular communications were intended to be confidential, (3) the communications were made for the purpose of obtaining legal advice or assistance, and, (4) “the key question in determining the existence of a privileged communication is whether the client reasonably understood the conference to be confidential.”

Applying this test, the court found that he intended to make his communications to the two “legal assistance” attorneys confidential and for the purpose of securing legal advice. The government argued that because the defendant was informed that the two legal assistance attorneys were also ethics counselors for the Air Force, he should have been aware his disclosures were not confidential. Rejecting the government’s argument, the court reasoned that non-lawyers are generally unable to delineate when a legal assistance attorney is no longer acting in the capacity of a legal assistance attorney. More importantly, the court recognized that the type of “hair splitting”

301 Id.
302 Id. The district court ruled that the communications between the defendant and the legal assistance attorneys were not confidential because one of the legal assistance attorneys testified he noted to the defendant the attorney's status as a Deputy Counselor rather than as a legal assistance attorney for matters of conflict of interest.
303 Id. at 1562, citing In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983).
304 930 F.2d. at 1562, citing United States v. Ponder, 475 F.2d 37, 39 (5th Cir. 1973).
305 930 F.2d. at 1562, citing Kevlik v. Goldstein, 724 F.2d 844, 849 (1st Cir. 1984).
307 Id.
308 Id.
envisaged by the government would “inhibit [service members] from seeking the advice of JAG attorneys in order to avoid conflicts of interest.”309 In light of this holding, wise SJAs will make sure ethics counseling customers are taken in separately from legal assistance clients, and that very clear explanations are given regarding the purpose of the counseling, that the counselor is not acting as a legal assistance attorney, and that the conversation is not privileged.

D. The Role of Claims Officer

As in the Schaltenbrand case, the court's analysis in Kevlik (regarding when an attorney-client relationship is formed) was ultimately adopted by the United States Court of Appeals for the Armed Forces in United States v. Rust.310 An examination of the Rust decisions is particularly useful to those wrestling with issues of privilege as it combines elements of military justice, claims, and legal assistance—showing how the lines may quickly become blurred in the eyes of the “client,” and modeling, through the professional actions of the claims officer in the case, the correct way to handle such situations. The case also makes the point that a claims officer represents the government and not any individual claimant, witness, and tortfeasor when investigating and settling claims. As long as he makes this clear, then the attorney-client privilege does not come into play.

While several cases discuss the duration and scope of the attorney-client relationship, few actually delineate how the relationship is formed. As noted throughout this article, some authorities hold that the relationship comes into being when confidences are accepted, and when the client honestly (but not necessarily reasonably) believes and that he has formed an attorney-client relationship and that his confidences will be kept. This subjective standard has not received wide acceptance, and most military and federal courts apply an objective, “reasonable belief” test, as the court did in Rust.

The pertinent facts of Rust are as follows: Major (Dr.) Rust worked at the Castle Air Force Base hospital as the base obstetrician.311 When a pregnant hospital patient visiting another doctor complained of vaginal bleeding, the other doctor sought advice from Dr. Rust. Dr. Rust advised his colleague to prescribe bed rest and that the patient should return to the hospital if she had any further complaints. The patient returned to the hospital the following evening and spoke over the telephone to Dr. Rust. In a written statement, Dr. Rust said that he advised the patient to remain at the hospital but she refused. Ultimately, the patient left the hospital, went into premature labor, and lost the baby. To complicate matters further, within a few days, the patient was killed

309 Id.
310 Rust, supra note 283, 41 M.J. 472.
311 Id. at 472-473.
by her boyfriend (the baby’s father) who then committed suicide himself, apparently in a joint suicide plan. 312

During the ensuing claims investigation, Dr. Rust was contacted by the Castle Air Force Base claims officer. He advised Dr. Rust that, “he was the hospital’s lawyer,” and not Dr. Rust’s lawyer. Significantly, he also informed Dr. Rust that his report would be sent to a number of other reviewing authorities. 313 Prior to their meeting, Dr. Rust made a handwritten statement detailing his involvement with the patient in question and subsequently gave the statement to the claims officer during their meeting. Later, the accused was tried for dereliction of duty 314 and false official statement, 315 and found guilty of both charges. The note given to the claims officer was the basis for Dr. Rust’s false official statement conviction. It was also useful to the prosecution because it contradicted other testimony given by the accused. The statement’s admission was contested on appeal as protected under the attorney-client privilege. 316

The Air Force Court of Military Review, in a brief analysis, concluded that Dr. Rust’s written statement given to the claims officer was not protected by the attorney-client privilege. 317 The court cited United States v. Henson for the proposition that, while the test to determine the existence of the relationship is examined from the would-be client’s point of view, the belief must be reasonable. 318 The court found that Dr. Rust’s belief that he had an attorney-client relationship with the base claims officer was unreasonable 319

The United States Court of Appeals for the Armed Forces affirmed the Air Force Court’s decision but provided a more detailed analysis. Relying on both Schaltenbrand and Kevlik, the court acknowledged that the party invoking the attorney-client privilege has the “burden of proving that a relationship existed and that the communications [in question] were confidential.” 320 The court also held that the pivotal question is whether the client reasonably understood the communication to be confidential. Noting that any questions of doubt as to the existence of the privilege should be resolved in favor of the accused, the court held that there was no attorney-client relationship. Dr. Rust should reasonably have understood that the claims officer was not providing him with personal legal assistance, but rather, investigating on behalf of the

312 Id.
313 Id. The claims officer had indicated to Dr. Rust that he was “basically the hospital’s attorney” and that he represented the Air Force. The claims officer also indicated to Dr. Rust that if a medical malpractice suit were to arise, the United States Attorney would move to replace the United States as the defendant vice Dr. Rust.
316 Id.
319 38 M.J. at 730.
320 41 M.J. at 475.
United States. It was also clear that these communications were not intended to be kept confidential, because the accused knew that any information he gave would be passed on to other military authorities via the claims officer’s report. Thus, the court had little trouble holding that no attorney-client privilege existed.

E. Summary

The case law, regulatory, and policy guidance cited within this article is applicable to all Air Force attorneys, military and civilian, in all of their various roles as advocates, advisers, and counselors. However, general practitioners, primarily at installation-level legal offices must be particularly vigilant about avoiding conflicts of interest with their duties under the attorney-client privilege. The very service members they advise today, may face adverse action or court-martial tomorrow. It is the best practice, where possible, to avoid prosecuting or assisting in the prosecution of service members to whom we have provided legal assistance. However, it is not Air Force practice to designate permanent legal assistance attorneys. Thus, the need to preserve the attorney-client privilege takes on added importance. When the privilege is abrogated, the administration of military justice may suffer and the attorney risks disciplinary action.

Legal office personnel should diligently and regularly check their records to ensure that conflicts of interest do not exist before referring a client to a particular attorney. Likewise, SJAs should ask legal assistance personnel to check their records for conflicts, prior to detailing trial counsel to cases. This will help to avoid pre-existing attorney-client relationship conflicts between trial counsel and the accused. The best practice, where possible, is to remove the attorney from any involvement in the case, when such a conflict is discovered.

VI. CONCLUSION

The attorney-client privilege is the oldest and most universally respected of the testimonial privileges. It remains a professional core value and all military and civilian attorneys owe their best efforts to keep the privilege and client confidences inviolate. An attorney who cannot or will not keep his client’s confidences has no place in our profession. Violation of this sacred trust eviscerates fundamental constitutional, codal, MCM, regulatory, ethical, and common law principles and brings our profession into disrepute.

This article has grappled with and presented many examples of the purpose, limits, and uses of the privilege. These issues have been analyzed with an eye toward practical applications of the privilege to daily military legal practice generally and to Air Force practice in particular. The historical

321 Id.
development of the attorney-client privilege and some specific areas where the privilege commonly arises in military practice have been explored. As these examples, rules, and cases have shown, the attorney-client privilege touches every aspect of the legal profession. Important aspects of the privilege have been examined and described from three different perspectives: (1) a prosecution perspective—saving court-martial cases involving alleged compromise of attorney-client privileged material by trial counsel and/or investigators, (2) a defense perspective—using the privilege to protect information about the whereabouts of a client and the contents of a defense counsel’s appointment calendar, and, (3) a general military practice perspective—the potential conflicts of interest which may arise when the privilege is factored into a diverse military practice involving advice to command, claims litigation, military legal assistance, and the many other issues handled by installation-level judge advocates daily.

Hopefully, this article provides a greater appreciation of the central role of the attorney-client privilege in the daily practice of military law and provides a number of practical tools and references for researching privilege questions as they arise. Despite the complex, often tangled set of facts that inevitably appear in these cases, it is hoped all will keep in mind our shared professional core value: an attorney’s first duty is to keep the secrets of his clients.