Whose Side Are You On?

Conflict, Argument, and Disqualification in Last Year's Court Term

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In the most recent court term, the Court of Appeals for the Armed Forces (CAAF) court confronted the various conflicts that arise from confusion of the roles of parties to the court-martial process. Specifically, what is the impact on the trial if the staff judge advocate (SJA) who advised the convening authority sits as the military judge of the accused?[1] The court also examined the limits of the right to counsel when the accused hires a civilian attorney who was a former military prosecutor.[2] The court also examined the ethical quandary of a defense counsel who simultaneously wears the hat of a prosecutor.[3] Finally, the court examined whether a defense counsel can ethically argue against his client's innocence.[4] The term revealed no global rule for resolving matters of apparent conflict other than perhaps a rule of common sense. Where conflict was illusory and remote, the court ordered no relief.[5] Where conflict was obvious and threatened the credibility of proceedings, the court upheld action to sever it.[6] Where it was unclear, the court sought more clarity.[7]

I'll Be Seeing You In All the Old Familiar Places . . . [8]

Rule for Courts-Martial 1106(c) and the Definition of Same Courts-Martial

In *United States v. Moorefield*, Sergeant (SGT) Daqric Moorefield, was convicted contrary to his pleas of making a false official statement, insubordination, attempting to strike a military policeman, disorderly conduct, soliciting a crime, communicating a threat, impersonating a non-commissioned officer, and five specifications of assault.[9] For his crimes he was sentenced to two years confinement and a bad conduct discharge.[10] At some point, SGT Moorefield realized the SJA who advised the convening authority before his trial and prepared the post-trial review was familiar to him.[11] The SJA had sat as a military judge on SGT Moorefield's earlier unrelated court-martial.[12]

The court examined whether prior service as a military judge disqualified the SJA from taking action for this accused.[13] Sergeant Moorefield relied on the provisions of RCM 1106 (b).[14] This rule provides that:

> No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as a staff judge advocate or legal officer to any reviewing or convening authority in the same case.[15]

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[1] United States v. Moorefield, 66 M.J. 170 (C.A.A.F. 2008).

[2] United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008).

[3] United States v. Lee, 66 M.J. 387 (C.A.A.F. 2008).

[4] United States v. Larson (*Larson II*), 66 M.J. 212 (C.A.A.F. 2008).

[5] *See, e.g.*, *Moorefield*, 66 M.J. 170.

[6] *See, e.g.*, *Rhoades*, 65 M.J. 393.

[7] *See, e.g.*, *Lee*, 66 M.J. 387.

[8] I'LL BE SEEING YOU, *in* RIGHT THIS WAY (1938).

[9] *Moorefield*, 66 M.J. at 170.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 171.

[14] *Id.*

[15] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106 (2008).

Sergeant Moorefield also referred to Article 6(c), UCMJ, which provides the statutory basis for RCM 1106(b).[16] The CAAF pointed out that the Navy-Marine Corps Court of Appeals (NMCCA) keyed-in on the final line of the RCM that a person shall not serve in dual capacity "in the same case."[17] Two courts-martial brought at different times against the same accused can constitute the same case.[18] In *Moorefield* the court looked to the facts that the courts-martial were years apart, and that they involved different facts, victims, and evidence.[19] The CAAF also noted that there was no allegation that the SJA in this case had acquired any specialized knowledge as military judge that would impact his decision as SJA.[20] The court was finally persuaded by the absence of any prejudice to the accused by the SJA's prior assignment.[21]

The CAAF was very clear that the rule barring service in the "same case" should be applied with common sense and not with an extremely expansive view.[22] Rules for Professional Conduct 1.1, 1.7, and 1.12 should put counsel on notice that the duty to be a zealous advocate would preclude having two roles in the same trial.[23] These prohibitions do not prevent the counsel from crossing paths with former parties as part of the ordinary assignment rotations.

You Cannot Serve Two Masters[24]

My Enemy's Enemy is My Friend. So Who Are You?[25]

Clearly there is no conflict when different facts and several years separate a counsel's assignment to roles on different sides of a court-martial. But what occurs when there isn't a great separation in time? In *United States v. Lee*, Captain (Capt) Jonathan Lee, USMC, complained that his assigned defense counsel labored an undisclosed and un-waived conflict of interest as he was a working prosecutor on another case while serving as the Capt Lee's defense counsel.[26]

Captain Lee entered a mixed plea and was subsequently tried on the contested charges.[27] He was convicted of three specifications of burglary, conduct unbecoming an officer, three specifications of fraternization, and five specifications of indecent assault.[28] The court sentenced him to three years confinement and a dismissal.[29] He received some appellate relief from the NMCCA in dismissal of a fraternization and allied conduct unbecoming charge and concordant sentence re-assessment.[30]

After his court-martial, Capt Lee became aware of the book *Warlord: No Better Friend, No Worse Enemy.*[31] The book details the high profile investigation and Article 32 examination of then Marine Second Lieutenant (2ndLt) Ilario Pantano,

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[16] 47 U.S.C. § 806(c) (2006).

[17] *Moorefield*, 66 M.J. at 171.

[18] Charges dismissed without prejudice that are later retried, companion cases or later retrial on related charges, or cases that otherwise have significant overlapping facts may be substantially the same matter requiring disqualification of the SJA.

[19] *Moorefield*, 66 M.J. at 171.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.7, 1.12 (1 May 1992). Rule 1.1 requires competent representation. *Id.* R. 1.1. Rule 1.7 requires that a lawyer avoid conflicts of interest. *Id.* R. 1.7. Rule 1.12 prevents a person who has served as a judge or arbitrator from representing a party in the case that they were responsible for adjudicating. *Id.* R. 1.12.

[24] *Matthew* 6:24.

[25] Wikipedia. http://en.wikipedia.org/wiki/The_enemy_of_my_enemy_is_my_friend (last visited Mar. 11, 2009) (derived from the Arab proverb "The Enemy of my enemy is my friend."); *Exodus* 23:22 ("I will be an enemy to your enemies.").

[26] United States v. Lee, 66 M.J. 387 (C.A.A.F. 2008).

[27] *Id.* at 387.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 388; *see generally* ILARIO PANTANO & MALCOLM MCCONNELL, WARLORD: NO BETTER FRIEND, NO WORSE ENEMY (2006).

who was charged with the premeditated murder of two Iraqis.[32] Captain Lee discovered that while his defense counsel was representing him at his court-martial, he was also working on the prosecution team of 2ndLt Pantano.[33] The book also revealed that the lead prosecutor in 2ndLt Pantano's case was also the lead prosecutor in Capt Lee's case, such that Capt Lee's defense counsel was simultaneously opposing Capt Lee's prosecutor in one case and assisting him as second chair in another.[34] The apparent conflict was mitigated by the fact that Capt Lee had hired a civilian counsel who was apparently without conflict.[35]

The CAAF began by affirming the legal precept that the right to counsel necessarily includes the right to conflict-free counsel.[36] They then turned to the idea that an accused may retain a conflicted counsel, if and only if their waiver is knowing and voluntary.[37] The court then looked at the nature of the conflict.[38] First, should there be a general prohibition against simultaneous service as a prosecutor and defense counsel?[39] The court looked at an opinion of the Office of Legal Counsel within the Department of Justice (DoJ) which held "it is considered unethical for an active prosecutor to represent criminal defendants in his or her own or another jurisdiction."[40] The opinion cited "'subliminal or concealed' influences on the attorney's loyalty."[41] The court also cited two ABA informal ethics opinions for the proposition that no counsel should be defense and prosecutor in the same case.[42]

The CAAF then looked to the case law of numerous jurisdictions for guidance.[43] The Fourth Circuit rejected a per se prejudice rule where a defense counsel worked in a neighboring jurisdiction as a part time prosecutor.[44] The Ninth Circuit required an appellant to demonstrate some impact on the quality of representation when the defense counsel was simultaneously working as a prosecutor.[45] The Ninth Circuit's holding suggested that a timely objection by the appellant might obviate the need to demonstrate impact.[46] The Court of Military Appeals had touched the issue tangentially in rejecting a per se finding of prejudice where the trial counsel wrote or endorsed the personnel evaluations of the defense counsel.[47]

Captain Lee alleged that while he was aware that his defense counsel would transition into working as a prosecutor, he was not informed when that would occur.[48] The allegation raised three questions for the CAAF.[49] First, was there an actual conflict of interest due to simultaneous service as trial and defense counsel; second, was the defense counsel supervised in one case by the trial counsel he opposed in another case; and finally, to the extent there was waiver by the accused, was it knowing and voluntary.[50] In other words did the accused know exactly when his lawyer began serving as a prosecutor and

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[32] Connie Fletcher, BOOKLIST, *available at* http://www.amazon.com/Warlord-Better-Friend-Worse-Enemy/dp/1416524266 (reviewing PANTANO & MCCONNELL, *supra* note 31).

[33] *Lee*, 66 M.J. at 388.

[34] *Id.*

[35] *Id.*

[36] *Id.*; *see also* Wood v. Georgia, 450 United States, 261, 271 (1981).

[37] *Lee*, 66 M.J. at 388; *see also* United States v. Davis, 3 M.J. 430, 433 (C.M.A 1977).

[38] *Lee*, 66 M.J. at 388.

[39] *Id.*

[40] *Id.* (quoting 1 Op. Off. Legal Counsel 110, 112 (1977)).

[41] *Id.*. at 388 (quoting 1 Op. Off. Legal Counsel at 112).

[42] *Id.* at 389; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 1235 (1972); ABA Comm. on Ethics and Prof'l Responsibility, Informal Ops. 1474 (1982).

[43] *Lee*, 66 M.J. at 389.

[44] *Id.*; *see also* Beaver v. Thompson, 93 F.3d 1186, 1193 (4th Cir. 1996).

[45] *Lee*, 66 M.J. at 389; *see also* Garcia v. Bunnell, 33 F.3d 1193, 1198 (9th Cir. 1994).

[46] *Lee*,, 66 M.J. at 389; *see also Garcia*, 33 F.3d at 1198.

[47] *Lee*, 66 M.J. at 389; *see also* United States v. Nicholson, 15 M.J. 436, 438 (C.M.A. 1983); United States v. Hubbard, 20 C.M.A. 482, 484 (1971).

[48] *Lee*, 66 M.J. at 389.

[49] *Id.*

[50] *Id.*

did the accused know the extent of his lawyer's duties as a prosecutor, to include that he would be supervised by the person prosecuting him?[51]

The CAAF remanded the case for further fact finding on those issues.[52] In contrast, the DoJ issued an opinion alleging simultaneous service as defense and trial counsel is unethical.[53] The CAAF signaled that a close reading of the facts is necessary before issuing a final ruling.[54] This is a welcome outcome given the practical realities of Active and Reserve assignment policies within the Judge Advocate General Corps.

Judge Advocates (JAs) may be re-assigned from one criminal law function to another.[55] Safeguards are often employed to limit the ethical conflicts that arise from direct transfer from trial counsel to defense counsel or vice-versa.[56] Some reserve JAs may hold civilian employment that technically conflicts with their assigned military duty.[57] A per se rule against all cases of a person performing opposing roles in different jurisdictions, would require a sizeable percentage of practicing JAs to change reserve assignments. Such a rule would also disrupt the flexibility that our assignments officers have in staffing missions filled by reservists. While the court will make some ruling on the issue in the future it seems likely the court will have the more practical approach against per se rules found in several federal circuits.[58]

An Inside Job

Everything Has Limits[59]

The court's prior rulings suggest a person can simultaneously be a prosecutor in one jurisdiction and a defense counsel in another.[60] The court was also asked whether a person can oversee the prosecution and then switch sides, particularly when the appellant's right to counsel is at stake.[61] In *United States v. Rhoades*, Specialist (SPC) Rhoades faced courts-martial for three specifications of willful disobedience of a superior commissioned officer.[62] In preparing for his trial at Fort Huachuca, SPC Rhoades hired Mr. R, a former JA who had just left active duty.[63] Mr. R's final active duty position was as the Chief of Justice at Fort Huachuca.[64] After appearing at trial on SPC Rhoades behalf, the Government moved to disqualify Mr. R. as counsel due to his prior government service.[65]

The Sixth Amendment gives accused the right to counsel of their choice, though the right is not absolute.[66] The "need for fair, efficient, and orderly administration of justice may outweigh the interest of the accused" in their selection of counsel.[67] The right may be abrogated due to a previous relationship with another party in the case, even if that party is the

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[51] *Id.*

[52] *Id.* at 390.

[53] 1 Op. Off. Legal Counsel 110, 112 (1977).

[54] *Id.* at 388, 390.

[55] Anecdotal evidence compiled by the author.

[56] Safeguards include refraining from assigning departing TDS counsel, new cases within three months of their prospective PCS, so that they have no lingering representations after departing TDS; and the construction of "Chinese walls" to insulate a counsel from potentially learning information which would create an irresolvable conflict. Interview with Major Tyesha Lowery, Criminal Law Dep't, The Judge Advocate General's Sch., in Charlottesville, Va. (Mar. 19, 2009).

[57] Some JA's assigned to Trial Defense Service Legal Service Offices are active civilian prosecutors. Some reserve military judges are practicing criminal lawyers. Some reserve command JAs whose duties include prosecution functions are private criminal defense attorneys.

[58] *See generally Lee*, 66 M.J. at 387–89; Beaver v. Thompson, 93 F.3d 1186, 1193 (4th Cir. 1996); Garcia v. Bunnell, 33 F.3d 1193, 1198 (9th Cir. 1994).

[59] Attributed to Mark Twain (1835–1910).

[60] *See generally Lee*, 66 M.J. at 388–90.

[61] United States v. Rhoades, 65 M.J. 393 (C.A.A.F. 2008).

[62] *Id.*

[63] *Id.* at 394.

[64] *Id.*

[65] *Id.*

[66] *Id.*; *see* Wheat v. United States, 486 U.S. 153, 159 (1988).

[67] *Rhoades*, 65 M.J. at 394 (quoting United States v. Campbell, 491 F.3d 1306, 1310 (11th Cir. 2007)).

Government.[68] While a judge is afforded broad discretion in ruling on motions for disqualification, a court should recognize a presumption favoring allowing an accused their counsel of choice.[69]

In this case the military judge considered 18 U.S.C. § 207(a)(1) a federal law that mandates that a former federal employee can not undertake post-government employment in connection with a matter which the person participated "personally and substantially."[70] The military judge also considered 18 U.S.C. § 207(a)(2) which mandates a two year ban on post-government employment in connection with particular matters under official responsibility.[71] There was no evidence in the record that Mr. R had substantial personal involvement with SPC Rhoades's court-martial prior to his release from active duty.[72]

The military judge then looked to the definition of matters pending "under official responsibility."[73] The statute was clear that a matter had to be actually "referred to or under consideration by persons within the employee's area of responsibility." In other words, it was not enough to show that a matter could have come under the former employee's purview.[74]

The government in its motion for disqualification submitted an affidavit from the SJA detailing then Captain (CPT) R's duties as the Chief of Justice, an affidavit from a CID agent discussing his agency's interaction with the former prosecutor, and an opinion from the post ethics counselor.[75] Mr. R. countered with an affidavit describing his involvement with the case prior to his termination of military service and a "Waiver of Conflict of Interest" signed by SPC Rhoades.[76]

The judge heard argument and ruled in favor of the Government disqualifying Mr. R.[77] The judge pointed to then CPT R's duties supervising the counsel who were now trying the case, advice to the CID and command regarding disposition of the case, and the clear fact that the case was being actively investigated for months, with the knowledge and assistance of the military justice section, while CPT R was the chief.[78] The trial court enumerated an e-mail chain started by SPC Rhoades' commander sent to CPT R, seeking advice on the issue of the investigation, and forwarded by the now defense counsel to a junior prosecutor.[79] Mr. R also briefed the incoming chief of justice about the strength of the case that in a month he would take on as defense counsel and, while on terminal leave, advised CID on elements of the investigation which would give rise to Specialist Rhoades being charged with kidnapping.[80]

The appellate court reviewed the judge's decision under an abuse of discretion standard.[81] The CAAF pointed out the judge's inquiry did not amount to a judicial finding that Mr. R committed a criminal violation of 18 U.S.C. § 207(a)(2).[82] Rather the appellate court reviewed whether the judge's decision to disqualify was within his discretion.[83] It was.[84] The CAAF found a reasonable likelihood that Mr. R's continued representation of SPC Rhoades would have violated a federal

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[68] *Rhoades*, 65 M.J. at 394; *see also Wheat*, 486 U.S. at 159.

[69] *Rhoades*, 65 M.J. at 395; *see also Wheat*, 486 U.S. at 164.

[70] *Rhoades*, 65 M.J. at 395; *see also* 18 U.S.C. § 207(a)(1) (2006).

[71] *Rhoades*, 65 M.J. at 396; *see also* 18 U.S.C. § 207(a)(2).

[72] *Rhoades*, 65 M.J. at 396.

[73] *Id.*

[74] *Id.* (citing 10 U.S.C. § 207(a)(2)).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 397.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

law whose purpose was to safeguard the integrity of the trial process.[85] The CAAF cited the holding in a civil case, *Kessenich v. Commodity Futures Trading Commission*, for the proposition that "the possibility that continued representation may be illegal militates strongly in favor disqualification."[86] The CAAF thereby ruled that the military judge did not abuse his discretion in disqualifying Mr. R., and that an appellant's right to counsel of their choice could be abrogated by the prospect of continued representation being illegal.[87]

Nothing Disarms a Doubting Thomas Like Honesty[88]

Failing to Succeed in Courts-Martial

We've examined the court's rulings when participants in the court-martial process switch sides at some point before, during, or after the proceeding. We now look at the court's rulings when a defense counsel's argument suggests they've switched sides.[89] Major (Maj) John Larson was court-martialed on various charges arising from the allegations that he used his government computer to download pornography and attempted to set up a sexual tryst with a minor.[90] Major Larson apparently established a rendezvous with what he believed was a fourteen year old girl named "Kristin."[91] Kristin was actually a civilian police detective who arrived at the rendezvous and arrested the major.[92]

In his opening statement and closing argument of the contested members trial, Maj Larson's civilian attorney conceded guilt on the issue of misuse of the computer.[93] Major Larson argued that these and similar statements during closing argument constituted ineffective assistance of counsel because he pled not guilty to the charge of violation of a lawful general

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[85] *Id.*

[86] *Id.* at 398 (quoting, 684 F.2d 88, 99 (D.C. Cir. 1982)).

[87] *Id.*

[88] BARRY MAHER, FILLING THE GLASS: THE SKEPTICS GUIDE TO POSITIVE THINKING IN BUSINESS 185 (2001).

[89] *Larson II*, 66 M.J. 212 (C.A.A.F. 2008).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 214.

[93] *Id.* at 216. During his opening statement the Appellant's attorney told the members:

> You're going to see that Major Larson was employed and used his computer in an inappropriate fashion. There's no question about that. That's not going to be an issue in this case. It's going to be conceded. Major Larson took his computer and used it inappropriately.
>
> You're going to hear that there is a regulation or rule that you are not to use your computer for particular purposes. . . . It's not going to be the defense contention in this case that Major Larson—that it was ever intended for Major Larson to gent on the computer and start going into profiles and contacting individuals in chat rooms, and profiles, and downloading photos. . . . That is not going to be an issue in this case.

Id. Appellant's attorney concluded his opening statement with:

> But when it gets down to the truth of this case—and I'm not going to get up here and try to represent something to you that's not true-Major Larson is guilty of misusing his computer because it was never anticipated by [Appellant's superiors] that he was to use that computer for those reasons. It wasn't and he shouldn't have done that. . . . But he certainly never attempted to do what they're claiming he did. And we're going to ask you at the conclusion of this case to find him not guilty of these charges and specifications.

Id. at 216–17. The closing argument on behalf of the Appellant included:

> I said to you in the opening that he violated-he did not obey a lawful order and that's viewing sexually explicit material over the internet.
>
> . . . There's a lot of thing s that I've forgotten and there are a lot of issues that I won't necessarily raise and bring up and for that I'm sorry. And I apologize to my client if I forgot to mention things that are important, certainly, that you might feel they're important. But I know that I each and every one [of] you are dedicated, your service here and I know that each one of you believe that it in order to make sure this officer, and yes, an officer that made bad choices and bad decisions, and he disobeyed his lawful orders, and certainly communicated indecent language and he did things, and thinking this was in the privacy of his own office, but certainly took advantage of that and brought, I think, discredit upon the service, you know, a disreputable situation and for that I'm sure you can—you know that this man is embarrassed and sorry for that.

Id. at 217.

regulation.[94] On appeal, Maj Larson alleged that he was surprised by his counsel's tactic of conceding guilt and that his chosen counsel was ineffective for not consulting him and thereby limiting his right to select his plea or testify in his defense.[95]

The Air Force Court of Appeals directed the civilian defense counsel to describe his consultation with the accused.[96] The civilian counsel never answered the courts inquiry, yet the court found that counsel was not constitutionally deficient anyway.[97]

The issue of ineffective assistance of counsel turned on two legal questions. First, is it ineffective for counsel to concede guilt contrary to the pleas of their client?[98] Second, if counsel may concede guilt for tactical advantage in the case of multiple charged offenses, must they obtain prior consent of their client before doing so.[99]

In answering both questions the court looked at somewhat analogous Supreme Court precedent, the case of *Florida v. Nixon*.[100] In *Nixon*, a defense counsel in a capital case consulted with his client and counseled that they concede guilt during the merits phase of the trial, in order to retain credibility during the punishment or sentencing phase of the trial.[101] The defendant in that case was generally unresponsive during meetings with his counsel and never consented to the strategy.[102] The Court reversed the Florida Supreme Court, and found that it was constitutionally permissible for a defense counsel to proceed with his strategy to concede guilt when a non-responsive client neither objects nor consents.[103] The Court and numerous federal courts have held consistently that conceding guilt to one charge to bolster the case for innocence on remaining charges is a valid trial strategy.[104]

While it was clear that a lawyer may tactically concede guilt, and needn't have the express permission of the client to do so, in *Larson* the CAAF made it clear that a counsel should consult the client before undertaking that course.[105] Absent a clear record that there was prior consultation, the court presumed deficient conduct on the part of the civilian defense counsel in failing to consult with his client before conceding guilt.[106] The court then turned to a *Strickland* analysis of prejudice in deciding whether relief was appropriate for the ineffective assistance rendered by the counsel.[107] The court held that Maj Larson had not met his burden of showing prejudice from his counsel's unwarned concession in argument.[108]

The CAAF found the evidence of guilt was overwhelming, that Maj Larson never offered a plausible defense to the charge of misusing his government computer, and the core defense strategy was unaffected by his counsel's concession.[109] The CAAF concluded with a quote from *United States v. Cronic*, that while an accused may want his counsel to engage in a "useless charade" of innocence in the face of overwhelming evidence, he suffered no prejudice from his counsel's failure to

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[94] *Id.* at 219.

[95] *Id.*

[96] *Id.* at 217.

[97] *Id.*; *see also* United States v. Larson (*Larson I*), 64 M.J. 559, 564 (A.F. Ct. Crim. App. 2006).

[98] *Larson II*, 66 M.J. at 213.

[99] *Id.*

[100] *Id.* at 218; *see also* Florida v. Nixon, 543 U.S. 175, 181 (2004).

[101] *Nixon*, 543 U.S. at 182.

[102] *Id.* at 183.

[103] *Id.* at 193.

[104] *Larson II*, 66 M.J. at 218; *see also Nixon*, 543 U.S. at 188; United States v. Holman, 314 F.3d 837, 840 (7th Cir. 2002); United States v. Swanson, 943 F.2d 1070, 1075–76 (9th Cir. 1991).

[105] *Larson II*, 66 M.J. at 218–19; *see* Davenport v. Diguglelmo, 215 Fed. Appx 175, 181 (3d Cir. 2007).

[106] *Larson II*, 66 M.J. at 219.

[107] *Id.* at 219; *see also* Strickland v. Washington, 466 U.S. 668, 688 (2004). The *Strickland* analysis is the prevailing norm for judging cases of ineffective assistance of counsel: (1) Did counsel's performance fall below the norm of reasonable conduct? (2) Is there a justification for the deficient conduct? (3) If not, did the Appellant suffer prejudice that could reasonably have impacted on the outcome of the trial? *Id.* at 697.

[108] *Larson II*, 66 M.J. at 219.

[109] *Id.* The court was persuaded by the amount and clarity of sexually explicit photographs and chat sessions seized from the Appellant's computer and that the accused bought condoms just fifteen minutes before his intended rendezvous with "Kristin." *Id.* Larson's core defense was that he was unaware that "Kristin" was underage. *Id.*

do so.[110] Defense and government counsel must remember that when an accused pleads not guilty, the onus remains on the government to produce evidence that proves the accused guilt beyond a reasonable doubt, regardless of the defense's argument or posturing.[111]

Conclusion

What we've got here is failure to communicate . . . .[112]

Perhaps the most vexing area of professional responsibility is sorting out conflicts of interest at the margins. It is easy to figure out what is right when there are two clear clients with diametrically opposed interests. But when the conflict is remote and often somewhat academic, guidance is needed. In four cases this term, the CAAF has provided some guidance. Counsel must first understand that the rules are based on common sense and not intended to prevent the occasional coincidence of a party who served in one capacity in a trial involving the accused from ever serving in a different role with the same accused in a later trial. Counsel should always keep in mind that "when in doubt, talk it out." Full and free disclosure about any roles, relationships, or tactical choices that might be meaningful to a client is always the best course. Finally, all sides must remember that the Army is a client and as such is entitled to conflict free representation and loyalty from its counsel.

[110] *Id.* (quoting 466 U.S. 648, 656 n.19 (1984)).

[111] *Id.*

[112] COOL HAND LUKE (Warner Brothers 1967).