HOW THIS MANUAL IS STRUCTURED

Chapter 1 contains background information on the military justice system as well as the services provided by the Directorate of Defence Counsel Services (DDCS) and the role of DDCS lawyers. Chapter 2 examines the Code of Service Discipline, specifically in relation to summary trials and courts martial. The duties of DDCS lawyers as they relate to defence counsel are detailed in Chapter 3, while Chapter 4 outlines the duties of DDCS lawyers in terms of their advisory role with respect to matters of arrest or detention, election of a mode of trial, assisting officers, and summary investigations and boards of inquiry.

Chapters 5 through 8 describe the specific roles of the DDCS lawyer as they relate to lawyer-client relationships, pre-trial matters, the particulars of courts martial, post-trial matters and appeals. Chapter 9 provides general guidelines for dealing with the media, and the final chapter examines other related matters, including arrest, custody, release from custody and fitness to stand trial.

Annex A contains the Judge Advocate General Policy Directive regarding defence counsel services (dated March 23, 2000), and Annex B is a compilation of the DDCS Directives that are contained in the Manual.

TABLE OF CONTENTS

INTRODUCTION TO DEFENCE COUNSEL SERVICES

CONTENTS:

BACKGROUND

The Canadian military justice system is an integral part of the broader Canadian justice system; it exists concurrently with — and alongside of — the civilian justice system. Canadian law has long recognized the requirement for a separate system of military justice[1]— most recently in the cases of *MacKay v. The Queen* and *R. v. Généreux*. In fact, the Supreme Court of Canada stated in *R. v. Généreux* that the safety and security of Canadians depend in large measure on the efficiency and discipline of the Canadian Forces (CF).

The *National Defence Act*[2] (NDA) sets out the framework of the military justice system. While CF members are subject to the ordinary law of the land that is applicable to all Canadians, they are also subject to the Code of Service Discipline.[3] The Code of Service Discipline sets out the foundation of the military justice system, including disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, and appeals and reviews. In some cases, the service offences prescribed by the Code of Service Discipline are analogous to offences in ordinary Canadian law; however, many service offences are unique to the military and have no equivalent in ordinary Canadian law.

In December 1998, Parliament extensively amended the NDA. These amendments — many of which came into effect on 1 September 1999 — brought about substantial reforms to the Canadian military justice system. For example, subsection 9.2(1) of the NDA now specifically provides that the CF's highest-ranking legal officer, the Judge Advocate General (JAG), is responsible for the superintendence of the administration of military justice in the CF. Another important reform is the formal recognition in the NDA of an accused person's right to representation:

> A person who is liable to be charged, dealt with and tried under the Code of Service Discipline has the right to be represented in the circumstances and in the manner prescribed in regulations made by the Governor-in-Council.[4]

The NDA also formally established the position of an independent Director of Defence Counsel Services (DDCS) — an experienced lawyer who is a legal officer in the CF. The independence of the DDCS is fostered by the fact that the DDCS is appointed by the Minister of National Defence,[5] rather than simply posted to the position by the CF chain of command. Furthermore, the DDCS holds office during good behaviour for a term not exceeding four years, and is eligible for reappointment on the expiration of a

---

[1] For two examples, see the Supreme Court of Canada cases of *MacKay v. The Queen*, [1980] 2 SCR 370 and *R. v. Généreux*, [1992] 1 SCR 259.

[2] RSC 1985, c. N-5, as amended by SC 1998, c. 35.

[3] NDA Part III, ss. 55 – 249.26.

[4] NDA s. 249.17.

[5] NDA subs. 249.18(1).

first or subsequent term of office.[6] Nonetheless, the DDCS's duties are carried out under the general supervision of JAG.[7]

PRESCRIBED SERVICES[8]

DDCS provides the following principal services.[9]

- Legal counsel services[10] are provided to
  - accused persons
    - at courts martial;
    - where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial; and
    - in cases where a finding of unfit to stand trial has been made, at hearings to determine the sufficiency of admissible evidence to put the accused person on trial;
  - persons sentenced by court martial to detention or imprisonment, at hearings for
    - release pending appeal;
    - review of undertakings for release pending appeal; and
    - cancellation of release pending appeal;
  - persons held in custody, at hearings by a military judge under subsection 159(1) of the NDA to determine retention in custody;
  - the respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial; and

[6] NDA subss. 249.18(2) and (3).

[7] NDA subs. 249.2(1).

[8] NDA s. 249.19. The legal services addressed here are separate and distinct from those in the Treasury Board Directive *Policy on the Indemnification of and Legal Assistance for Crown Servants.*

[9] *Queen's Regulations and Orders for the Canadian Forces* (QR&O) arts. 101.20(2) and (3).

[10] Pursuant to QR&O art. 101.20(6), legal counsel services are not provided in connection with any matter for which a person is represented by civilian legal counsel.

- a person on an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee.[11]

➢ Advisory services are provided to

- persons arrested or detained in respect of a service offence (subsection 10(*b*) *Charter of Rights* advice), on a seven-days-a-week/24-hours-a-day basis;

- assisting officers[12] and accused persons with respect to the making of an election to be tried by court martial pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) articles 108.17 and 108.18;

- assisting officers or accused persons on matters of a general nature relating to summary trials; and

- persons subject to an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

ROLE AND FUNCTION OF DDCS LAWYERS IN THE DISCIPLINARY SYSTEM

DDCS lawyers are the "defence bar" of the CF. A DDCS lawyer's duty is the same as a defence counsel in the civilian criminal justice system. The DDCS lawyer's solemn duty to his or her client is to fearlessly raise every issue, advance every argument and ask every question that the lawyer thinks will help his or her client's case. Furthermore, the DDCS lawyer must endeavour to obtain for his or her client the benefit of any and every remedy and defence that is authorized by law. The DDCS lawyer must discharge this duty by fair and honourable means, without illegality, and in a manner consistent with a lawyer's duty to treat the court with candour, fairness, courtesy and respect.[13]

DDCS is statutorily obliged to provide — free of charge — advice and representation to persons subject to the Code of Service Discipline[14] who are suspected of, or charged with, the commission of service offences.[15] DDCS lawyers deal directly with their clients, including assisting officers, irrespective of rank, status, unit or physical location. They also deal with their clients' chain of command, military and civilian prosecution and

[11] See QR&O art. 101.21 for provisions respecting the Appeal Committee.

[12] An "assisting officer" is defined at QR&O arts. 108.03 and 108.14 as an officer or non-commissioned member appointed by, or under the authority of, the commanding officer to assist persons subject to the Code of Service Discipline who have been charged with the commission of a service offence.

[13] Commentary 2 to Rule 10 of the Law Society of Upper Canada *Professional Conduct Handbook* and the Canadian Bar Association *Code of Professional Conduct* (1998), c. IX.

[14] Those persons who are subject to the Code of Service Discipline are set out in NDA s. 60.

[15] A "service offence" is defined at s. 2 of the NDA as an offence that is defined as such by the NDA, the Criminal Code or any other Act of Parliament and that is committed by a person while subject to the Code of Service Discipline.

enforcement authorities, and all other persons involved in disciplinary proceedings respecting their clients. Finally, DDCS lawyers interact with military prosecutors, courts martial, the Court Martial Appeal Court, the Federal Court of Canada, the Supreme Court of Canada, provincial bars and professional associations.

INDEPENDENCE OF DDCS LAWYERS AND THE CHAIN OF COMMAND

Since they are CF members, DDCS lawyers are at all times subject to the NDA, the Code of Service Discipline, the QR&Os, and all other CF orders and instructions. As noted previously, they perform their duties and provide their services under the general supervision of JAG.[16] It may appear that there is a conflict, or a potential for conflict, between the requirements of membership in the CF and officership on the one hand and the duties and responsibilities of defence counsel on the other.

To address this misperception it is important to remember that the DDCS is appointed by the Minister of National Defence, not by CF authorities. Furthermore, an examination of the respective oaths[17] they are required to swear, the governing legislation and regulations for DDCS lawyers,[18] and the codes of professional conduct of the provincial and territorial law societies show that the legislative intent is to ensure, to the fullest extent possible,[19] their independence in the provision of defence counsel services. In the final analysis, DDCS lawyers are subject to the same responsibilities and obligations as any other CF officer unless those responsibilities and obligations conflict with defence counsel duties.

DDCS lawyers perform their duties and provide their services independent of the chain of command and of CF and Department of National Defence disciplinary and enforcement authorities. The sole restraints on the provision of their services are those imposed by law and by professional ethics, including the requirements and constraints of solicitor-client privilege.

As indicated above, in fulfilling the mandate set out for the DDCS in the NDA, DDCS lawyers provide their clients with the defence counsel and advisory services typically provided by criminal lawyers in the civilian practice of law. They are, in fact and in law, under lawful military orders to provide those services to their clients.[20] Accordingly, in respect of the provision of those services, the DDCS lawyer's allegiance is to the client.[21]

---

[16] NDA subs. 249.2(1).

[17] See QR&O art. 6.04 for the oath taken by officers on enrolment in the CF.

[18] NDA s. 249.18 – s. 249.21 and QR&O art. 101.19 – 101.20.

[19] NDA subss. 249.2(1) and (2).

[20] See NDA s. 249.19, and QR&O arts. 101.20 and 101.22(1)(*a*).

[21] In discharging their duty to their clients, DDCS lawyers must always act ethically in accordance with the rules of professional conduct of their law society and those adopted by the Canadian Bar Association.

A MILITARY JUSTICE PRIMER

CONTENTS:

BACKGROUND[1]

The ultimate role of the CF is to apply force — or to threaten to apply force — to the extent of doing violence to destructive levels on behalf of, and in the interest of, the state. In support of this critical role, the CF has at its disposal a myriad of lethal and destructive weaponry. In light of this, it is important that such an armed force be closely controlled and highly disciplined.[2]

In order to fulfil their role properly, CF members must be willing to suppress their own personal interests, including ultimately their interest in preserving their own lives, in favour of the overall interests of the state as expressed by the lawful orders of their superior officers. Such orders will often include orders to go into combat and therefore to place one's own life in jeopardy. In this respect, the purpose of military justice has been aptly described by DesRoches J. as follows:

> Military justice must not only promote good order but also high morale and discipline. In this way it has a more positive purpose than law in the purely civilian context. Discipline is defined as instant obedience to lawful orders, and the most essential form of discipline in the military environment is self-discipline - a person's willingness to carry out his or her assigned duties regardless of the danger, or lack of immediate supervision.[3]

The need to maintain a disciplined military force is not only self-evident but it is also enshrined in law.[4] CF discipline serves the following three important purposes:[5]

- ensuring that CF members follow orders, even in the face of danger to their person;
- controlling the CF so that it does not abuse its power; and
- assisting in the assimilation of CF members to institutional military values.

THE CODE OF SERVICE DISCIPLINE

Military discipline is much more intrusive than even the discipline exercised in para-military organizations such as police forces. This is reflected in the Code of Service Discipline, which prescribes a complete and expansive system of military justice. Unlike

---

[1] For a lengthier and more in-depth discussion of military justice and discipline, see Chapter 1 of the JAG publication *Military Justice at the Summary Trial Level.*

[2] The Canadian Forces adopts the following *Concise Oxford Dictionary* definition of discipline:

- n. 1. a. a control or order exercised over people…esp. …military personnel… b. the system of rules used to maintain this control.
- v.tr. 1. punish, chastise. 2. bring under control by training in obedience; drill.

[3] *R. v. Stewart* (1993), 5 C.M.A.R. 205, at 212.

[4] Ibid. See also *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at 399, and *R. v. Généreux*, [1992] 1 S.C.R. 259, at 293.

[5] JAG publication, *Military Justice at the Summary Trial Level*, c. 1, para. 33.

the *Criminal Code*, which seeks primarily to regulate society, this Code regulates the conduct of the persons to whom it applies in support of its primary aim of achieving and maintaining discipline. It also sets out a complete legal system for the prosecution, trial and defence of offenders.

The military justice system is of necessity a portable and expeditious system of justice that applies equally in peacetime and wartime. Its intrusiveness is reflected in the service offences otherwise unknown to civilian criminal law (e.g., poor dress and deportment on parade, absence without leave, insubordination). Its expansiveness is reflected by the fact that

- it is a service offence to violate
  - not only the Code of Service Discipline but also any federal statute, including the *Criminal Code*;[6] and
  - the law of foreign jurisdictions in which persons subject to the Code of Service Discipline may find themselves;[7] and
- it is accepted in our law that military discipline often requires greater punishment for offences that are considered minor by civilian standards or that are even unknown to civilian criminal law.[8]

The Code of Service Discipline establishes two categories of service tribunal: the summary trial and the court martial.[9]

SUMMARY TRIALS[10]

The summary trial[11] is designed

> to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.[12]

The summary trial deals with disciplinary matters that are relatively minor in nature but that, nonetheless, have an important impact on discipline and efficiency. The large

[6] NDA s. 130.

[7] NDA s. 132.

[8] *MacKay*, supra, at 399; *Généreux*, supra, at 293.

[9] NDA s. 2.

[10] For a thorough discussion of the summary trial, see the Judge Advocate General publication *Military Justice at the Summary Trial Level*.

[11] See a definition of "summary trial" at NDA s. 2.

[12] QR&O art. 108.02.

majority of charges under the Code of Service Discipline are disposed of by summary trial, thus making it the predominant service tribunal.

There are three types of summary trials: summary trial by commanding officer,[13] summary trial by delegated officer[14] and summary trial by superior commander.[15]

While it is apparent that the officers presiding at summary trials are not legally trained, before they are permitted to exercise their summary trial power and authority, they must be certified by JAG as being qualified to so do.[16] Generally, accused persons at a summary trial are not represented by a lawyer;[17] however, they are entitled to an assisting officer.[18] One of the DDCS services is the provision of legal advice of a general nature to assisting officers or accused persons respecting the summary trial process.[19]

In keeping with its summary nature, the *Military Rules of Evidence*[20] (MRE) do not apply[21] at a summary trial, and trial procedures are straightforward in nature.[22] Moreover, the powers of punishment of the presiding officers are limited in scope.[23] Nonetheless, the rules and procedures governing the conduct of summary trials are

[13] See a definition of "commanding officer" at NDA ss. 160 and 162.3 and QR&O arts. 101.01 and 1.02 (definitions).

[14] See a definition of "delegated officer" at QR&O art. 108.03; see also QR&O art. 108.10.

[15] See a definition of "superior commander" at NDA s. 162.3.

[16] See QR&O art. 101.09 for commanding officers and superior commanders, and see QR&O art. 108.10(2) for delegated officers.

[17] Neither the NDA nor the QR&Os explicitly permits or prohibits the presence of lawyers at summary trials. Should the accused request a lawyer at a summary trial, the presiding officer has discretion either: (a) to permit or deny the request; or (b) to apply for disposal of the charges by court martial (Note B to QR&O art. 108.14). In this respect, some guidance is given to the presiding officer at Note C to QR&O art. 108.14.

[18] QR&O arts. 108.03 and 108.14 for a definition of "assisting officer".

[19] QR&O art. 101.20(2)(*c*).

[20] The *Military Rules of Evidence* (MRE), made pursuant to NDA subs. 181(1), are the rules of evidence governing court martial proceedings and all other hearings and proceedings over which a military judge presides. They are found at *The Consolidated Regulations of Canada 1978*, Chapter 1049, as amended by *SOR/90-306*, and at Appendix 1.3 to QR&O Volume IV.

[21] QR&O art. 108.21(1).

[22] QR&O arts. 108.20 and 108.21. For a complete discussion of summary trial procedures, see Chapter 13 of the JAG publication *Military Justice at the Summary Trial Level*.

[23] See NDA subs.139(1) and QR&O art. 104.02 for the scale of permissible punishments in respect of service offences. The maximum punishment that a commanding officer may impose is detention for 30 days, reduction in rank by one rank and a fine in the amount of 60% of monthly basic pay (QR&O art. 108.24); the maximum punishment that a delegated officer may impose is a reprimand and a fine in the amount of 25% of monthly basic pay (QR&O art. 108.25); and the maximum punishment that a superior commander may impose is a severe reprimand and a fine in the amount of 60% of monthly basic pay (QR&O art. 108.26).

designed to ensure that the process is fair.[24] The primary features designed to achieve fairness in a summary trial are as follows:

- presiding officers are required to take an oath or solemn affirmation at the beginning of every summary trial;[25]
- the accused has to be informed in a timely fashion of the case against him or her prior to his or her making any decisions respecting the process;[26]
- the accused must be present throughout the whole of the trial and must be given the opportunity to question all witnesses, give evidence and make representations about the evidence provided;[27]
- witnesses must testify under oath;[28] and
- the presiding officer must be satisfied beyond a reasonable doubt as to the guilt of the accused.[29]

An accused to be tried by summary trial has the right to elect[30] trial by court martial in all but the two following circumstances:[31]

- when charges are laid under NDA sections 85 (*insubordinate behaviour*), 86 (*quarrels and disturbances*), 90 (*absence without leave*), 97 (*drunkenness*) and 129 (*conduct to the prejudice of good order and discipline*, relating to training, maintenance of personal equipment, quarters or work space, or dress or deportment);[32] and[33]

[24] While there is no one definition of procedural fairness, it is generally accepted that in order to be fair in a legal sense the common law rules of natural justice, freedom from bias on the part of the decision maker, and the meaningful and informed participation by the person in the proceedings must be followed throughout the process.

[25] QR&O art. 108.20(2).

[26] QR&O art. 108.15.

[27] QR&O art. 108.20.

[28] QR&O art. 108.30.

[29] See Note B to QR&O art. 108.20 for the guidance given presiding officers on the meaning of "reasonable doubt".

[30] For a lengthier discussion of the election, see DND publication A-LG-050-000/AF-001 — *The Election To Be Tried By Summary Trial or Court Martial.*

[31] QR&O art. 108.17(1).

[32] QR&O art. 108.17(1)(*a*).

[33] Both elements must be present at the same time.

- when the presiding officer concludes that, in the event that the accused were to be found guilty, the circumstances of the offence would not justify a punishment of detention, reduction in rank or a fine in excess of 25% of monthly basic pay.[34]

Prior to deciding the mode of trial, the accused must be given a reasonable period of time — not less than 24 hours — to consider the decision and to consult with a lawyer.[35] While the accused is at liberty to consult with a civilian lawyer at his or her own expense, DCS lawyers are available for such consultations.[36] However, unlike the court martial, DCS lawyers are not available to represent the accused at a summary trial.

COURTS MARTIAL

A court martial is a formal military court of record[37] over which a military judge presides.[38] The powers of punishment[39] open to a court martial greatly exceed those available to a presiding officer at a summary trial. Court martial procedures[40] are formal and quite similar to those followed by civilian criminal courts. A lawyer from the Directorate of Military Prosecutions conducts the prosecution. Persons to be tried by court martial are entitled to the services of and representation by a DCS lawyer free of charge,[41] or they may retain a civilian lawyer at their own expense or, where qualifying criteria are met, with the assistance of a provincial legal aid plan.

There are two types of court martial:

- General Courts Martial;[42] and
- Standing Courts Martial;[43]

General Courts Martial and Standing Courts Martial may try any person subject to the Code of Service Discipline[44] and may impose any punishment in NDA subsection 139(1), including imprisonment for life.

---

[34] QR&O art. 108.17(1)(*b*).

[35] QR&O arts. 108.17(2)(*b*) and 108.18.

[36] QR&O art. 101.20(2)(*d*).

[37] NDA subs. 179(1).

[38] See NDA s. 165.21 – 165.27 respecting appointment of military judges.

[39] See NDA subs. 139(1) and QR&O Chapter 104 respecting punishments under the Code of Service Discipline.

[40] Court martial procedures are exhaustively set out at QR&O art. 112.05.

[41] QR& O art. 101.20(2)(*f*).

[42] See NDA ss. 166 – 168.

[43] See NDA ss. 173 – 175.

[44] NDA ss. 166 and 173, respectively.

Standing Courts Martial are presided over by a military judge sitting alone.[45] General Courts Martial are analogous to trial by judge and jury in a civilian criminal court. They are composed of a military judge and a panel of five members.[46] The panels consist entirely of officers, unless the accused is a non-commissioned member — in which case the panels must include two non-commissioned members of the rank of warrant officer or above.[47] The panels are responsible for making the finding respecting guilt, and the presiding military judge is responsible for making legal rulings and for imposing the sentence.

For many offences, the person accused can elect between a General Court Martial and a Standing Court Martial. Offences punishable by imprisonment for less than two years, or by a lower punishment on the scale, will be tried by Standing Court Martial. Those punishable by imprisonment for life will be tried by General Court Martial, unless prosecution consents to a Standing Court Martial. For other offences, the accused can generally elect between Standing and General Court Martial.[48]

ASSISTANCE AND ADVICE TO AND REPRESENTATION OF THE ACCUSED

When an accused is charged with an offence he or she is entitled to the services of an assisting officer.[49] While assisting officers are not — save for a very few exceptions[50]— legally trained, it is their role to provide advice and assistance to the accused. It is the assisting officer's duty and responsibility

- to assist in the preparation of and presentation at summary trial of the accused's case to the extent desired by the accused;[51] and

- prior to the accused making an election to be tried by summary trial or court martial, to ensure that the accused is aware of the nature and gravity of the offences with which he or she has been charged and of the differences between a summary trial and a court martial.[52]

The assisting officer provides assistance and information to the accused respecting the preparation for and conduct of the summary trial.[53] As noted in Chapter 1, either the

[45] NDA ss. 174 and 177, respectively.

[46] NDA subs. 167(1).

[47] NDA subss. 167(7) and 170(4), respectively.

[48] NDA, ss. 165.191 to 165.193.

[49] QR&O art. 108.14(1).

[50] For example, a lawyer engaged in the practice of law who is also a member of a reserve unit.

[51] QR&O art. 108.14(4).

[52] QR&O art. 108.14(5).

[53] For a more complete discussion of the role and responsibilities of the assisting officer see the JAG publication *Military Justice at the Summary Trial Level* and the DND publication A-LG-050-000/AF-001 — *The Election To Be Tried By Summary Trial or Court Martial.*

assisting officer or the accused may consult with a DCS lawyer on general legal matters with respect to the summary trial[54] and to the making of the election to be tried by summary trial or court martial.

An accused to be tried by court martial is entitled to both a lawyer and an adviser.[55] As stated previously, the lawyer may be civilian counsel retained at the personal expense of the accused or may be a DCS lawyer at no cost to the accused. The adviser's role is to assist the accused, prior to and during trial, on any technical or specialized aspect of the case.[56]

[54] Such advice will typically concern the accused's rights and entitlements before, during and after the summary trial.

[55] QR&O art. 101.22(1).

[56] QR&O art. 101.22 (1)(*b*).

DEFENCE COUNSEL

CONTENTS:

QUALIFICATIONS

Lawyers posted to DDCS are fully qualified members in good standing of the bar of a province or territory. In order to promote their competence as defence counsel, DDCS lawyers undergo extensive training and continuing legal education.

As mentioned in Chapter 1, DDCS lawyers must observe not only their oaths as officers in the CF but also, like all lawyers, their oaths as barristers and solicitors of the bar of the province or territory to which they belong. This, in turn, requires them to comply with their law society's Code of Ethics or Rules of Professional Conduct.[1] In addition, all DDCS lawyers are members of the Canadian Bar Association and must adhere to its *Code of Professional Conduct*.

The role of DDCS lawyers as defence counsel at courts martial is identical to that of civilian defence counsel in the civilian criminal justice system: within the scope of law and ethics, to represent, to be an advocate for, and to provide the best possible defence for their clients. Thus, in keeping with the lawyers' rules of professional conduct[2] and with DDCS's statutory obligations, the first duty of DDCS counsel is to the client.

THE DUTY OF AN ADVOCATE

DDCS lawyers are, in every sense of the word, advocates for their clients: they support, speak in favour of and plead for their clients.[3] The lawyer is the person who has been retained to articulate and support the client's position and cause. Defence counsel are duty bound to advance the client's case and cause in an independent, fearless and courageous manner. In this respect, all law societies demand that the lawyer "must represent the client resolutely, honourably and within the limits of the law."[4]

However, DDCS lawyers, like all lawyers, are bound to adhere to the ethics or rules of professional conduct for their governing law society. The list of prohibited conduct is lengthy,[5] and all lawyers are obliged by their governing law societies to comply. In the interest of brevity, however, the matter may be summed up by stating that lawyers are

---

[1] The practice of law is governed in each province or territory by law societies. Each law society has enacted rules of professional conduct (see the Law Society of Upper Canada *Professional Conduct Handbook* as well as the Canadian Bar Association *Code of Professional Conduct*). These rules act as a guide to the profession and are enforced through a disciplinary process that can, as a sanction for violation of the rules, suspend or revoke the lawyer's licence to practise law.

[2] Commentary 2 to Rule 10 of the Law Society of Upper Canada *Professional Conduct Handbook* states in part that "[T]he lawyer has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case and to endeavour to obtain for his client the benefit of any and every remedy and defence which is authorized by law."

[3] See the definition of "advocate" in the C*oncise Oxford Dictionary of Current English*, 9th ed (Oxford: Clarendon Press, 1995), p. 20.

[4] Rule at Chapter IX of The Canadian Bar Association *Code of Professional Conduct* and Rule 10 of The Law Society of Upper Canada *Professional Conduct Handbook.*

[5] Ibid.

duty bound at all times to conduct themselves with honour and integrity[6] and to refrain from engaging in any conduct or activity that could lead to legitimate reproach or criticism. The ethics and rules of professional conduct place certain limits upon the extent to which the lawyer may go in being an advocate for the client.

DDCS Directive 1

DDCS counsel shall be knowledgeable of and adhere to their law society's code or rules of professional conduct as well as the Canadian Bar Association *Code of Professional Conduct*. DDCS counsel who may be uncertain about a particular activity or course of conduct respecting any aspect of the discharge of their duties and responsibilities are to consult with the Director and their law society as required.

CONFLICT OF INTEREST[7]

As noted earlier, within the requirements of law and ethics, the DDCS lawyer's loyalty is to the client. Accordingly, the various codes or rules of professional conduct prohibit lawyers from advising or representing both sides of a dispute.[8] A not uncommon challenge for defence counsel is to avoid situations that give rise to a conflict of interest. A conflict of interest is any situation

> that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.[9]

The challenge is often enhanced by the subtlety of some conflict situations. In this regard, it is important to note that today, especially for the CF, perception is frequently on the same footing as, if not more important than, reality.

DEFENCE COUNSEL AND THE CHAIN OF COMMAND

The chain of command is the single most pervasive feature of the CF, and DDCS lawyers are not exempt from the requirements of this ubiquitous feature of military life and organization. Within their own context, DDCS lawyers are under the immediate command and supervision of the DDCS. They are, moreover, under the general supervision of JAG.[10] Finally, being subject to the Code of Service Discipline, they are required to follow the lawful orders of all superior officers.[11]

---

[6] Ibid.

[7] A second aspect of conflict of interest is discussed in Chapter 5 of this Manual.

[8] Chapter V of The Canadian Bar Association *Code of Professional Conduct* and Rule 5 of The Law Society of Upper Canada *Professional Conduct Handbook.*

[9] The Law Society of Upper Canada *Professional Conduct Handbook*, Rule 5, Commentary 1.

[10] NDA subs. 249.2(1).

In this latter vein, at the unit level, it is particularly evident that there is irreconcilable conflict between the interests of the chain of command and of defence counsel. The chain of command is responsible for the administration of discipline and, therefore, for the trial and punishment of alleged offenders. The defence counsel, on the other hand, is responsible for protecting and advancing the alleged offender's interests.

As noted earlier,[12] insofar as it is possible in a military organization, the statutory and regulatory framework for DDCS counsel detaches them from the chain of command and provides for them to discharge their duties and responsibilities in their capacities as legal advisor and defence counsel independent of the chain of command.[13] As a result, in conducting their lawful and ethical activities in their capacity as defence counsel, DDCS lawyers are legally immune from any influence or authority purported to be exercised by the chain of command.

This does not mean that the DDCS lawyer can ignore or otherwise disregard the chain of command. The necessity of earning respect, and the courtesy and necessity of paying the proper respect, should never be overlooked. Moreover, DDCS lawyers are members of the CF and are not only subject to the provisions of the Code of Service Discipline but also are expected to observe the ethics of officership.

In addition, defence counsel should remember that the chain of command has an inherent responsibility respecting the welfare of the alleged offender as a serviceperson. Accordingly, the chain of command can provide useful assistance to defence counsel in numerous areas (e.g., procuring witnesses, obtaining specialized information, providing the necessary administrative services and support).

DDCS Directive 2

DDCS counsel shall at all times treat the chain of command with respect and in such a manner so as not to be perceived to be submissive to it or to otherwise cast doubt respecting their allegiance to the client.

[11] NDA s. 83 and QR&O art. 19.015.

[12] See “Independence and the Chain of Command” at Chapter 2.

[13] Ibid.

ADVISORY SERVICES

CONTENTS:

GENERAL

DDCS is mandated to provide legal advice on a broad range of matters[1] to persons subject to the Code of Service Discipline.[2] DDCS does not, however, provide legal advice or services respecting matters not likely to be tried under the Code of Service Discipline. In such instances, the services of civilian counsel must be obtained and privately paid for. It also should be noted that DDCS services are not provided when civilian counsel has also been retained.[3] This practice conforms to rules of professional conduct prohibiting the provision of advice and services to another lawyer's client without the other lawyer's knowledge and consent.[4]

DDCS provides a 24-hours-a-day, bilingual duty counsel service for persons[5] subject to the Code of Service Discipline who require legal advice respecting allegations of the commission of a service offence.[6] While the subsequent conversation invokes the doctrine of solicitor-client privilege,[7] the DDCS lawyer providing advice in a particular situation may not be the lawyer appointed to defend at a court martial, should the matter advance that far.

ADVICE ON ARREST OR DETENTION

Section 10 of the Charter provides that:

> Everyone has the right on arrest or detention…
>
> (b) to retain and instruct counsel without delay and to be informed of that right.

The matter of arrest is fairly straightforward.[8] More problematic is the interpretation of "detention". In this respect, the leading cases of *R. v. Therens*[9] and *R. v. Thomsen*[10] established the following[11]:

---

[1] See QR&O art. 101.20(2) and Chapter 1 of this Manual.

[2] See NDA s. 60 for the persons subject to the Code of Service Discipline.

[3] QR&O art. 101.20(6).

[4] Canadian Bar Association, *Code of Professional Conduct*, c. XVI, commentary 8.

[5] QR&O art. 105.08(1) requires that "…a person who is arrested or detained, shall, without delay, be informed: …(d) that the person has the right to have access to free and immediate advice from duty counsel provided by the Director of Defence Counsel Services or other duty counsel in the jurisdiction where the person is arrested or detained, and how duty counsel may be contacted."

[6] See footnote 9 in Chapter 1 of this Manual.

[7] Tapper, *Cross and Tapper on Evidence*, 8th ed. (London: Butterworth's, 1995), 477-78.

[8] See QR&O Chapter 105 respecting arrest under the Code of Service Discipline.

[9] [1985] 1 SCR 613.

[10] [1988] 1 SCR 640, at 649.

- "detention", as used in section 10 of the Charter, is a restraint of liberty, other than arrest, in which a person may reasonably require the assistance of counsel but may be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee;

- there is a detention within section 10 of the Charter when a person in authority assumes control over the movement of another person[12] by a demand or direction that may have significant legal consequence and that prevents or impedes access to counsel;

- the necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that there is no choice but to comply;[13] and

- section 10 applies to a great variety of detentions[14] of varying duration and is not confined to those of such duration as to make the effective use of *habeas corpus* possible.[15]

The existence of a detention within the meaning of section 10 turns on the particular facts of each case. However, the following are some of the factors to be considered:[16]

- the precise language used by the person or persons in authority in seeking to question the accused;

- the choice or choices, if any, offered to the accused;

- whether the accused was under escort or acting voluntarily;

- whether the accused left at the end of the interview or was arrested;

- the stage of the investigation (i.e., whether the questioning of the accused was part of the general investigation of an offence or possible offence or for the purpose of obtaining self-incriminating statements);

- whether there existed reasonable and probable grounds to believe that the accused had committed or was involved in the offence being investigated;

---

[11] See also *R v. Grant* 2009 SCC 32 (not every interaction between an individual and a police officer is detention), and *R v. Suberu* 2009 SCC 33 (psychological detention).

[12] See, for example, *R. v. Harder* (1988), 49 CCC (3d) 565 (BCCA).

[13] See, for example, *R. v. Johns* (1998), 123 CCC (3d) 190 (Ont. CA).

[14] See, for example, *Harder*, *Johns* and *Thomsen*, supra; *R. v. Mickey* (1988), 46 CCC (3d) 278 (BCCA); and *R. v. Moran* (1987), 36 CCC (3d) 225 (Ont. CA).

[15] See, for example, *R v. Schrenk* 2010 MBCA 38 (as to whether detention occurred after a valid roadside traffic stop, made pursuant to provincial legislation and justified by s. 1 of the Charter).

[16] *Moran*, supra, 258 – 59.

- the nature of the questions (i.e., were the questions of a general nature designed to obtain general information or was the accused confronted with evidence pointing to his or her guilt); and

- the accused's personal circumstances (e.g., intelligence, emotional balance, youth, experience, sophistication).

In brief, "detention", as used in section 10 of the Charter, is a physical or psychological restraint of liberty. Its existence is determined by examining the overall situation, taking into consideration what is said and done by all the relevant actors and in what manner.[17]

In order to make it effective, the Supreme Court of Canada has held that the substantive constitutional right to retain and instruct counsel without delay[18] includes the right to

- have a reasonable opportunity to exercise the right to counsel;[19]

- have questioning and other aspects of the search for self-incriminatory evidence curtailed until the reasonable opportunity has been exercised;[20] and

- be informed about legal aid, duty counsel and other services[21] in existence and available[22] to provide free, preliminary legal advice.

In addressing the issue of detention within the meaning of section 10 of the Charter, DDCS lawyers must be aware of and alert to as well as consider very carefully the dimension added by unique military factors such as the following:

- subordinates are statutorily obliged to follow the orders, unless manifestly unlawful,[23] of their superiors in rank,[24] and must generally endeavour to comply with the requests of their superiors in rank; and

- the unique circumstances arising from and connected with deployment on operations.

---

[17] *R. v. Keats* (1987), 60 CR (3d) 250 (Nfld. CA).

[18] See *Suberu*, supra.

[19] *R. v. Manninen*, [1987] 1 SCR 1233; *R . v. Brydges*, [1990] 1 SCR 190; and *R. v. Bartle*, [1994] 3 SCR 173.

[20] Ibid.

[21] *Brydges*, supra; *Bartle*, supra.

[22] In *R. v. Prosper*, [1994] 3 SCR 236, the Supreme Court of Canada held that there is no requirement to provide this information should no such services be available.

[23] QR&O art. 19.015, Note B.

[24] See NDA s. 83 and QR&O art. 19.015.

FACTORS AFFECTING ELECTION AS TO MODE OF TRIAL[25]

Except in the circumstances[26] described at QR&O article 108.17(1)(*a*) and (*b*), an accused charged with a service offence has the right to elect trial by court martial. Both the person charged with a service offence and the assisting officer may seek legal advice in this regard from DDCS.[27]

The following are some of the important factors to be considered in making this decision.

- The nature and gravity of the offence(s) — Summary trials are meant to deal only with minor service offences.[28]

- The technical nature of the offence(s) and/or of the available defence(s) — Neither assisting officers nor presiding officers are legally trained. Offences or defences involving technical legal aspects, such as colour of right or induced error of law, are likely to be better understood by lawyers and judges than by lay persons.

- Powers of punishment — The maximum powers of punishment of a summary trial presiding officer are considerably less than those of a military judge at a court martial.

- Right to representation — An accused has a right to legal counsel at a court martial and is entitled to be provided with such by DDCS. There is no right to legal representation at a summary trial.[29]

- Reception of evidence — The Military Rules of Evidence do not apply at a summary trial. Consequently, certain evidence that may be inadmissible at a court martial may be considered at a summary trial.

- Right to appeal — The finding and sentence of a court martial is amenable to formal appeal to the Court Martial Appeal Court. Persons convicted and sentenced by summary trial may only request a review[30] of the finding or punishment by a "review authority".[31]

---

[25] For a more thorough discussion, see DND publication A-LG-050-000/AF-001 — *The Election to Be Tried by Summary Trial or Court Martial.*

[26] See pages 2-6 – 2-7 of this Manual.

[27] QR&O art. 101.20(2)(*d*).

[28] QR&O art. 108.02.

[29] Participation of a lawyer at a summary trial is at the discretion of the presiding officer (See Note B to QR&O 108.14). DDCS lawyers are not available to provide representational services at summary trials.

[30] QR&O art. 108.45.

[31] The "review authority" is the next officer to whom the presiding officer is responsible in matters of discipline (QR&O art. 108.45(2)).

- The nature of the process — A summary trial is an informal process meant to deal expeditiously with minor service offences. A court martial is a lengthier, formal legal proceeding that affords the accused full constitutional and legal rights.

- Prosecutorial discretion — At a summary trial, the presiding officer proceeds with all charges in the Record of Disciplinary proceedings. In court martial proceedings, the Director of Military Prosecutions determines the charges by an exercise of discretion in accordance with a charge screening policy.

- Attendance of civilian witnesses — A summary trial has no legal means to compel the attendance of civilian witnesses. Civilians may, by summons, be compelled to attend as witnesses at a court martial.[32]

- Release pending appeal review — A person sentenced to a punishment of imprisonment or detention imposed by a court martial may apply to that court martial to be released from custody pending an appeal of the findings and/or sentence.[33] A similar right exists for members sentenced to detention at a summary trial. Where an accused delivers a request for review of the finding or sentence, the review authority shall suspend the carrying into effect of the punishment of detention pending completion of the review.[34]

ASSISTING OFFICERS AND SUMMARY TRIALS[35]

An assisting officer is an officer or non-commissioned member who has been appointed, pursuant to QR&O article 108.14(1),[36] as soon as possible after a charge has been laid to assist the accused. It is the assisting officer's duty to

- ensure, before the accused makes a decision to be tried by summary trial or court martial, that the accused is aware of

  - the nature and gravity of the offence(s) charged; and

  - the differences between summary trial and court martial;[37]

[32] NDA subs. 249.22(1).

[33] NDA s. 248.1. See also QR&O Chapter 118.

[34] QR&O art. 108.45(17).

[35] For a more complete discussion on assisting officers, see DND publication A-LG-050-000/AF-001 — *The Election to Be Tried by Summary Trial or Court Martial* and the JAG publication *Military Justice at the Summary Trial Level*. Assisting officers should be quite knowledgeable of both publications.

[36] QR&O art. 108.03.

[37] QR&O art. 108.14(5).

- assist in the preparation of the accused's case, to the extent desired by the accused;
- advise the accused regarding witnesses, evidence and any other matter relating to the charge(s) or trial; and
- assist and speak for the accused during the trial,[38] to the extent desired by the accused.

The right of an accused to make full answer and defence, regardless of the mode of trial, is fundamental to Canadian criminal justice and, accordingly, applies to summary trials. Included in this right is the right of the accused to disclosure of the case to be made against him or her.[39] At a summary trial, the accused and the assisting officer must, in sufficient time to allow for consideration respecting selection of mode of trial and to properly prepare the case prior to summary trial,[40] be provided with a copy of, or given access to, any information[41] that

- is to be relied on at trial; and
- tends to show that the accused did not commit the offence(s) charged.[42]

In view of the legal ramifications of their duties and responsibilities, assisting officers are able and encouraged to seek legal advice from DDCS.[43] Assisting officers are not lawyers; therefore, protections afforded to lawyers — including solicitor-client privilege — do not apply to them.[44] Nonetheless, assisting officers should not divulge to anyone any communications with or information obtained from an accused without first seeking legal advice from DDCS.

SUMMARY INVESTIGATIONS OR BOARDS OF INQUIRY[45]

Another group of persons subject to the Code of Service Discipline eligible to seek legal advice from DDCS are those who are under investigation by a summary investigation or

[38] QR&O art. 108.14(4).

[39] *R. v. Stinchcombe*, [1991] 3 SCR 326.

[40] QR&O art. 108.15(2).

[41] See Note B to QR&O art. 108.15.

[42] QR&O art. 108.15(1).

[43] QR&O arts. 101.20(2)(*c*) and (*d*). Note that the legal advice is typically of a general nature only.

[44] This reflects the current state of the law. However, because of the potential grave adverse effect on the integrity and effectiveness of the assisting officer's role and, therefore, on the summary trial process, in the military context, justice is better served if communications between the assisting officer and the accused are accorded confidentiality. See *Military Justice at the Summary Trial Level*, Chapter 9, Section 3.

[45] See QR&O Chapter 21, DAOD 7002 Series, and CANFORGEN Message 105/11 CRS 091228Z June 2011.

a board of inquiry.[46] Summary investigations and boards of inquiry are the two mandated means of formally inquiring into and investigating any matter connected with the

> government, discipline, administration or functions of the Canadian Forces or any matter affecting an officer or NCM.[47]

While they may discover evidence and information respecting the commission of service offences, summary investigations and boards of inquiry neither supplant nor supplement a police investigation. Indeed, they may not be conducted for a primarily criminal or disciplinary purpose.[48]

The goal of both a summary investigation and board of inquiry is to determine the facts of a particular situation and, with a view to the future well-being, efficiency and smooth running of the CF, to make recommendations respecting the facts determined.

Personnel involved as witnesses in summary investigations or boards of inquiry are often unfamiliar with the respective processes and procedures. The situation is likely somewhat more troublesome for the witness who also is, or who is likely to be, the subject of a police investigation. Such persons will likely require legal advice respecting their situation *vis-à-vis* the summary investigation or board of inquiry before which they are to be witnesses. DDCS provides advice to all persons subject to the Code of Service Discipline who are, or who are likely to be, witnesses before a summary investigation or board of inquiry.

The summary investigation is the less formal and more expeditious of the two types of investigation. It is normally composed of one investigating officer and, sometimes, an adviser. The investigating officer may compel the attendance and the disclosure of evidence of military personnel, but has no jurisdiction or authority over civilians. The less formal nature of the summary investigation is demonstrated by the absence of formal requirements governing its nature and conduct (e.g., the investigating officer lacks the authority to receive sworn testimony). Telephone interviews or hearsay may, in a particular instance, be considered as adequate evidence.

A board of inquiry is a formal investigative body that finds its legal basis in subsection 45(1) of the NDA. It is composed of two or more officers or two or more officers together with one or more non-commissioned members above the rank of sergeant,[49] and may include an adviser.

---

[46] QR&O art. 101.20(2)(*i*).

[47] DAOD 7002-0 (BOI and SI). Matters typically the subject of a summary investigation would be injuries to personnel, minor damage to materiel or property, and sub-standard performance of equipment, personnel or military organizations (DAOD 7002-2). A board of inquiry, on the other hand, is typically convened to investigate matters considered to be much more serious or complex or to be of significant consequence to the CF (e.g., death of a CF member while on non-combat duty; loss, theft or misuse of or significant damage to major materiel). See DAOD 7002-1. See also *Military Justice at the Summary Trial Level*, Annex D.

[48] See DAOD 7002-1 for BOI, and DAOD 7002-2 for SI.

[49] QR&O art. 21.08(1).

Unlike a summary investigation, a board of inquiry may compel the attendance of civilians.[50] Evidence taken by a board of inquiry must be on oath or solemn affirmation,[51] and all witnesses are obliged to answer the questions put to them.[52] Furthermore, witnesses before a board of inquiry are subject to penal sanction for various actions amounting to contempt[53] and for giving false evidence.[54]

A witness before a board of inquiry may be compelled to give self-incriminating testimony.[55] However, such testimony may not be used against the witness in subsequent proceedings,[56] with the exception of charges of giving false or contradictory evidence or of perjury.[57] Finally, neither the report of a summary investigation nor the minutes of a board of inquiry are receivable in evidence at either a summary trial[58] or a court martial.[59]

[50] NDA subs. 45(2)(*a*).

[51] QR&O art. 21.10(3).

[52] NDA subs. 45(2)(*a*).

[53] NDA s. 302.

[54] NDA s. 119; *Criminal Code* ss. 131 and 136–139.

[55] NDA subs. 45.1(1).

[56] NDA subs. 45.1(2); *Charter of Rights and Freedoms* s.13; *Canada Evidence Act*, RSC 1985, Chapter C-5, subs. 5(2).

[57] Ibid.

[58] QR&O art. 21.16(2).

[59] QR&O art. 21.16(1).

THE LAWYER-CLIENT RELATIONSHIP

CONTENTS:

HOW DEFENCE COUNSEL IS ASSIGNED

An accused to be tried by court martial is entitled to legal representation appointed by DDCS.[1] When an application is forwarded to a referral authority[2] for disposal of a charge by court martial, the accused's commanding officer (CO) must ascertain the accused's desires and intentions respecting legal counsel.[3] Should the accused request legal counsel appointed by DDCS, the CO must advise DDCS accordingly,[4] including whether the accused wants a particular legal officer as legal counsel.[5] Should the accused request a particular legal officer, DDCS must endeavour to satisfy the request.[6] In determining which lawyer to appoint as defence counsel, DDCS considers the language in which the court martial will be conducted as well as the overall complexity of the case.

Upon receiving a request for representation by DDCS counsel, the Director, as soon as the nature of the charge(s) and the language of trial have been ascertained, will appoint counsel. This is done by written notification to the accused's CO. The notification sets out the details of the appointment and requests that the accused contact the appointed defence counsel. The CO, in turn, furnishes the accused with a copy of the DDCS notification letter. Once appointed as defence counsel for the case, the DDCS lawyer becomes "solicitor of record" and takes whatever measures he or she sees fit to protect the interests of his or her client, including requesting disclosure of evidence, scheduling and preparing the trial, and conducting the trial.[7] In rare and special circumstances, normally involving very serious and complex matters, DDCS may appoint counsel earlier in the process — even before the laying of charges.

SOLICITOR-CLIENT PRIVILEGE

A lawyer cannot provide complete, proper and effective professional service to the client unless there is full and unreserved communication between them.

> The solicitor-client relationship is anchored on the premise that clients should be able to have complete trust and confidence in the counsel who represent their interests. Clients must feel free to disclose the most personal, intimate and sometimes damaging information to their counsel, secure in the understanding that the information will be

[1] QR&O art. 101.20(2)(*f*).

[2] QR&O art. 109.02 prescribes that the officers authorized to refer a charge to the Director of Military Prosecutions are the Chief of the Defence Staff (CDS) and any officer having the powers of an officer commanding a command.

[3] QR&O arts. 101.22(2)(*a*) and 109.04(1)(*a*).

[4] QR&O arts. 101.22(4) and 109.04(3).

[5] QR&O arts. 101.22(3) and 109.04(2).

[6] QR&O arts. 101.22(5) and 109.04(4).

[7] Pursuant to QR&O arts. 101.26(2)(*c*) and 111.02(2)(*b*), the Court Martial Administrator, in consultation with the Chief Military Judge, the Director of Military Prosecutions and the Director of Defence Counsel Services or the appointed counsel, sets courts martial dates.

> treated in confidence and will be used or not used, within the boundaries of counsel's ethical constraints, in the client's best interests. The law recognizes the uniqueness of this confidential relationship by providing special protection from compelled disclosure that is exchanged between clients and their counsel.[8]

Consequently, for the solicitor-client relationship to function properly, the client must feel completely secure and entitled to proceed with the lawyer on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held secret and confidential. This is summed up in the lawyers' *Code of Professional Conduct*, which states that

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted by this Code [CBA].[9]

The law relating to the relationship between the solicitor and the client has developed to achieve four aims:[10]

- to preserve the integrity and confidentiality of the solicitor-client relationship;
- to encourage the seeking of legal advice;
- to ensure fairness to all parties; and
- to stabilize the administration of justice.

The Supreme Court of Canada has recognized the following four conditions[11] necessary to establish the existence of solictor-client privilege:

- the communications must originate in confidence that they will not be disclosed;
- this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
- the relation must be one that in the opinion of the community ought to be sedulously fostered; and
- the injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

---

[8] *R. v. McCallen* (1999), 43 OR (3rd) 56 (Ont CA), per O'Connor JA 67.

[9] The Canadian Bar Association, *Code of Professional Conduct*, Chapter 4, and the Law Society of Upper Canada, *Professional Conduct Handbook*, Rule 4.

[10] Judith Bowers, Q.C., *The Solicitor Client Relationship in the Public Service*, a paper delivered to the 1996 Commonwealth Law Conference, Vancouver, BC, 1.

[11] *Slavutych v. Baker*, [1976] 1 SCR 254, at 260. The Court merely adopted the conditions set out at paragraph 2285 of *Wigmore on Evidence*, McNaughton Revised Edition, Volume 8.

Solicitor-client privilege "originated as a respect for the oath and honour of a lawyer who was duty-bound to guard the client's secrets."[12] It has developed from confidentiality in communications between the solicitor and the client to include, in certain circumstances, communications involving third parties and documents prepared in contemplation of litigation.[13]

Historically, solicitor-client privilege was a rule of evidence and could be invoked only in the context of litigation.[14] The Supreme Court of Canada elevated solicitor-client privilege to the dimension of a fundamental civil and legal right.[15] Thus, today the doctrine of solicitor-client privilege has two rules: the first is an evidentiary rule,[16] and the second, a substantive rule. The evidentiary rule precludes the use of privileged communications in evidence at litigation. The substantive rule defines a right to confidentiality in circumstances where a communication between solicitor and client otherwise meets the criteria to invoke privilege but an evidentiary context is lacking. In such instances, the privilege cannot be claimed. The Court formulated the substantive rule as follows:[17]

a) the confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent;

b) unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have communications with the lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality;

c) when the law gives someone the authority to do something that, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with that confidentiality except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation; and

d) acts providing otherwise in situations under (b) above and enabling legislation referred to in (c) above must be interpreted restrictively.

---

[12] Manes and Silver, *Solicitor-Client Privilege in Canada* (Toronto: Butterworth's, 1993), 2.

[13] *Bowers*, supra.

[14] Wigmore, John Henry, *Wigmore on Evidence,* (McNaughten Revised Edition, 1961*)* paragraph 2292.

[15] *Descoteaux et al v. Mierzwinski and the Attorney General of Quebec et al*, [1982] 1 SCR 860 and *Solosky v. The Queen*, [1980] 1 SCR 821.

[16] See Military Rule of Evidence s. 77.

[17] *Descoteaux*, supra, 875.

The general rule is that a solicitor-client relationship exists, and the solicitor-client privilege is established when the communication is made[18]

- for the purpose of seeking legal advice; and
- to the lawyer as a professionally qualified practising lawyer and not in some other capacity that the lawyer may enjoy.

Any information that DDCS counsel may acquire in the course of the professional relationship with their clients cannot be divulged to any person or agency outside DDCS. This includes other elements of the Office of the JAG, the CF and DND. In this respect, counsel should be aware that the ethical rule[19] concerning confidentiality is much wider than the evidentiary rule prohibiting the use of privileged information in litigation. The ethical rule "applies without regard to the nature or source of the information or to the fact that others may share the knowledge."[20]

Thus, the obligation to protect confidential information applies not only to information received directly from the client but also to all other information acquired in the course of representing the client.

Finally, the following features of solicitor-client privilege are noteworthy:

- solicitor-client privilege is established with the client's "first dealings with the lawyer's office in order to obtain legal advice";[21]
- the requirement to protect privileged information applies equally to non-legal staff becoming apprised of that information in the course of their duties;[22] and
- solicitor-client privilege does not apply when
  - advice is sought for a criminal purpose, regardless of whether the lawyer is aware of the purpose for which the advice is sought;[23]
  - the privilege is waived by the client;[24] and/or
  - when a third party intercepts a privileged communication.[25]

---

[18] *R. v. Bencardino and De Carlo* (1974), 15 CCC (2d) 342 (Ont CA).

[19] See footnote 9, p. 5-3.

[20] The Canadian Bar Association, *Code of Professional Conduct*, Chapter 4, Commentary 2, and the Law Society of Upper Canada, *Professional Conduct Handbook*, Rule 4, Commentary 2.

[21] *Descoteaux*, supra, at 880.

[22] *Wigmore*, supra, para. 2301.

[23] *Solosky*, supra.

[24] *Re Director of Investigation and Research and Canada Safeway Ltd*. (1972), 26 DLR (3d) 745 (BCSC).

[25] *R. v. Kanesta*, [1966] 4 CCC 231 (BCCA) rev'd [1967] 1 CCC 97 (SCC).

Accordingly, persons utilizing the services of DDCS lawyers for the advisory or representational purposes set out in QR&O article 101.19(2) and (3) can be confident that the legal and ethical umbrella of solicitor-client privilege applies to their communications with DDCS lawyers and that all such communications will be confidential.

DDCS Directive 3

In order to foster a trusting relationship with their clients, DDCS counsel shall ensure that their clients understand the nature, extent and limitations of the solicitor-client privilege.

CONFLICT OF INTEREST

Essentially there are three types of conflict of interest in which a lawyer may become embroiled:

- conflicts between the lawyer and the institution;
- conflicts between the lawyer and the client; and
- conflicts between "clients of the office".

The first type of conflict — and the most evident — arises when the lawyer places personal or institutional needs or desires ahead of the client's (i.e., when the lawyer's primary loyalty, beyond the requirements of law and ethics, is either to himself or herself or to the institution of the CF, rather than to the client). This is the primary reason for the measure of statutory independence afforded to DDCS. As discussed above, DDCS counsel have the duty, within the boundaries of law and ethics, to provide the best possible representation to the client. DDCS lawyers must therefore, at all times, be cautious not to be or to appear to be sublimating the client's case and cause to personal or institutional desires or needs.

The second type of conflict arises when the lawyer becomes involved with the client in either a personal or business sense. In either instance, at the very least, there exists the risk that the lawyer's detached professional judgment respecting the best interests of the client will be clouded by that involvement.

The third type of conflict of interest — and probably the most subtle — is a conflict of interest between the requirements of different "clients of the office" (i.e., a conflict between the interests of one DDCS client and those of another DDCS client, whether the same or a different DDCS lawyer represents the other client). Such conflicts of interest can arise in three ways:

- a DDCS lawyer having been involved with a particular case as an advisor to the Military Police or to the chain of command before being posted to DDCS;

- a former DDCS client being called as a witness for the prosecution in the current case; and

- two or more accused in a single case being represented by DDCS lawyers.

DDCS lawyers must therefore remain extremely vigilant regarding the existence, potential existence and the perception of the existence or potential existence of conflicts of interest. Notwithstanding that the facts of a particular situation may be such that at law the lawyer or lawyers in question may be allowed to continue to advise or represent the client or clients in question, DDCS policy is to avoid all situations in which there may be a conflict of interest or a perception of conflict of interest.

DDCS Directive 4

DDCS counsel shall remain alert to

- the existence and danger of, and shall avoid, compromising or potentially compromising situations and influences that could give rise to the threat of either actual or perceived conflict of interest; and

- conflicts of interest or perceptions of a conflict of interest respecting two or more clients advised or represented presently or previously by DDCS counsel.

DDCS Directive 5

DDCS counsel are to report to the Director all instances of actual or perceived conflict of interest.

DDCS Directive 6

DDCS counsel who may be uncertain about the existence of or the perception of the existence of an actual or potentially compromising situation shall inform and consult with the Director and with the appropriate member of their law society as necessary.

DDCS Directive 7

In the event of the existence of a conflict of interest or of a perception of a conflict of interest respecting two or more clients advised or represented by DDCS counsel, either presently or in the past, the DDCS counsel shall cease to advise or to represent the persons involved.

DDCS will, in relation to clients involved in conflicts or perceived conflicts of interest addressed in DDCS Directive 7, seek alternate legal counsel from the private sector. In

such an instance, DDCS shall, pursuant to the provisions of NDA section 249.21, pay[26] for the legal services rendered because of the conflict. When a counsel from the private sector is so retained by DDCS, such a counsel is *deemed to be* a DDCS counsel and DDCS directives regarding the representation of clients apply to that counsel, except to the extent that such directives are incompatible with the full and independent representation of the client.

THE DDCS LAWYER'S FILE

As in any law office, a file is opened on every matter that comes into the DDCS offices. Two separate files are maintained for both advisory and representational matters: a "system file" and a "working file".

The advisory "system file" on a particular matter comprises a statistical data sheet on which is recorded the date and time of the request for legal advice, the language of communication, the status of the person seeking advice and the area of legal concern. It does not include the identity or any personal particulars of the person seeking advice. The court martial "system file" includes the charge sheet and administrative correspondence and documents such as the request for appointment of DDCS counsel and the court martial administrative message.

The "working file" is the lawyer's own file for an advisory matter or case. It contains all of the information from the system file as well as counsel's own notes, memoranda, records of conversations, legal research, etc. The "working file" is particular to and maintained solely by the lawyer who prepares it. No one outside of DDCS has access to the "working file".[27]

SOLICITOR-CLIENT PRIVILEGE AND PRIVACY[28] AND ACCESS TO INFORMATION[29]

The *Privacy Act* was enacted to

> protect the privacy of individuals with respect to personal information about themselves held by government…[30]

[26] While DDCS has the statutory authority to pay for such legal expenses, NDA subs. 249.21(3) prescribes that civilian counsel's terms and conditions of engagement, remuneration and expenses are subject to any applicable directives issued by the Treasury Board of Canada.

[27] Subs. 19(1) of the *Access to Information Act* prohibits disclosure of "personal information" as defined in s. 8 of the *Privacy Act*.

[28] RSC, c. P-21.

[29] RSC, c. A-1.

[30] *Privacy Act*, s. 2.

The *Access to Information Act* provides that every Canadian citizen and permanent resident

> has a right to and shall, on request, be given access to any record under the control of a government institution.[31]

Notably, neither Act prohibits government disclosure of solicitor-client privileged information. Indeed, both Acts leave the matter of disclosure of solicitor-client privileged information to the discretion of the head of the government institution controlling the information.[32] However, with three stated exceptions,[33] the *Access to Information Act* prohibits government disclosure of "personal information", as that term is defined in section 3 of the *Privacy Act*.[34] This will protect much solicitor-client privileged information from being disclosed to members of the public.

Both the *Access to Information Act* and the *Privacy Act* were enacted when the only lawyers in government service were lawyers for the government (i.e., when the "clients" in question were either government departments or employees). At that time, Parliament did not foresee the possibility of government lawyers acting for accused persons at criminal trials. Accordingly, the judicial experience to date with government-controlled solicitor-client privileged information is from the former perspective and, therefore, of limited assistance.

In *Wells v. Canada (Minister of Transport)*,[35] the court held that the party claiming the privilege had to meet the test in *Solosky v. R.*[36] The government records in issue were protected from disclosure under the umbrella of solicitor-client privilege. The court held that the information was[37]

- communicated by or to a government lawyer in order to provide senior government officials with advice on the legal consequences of proposed governmental activities; and

- confidential, and was treated as such both during the initial communication and since that time.

---

[31] *Access to Information Act*, subs. 4(1).

[32] *Privacy Act*, s. 27 and *Access to Information Act*, s. 23.

[33] *Access to Information Act*, subs. 19(2). The three exceptions are if the individual to whom personal information relates has given consent; if the information is already publicly available; and if disclosure is otherwise in accordance with s. 8 of the *Privacy Act*.

[34] *Access to Information Act*, subs. 19(1).

[35] (1995), 63 CPR (3d) 201 (FCTD).

[36] [1980] 1 SCR 821.

[37] *Wells*, supra, 205.

In *Susan Hosiery v. Minister of National Revenue*,[38] the court held, with respect to government records, that

> [W]hat is privileged is communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance…and the materials created for the lawyer's brief…[39]

The court stated that there is a "continuum of communications" between the solicitor and the client, and emphasized that

> all communications, verbal or written, of a confidential character, between a client and legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance, including the legal adviser's working papers directly related thereto, are privileged.[40]

Both the *Privacy Act* and the *Access to Information Act* apply only to that "information" that is under the control of a government institution.[41] While DDCS working files are under the physical control of the DDCS lawyer, and while the DDCS lawyer incontestably is a government employee, the law is quite clear that the solicitor-client privilege is subject to the instruction of the client and may be waived only by the client.

Accordingly

- the DDCS working files, insofar as they contain solicitor-client privileged information, are under the control not of a government institution but, rather, of the client; and

- for the purposes of release of information, the DDCS lawyer is, at the most, merely an agent of the client and, absent the client's express consent, lacks any legal authority to disclose the privileged information.

[38] [1969] 2 Ex. CR 27.

[39] *Susan Hoisery*, supra, 34.

[40] Ibid., 33.

[41] *Privacy Act*, subss. 7 and 8; *Access to Information Act*, subs. 4(1).

PRE-TRIAL MATTERS

CONTENTS:

CONTACT WITH CLIENT

When DDCS advises a CO of the appointment of a DDCS lawyer to represent an accused at court martial, the DDCS response will include the advice that the accused should contact the DDCS lawyer appointed. The initial consultation with the client is typically little more than an exchange of general information; however, it is of paramount importance that, during this initial consultation with the client, counsel ensure the client is aware of the following:

- the necessity of private communications between the two;
- the meaning, scope and importance of solicitor-client privilege; and
- the requirement for the client to provide counsel, as soon as possible, with the names of likely witnesses for both the trial proper and, should the case advance that far, sentencing.

After having received the prosecution's disclosure documents and having consulted with the client, counsel will be knowledgeable of many, if not most, of the legal and factual issues requiring research. Often, it will not be necessary for counsel to travel to the client's location more than a few days prior to the commencement of trial since a great deal of preparation can be accomplished in Ottawa — where all regular force DDCS counsel are posted — or in the city of residence of the reserve force DDCS counsel.

DISCLOSURE[1]

The CO is to ensure that the accused is provided with a copy of, or given access to, any information that either is to be relied on as evidence at the summary trial[2] or tends to show that the accused did not commit the offence charged.[3] This information must be provided in sufficient time for the accused to consider it in making an election to be tried by court martial or summary trial.[4]

This minimum disclosure, however, falls short of the disclosure requirements for courts martial. The Supreme Court of Canada has effectively elevated disclosure to a constitutional right.[5]

Modern disclosure law originates with the case of *R. v. Stinchcombe,*[6] and may be summarized as follows:

---

[1] DDCS counsel should also familiarize themselves with the Director of Military Prosecutions Policy on disclosure.

[2] QR&O art. 108.15(1)(*a*).

[3] QR&O art. 108.15(1)(*b*).

[4] QR&O art. 108.15(2)(*a*).

[5] See *R. v. Carosella,* [1997] 1 SCR 80 and *R. v. La,* [1997] 2 SCR 680.

[6] [1991] 3 SCR 326.

- The fruits of an investigation that are in the possession of the prosecution are not the property of the prosecution for use in securing a conviction; rather they are the property of the public to ensure that justice is done.

- The general principle is that all relevant information must be disclosed, whether or not the prosecution intends to introduce it in evidence. The prosecution must disclose all relevant information — whether it is inculpatory or exculpatory — and must produce information that may assist the accused. If the information is of no use then it is irrelevant and will be excluded by counsel for the prosecution in the exercise of discretion, which is reviewable by the trial judge.

- The overriding concern is that failure to disclose impedes the accused's ability to make full answer and defence.

- Information should not be withheld if there is a reasonable possibility that its being withheld will impair the accused's right to make full answer and defence. The withholding of evidence relevant to the defence may only be justified on the basis of the existence of a legal privilege or other exception.

- All statements obtained from persons who have provided relevant information to the authorities should be produced even though the prosecution does not propose to call them. When statements are not in existence, other information, such as investigator's notes, must be produced; if there are no notes, then, in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be disclosed.

- The prosecution's obligation to disclose is a continuing one, and disclosure must be made with respect to additional information when it is received.

The guiding principle is always full disclosure of the prosecution's case-in-chief as well as all other evidence relevant to the guilt or innocence of the accused. However, in this respect, *Stinchcombe* and the subsequent authorities speak more broadly than merely in terms of "evidence". They also speak of "information" and "material" that may be of use to the accused and that may affect the accused's ability to exercise his or her rights.[7] As a result, disclosure rules apply not only to matters touching directly or indirectly on the issue of the guilt or innocence of the accused but also to all matters touching on the rights of the accused that may be asserted at trial.

Defence counsel can expect to receive the following as disclosure from the prosecution:

- the names of witnesses the prosecutor proposes to call at the trial, the purpose of calling them and the nature of their proposed evidence;[8]

[7] See, for example, *R. v. Morra* (1991), 5 OR (3d) 255 (OCJ Gen Div); *R. v. Gray* (1993), 79 CCC (3d) 332 (BCCA); *R. Hutter* (1993), 16 OR (3d) 145 (Ont CA); and *R. v. Egger*, [1993] 2 SCR 451.

[8] QR&O art. 111.11(1).

- any other material that must be disclosed in accordance with common law, applicable legislation, QR&Os or DAODs;

- all relevant military and civilian police reports, including copies of the investigator's notes;

- the text of all utterances concerning the offence that have been made by a person with relevant evidence to an investigator, including

  - a copy or transcription of any notes that were taken by investigators when interviewing the witness; or

  - if there are no notes, a summary of the anticipated evidence of the witness;

- a copy of any written statements of a witness to a person in authority;

- where an accused makes any utterance to a person in authority concerning the offence alleged and

  - the utterance is a written statement, a copy of the statement and a copy of any notes taken by investigators pertaining to the taking of the statement;

  - the utterance is recorded by audio or video equipment, a copy of the recording and access to the original recording; and

  - the utterance is not a written statement and is not recorded by audio or video equipment, a verbatim account, any notes of the statement taken by investigators during the interview and an account or description of the circumstances in which the utterance was heard;

- with respect to audio or video recordings of statements of witnesses (other than the accused) that the prosecutor

  - *does* intend to introduce as substantive evidence, a copy of the recording and access to the original recording; and

  - *does not* intend to introduce as substantive evidence, a summary of the contents of the recording and access to the original recording;

- a copy of all expert witness reports relating to the offence, except to the extent that they may contain privileged information;

- copies of all documents and photographs that the prosecution intends to introduce into evidence during the case-in-chief for the prosecution as well as an appropriate opportunity to inspect any case exhibits — whether the prosecution intends to introduce them or not;

- subject to an order prohibiting access or disclosure, any search warrant relied on by the prosecution and, if intercepted private communications will be tendered, a

copy of the judicial authorization or written consent under which the private communications were intercepted;

- particulars of similar fact evidence that the prosecution intends to rely on at trial;
- particulars of any procedure(s) used outside court to identify the accused;
- particulars of any other evidence on which the prosecution intends to rely at trial and any information known to the prosecution that the defence may use to impeach the credibility of a prosecution witness in respect of the facts in issue in the case; and
- any information relating to the character of the accused.

The prosecution may consider certain material to be disclosed to be sensitive and may seek some restriction(s) on its provision and use. Courts have permitted restrictions to be put on disclosed material provided they are justified by the unique circumstances of the case.[9] In this regard, the prosecution may seek an undertaking from defence counsel. DDCS counsel are to always remain mindful not to do anything that might compromise or otherwise detract from their duty to provide the best representation of their client. Counsel should bring before the court martial as a pre-trial application[10] any matter of a proposed restriction on material to be disclosed not resolved to counsel's satisfaction.

DDCS Directive 8

DDCS counsel shall refrain from doing anything that may detract from providing the best representation for the client. DDCS counsel shall consult with the Director before agreeing to any undertaking requested by the prosecution respecting restrictions on material to be disclosed.

PREPARATION FOR TRIAL

Trial preparation requires a great deal of work in a variety of areas. The following are among the more important areas:

- Identification of legal and factual issues — Counsel must
  - examine the charges to determine if they comply with legal requirements such as disclosing a service offence,[11] sufficiency of particulars and duplicity or multiplicity;

[9] See, for example, *R. v. Petten* (1993), 21 CR (4th) 81 (Nfld SC, App Div).

[10] See QR&O arts. 112.03(2) and 112.05(5)(*e*).

[11] Failure of a charge to disclose a service offence is a ground to plead in bar of trial. QR&O art. 112.24(*e*).

- examine the documents respecting the convening of the court martial, along with the facts respecting the convening process, to determine if the court martial has jurisdiction[12] (i.e., to determine if there has been compliance with the relevant regulations for the convening of courts martial and, where applicable, for the appointment of court martial members);[13]

- examine the totality of the evidence with a view to determining

  - whether there is a factual foundation for the prosecution's case, and

  - the legal issues arising from the evidence; and

- study and learn in detail the totality of the evidence — in order to do the job of advocate properly, particularly during the cross-examination of witnesses, counsel must be a "master of the facts".

➢ Identification and gathering of additional necessary information and evidence — Having identified the weaknesses in both the prosecution and defence cases, counsel must identify and gather the needed information, material and evidence as well as locate the required witnesses. This will include determining if expert evidence will be required and, if so, identifying and locating the appropriate expert witnesses.

➢ Preparation of the case for sentencing — Since sentencing follows immediately after the handing down of a guilty finding,[14] preparation of the case to be advanced in the sentencing phase of the court martial is a standard part of pre-trial preparation. This includes extracting relevant material from the client's personnel file[15] such as Personnel Evaluation Reports, Course Reports and other favourable documentation, and identifying witnesses who can give positive evidence in mitigation of punishment.

➢ Preparation of witnesses — In most instances witnesses likely will have had no experience in testifying in court — especially in a military court — and will likely be apprehensive. Counsel should take the necessary time to ensure that witnesses are familiar with court martial procedure in respect of their role in the proceedings. This will include where they go upon entering the courtroom; paying respects to the court; taking the oath or solemn affirmation; where to sit while giving evidence; how to respond to both examination-in-chief and cross-examination; and what to do when their testimony is finished. Counsel should go over the witness's testimony with a view to advising how it can be most persuasive; however, counsel must refrain from "coaching" witnesses. In some

[12] Absence of jurisdiction is a ground to plead in bar of trial. QR&O art. 112.24(*a*).

[13] QR&O art. 111.03 sets out the procedure for the appointment of members of a court martial panel.

[14] QR&O art. 112.05(21).

[15] Subs. 8(1) of the *Privacy Act* requires the client's written consent in order for counsel to access the client's personnel file.

> instances it may be beneficial for counsel to conduct a mock examination-in-chief and cross-examination of a witness. If practical, counsel should accompany the witnesses to the courtroom before trial to enable them to get a feel for and become more comfortable with the military courtroom and its surroundings.

OPINION EVIDENCE

It is a general rule of the law of evidence that mere personal belief or opinion is not considered evidence and will not be admissible as such[16] because such opinion usurps the function of the trier of fact. However, there often arise at trial instances where the trier of fact can receive legitimate assistance from opinion evidence without encroaching on the fact-finding function. This occurs respecting matters in issue where the witness is in a position to assist the trier of fact in appreciating and understanding a certain matter.

The first such instance is an exception to the general rule for the non-expert or ordinary witness to give an opinion if he or she is able to accurately express the facts observed and if the opinion has probative value that is not outweighed by such policy considerations as surprising the opposite party, usurping the function of the trier of fact or confusing the issues.[17] For example, with a properly established evidentiary foundation,[18] an ordinary witness may give an opinion regarding the speed of a vehicle,[19] the mental or physical condition of a person,[20] the age of a person,[21] or voice identification.[22] However, the facts "observed or experienced" by the non-expert witness must be within the *res gestae* of the offence charged and must not be based on what the witness has experienced or observed in unrelated circumstances.[23]

The second instance occurs when only persons qualified by some special skill, training or expertise — expert witnesses — can provide the requisite assistance — expert evidence — to the trier of fact respecting a matter in issue. The expert witness's opinion is admissible

> to furnish the court with…information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusion without help, then the opinion of the expert is unnecessary.[24]

---

[16] MRE R. 61.

[17] MRE R. 64, and *Graat v. The Queen*, [1982] 2 SCR 819.

[18] MRE R. 64(1).

[19] *Graat*, supra.

[20] Ibid.

[21] *R. v. Spera* (1915), 25 CCC 180 (Ont. SC App Div).

[22] *R. v. Rowbotham* (1988), 41 CCC (3d) 1 (Ont. CA).

[23] *Ferguson v. The Queen*, 4 CMAR, at 499.

[24] *R. v. Abbey* (1982), 68 CCC (2d) 394 (SCC), 409.

In this respect, MRE Rule 81 provides that

> A witness is an expert witness and is qualified to give testimony if the [military judge] finds that
>
> a) to perceive, know or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training;
>
> b) the witness has the requisite knowledge, skill, experience or training; and
>
> c) the expert testimony of the witness would substantially assist the court.

There are five criteria for the admission of expert evidence:[25]

- relevance;
- reliability;[26]
- necessity in assisting the trier of fact;
- the absence of any exclusionary rule; and
- a properly qualified expert.

In determining whether the defence case will require an expert witness to assist the trier of fact, counsel must first address whether an ordinary witness under MRE Rule 64 could provide the necessary and appropriate assistance. Should counsel conclude that an expert witness is required, counsel must address the practical aspects involved — the cost versus the impact of the evidence.

While the effective representation and defence of the client is foremost, since DDCS does not have an inexhaustible budget at its disposal, counsel cannot ignore the expenses of expert witness fees as well as travel and accommodation costs. In this respect, it is wise to remember that a great deal of expertise in a myriad of areas and disciplines exists within the CF, DND and other federal government departments.[27]

---

[25] *R. v. Mohan*, [1994] 2 SCR 9 and MRE R. 3.

[26] *Mohan* did not set out reliability as a separate criterion; however, it was clearly considered as part of the relevancy criterion. Other cases consider reliability as part of the criterion for a properly qualified expert (e.g., see *R. v. McIntosh* (1997), 117 CCC (3d) 385 (Ont. CA)).

[27] CF and DND personnel do not require the payment of expert witness fees. Expert witness fees will generally not be required to be paid to personnel of other federal government departments; however, other federal government departments may seek recompense for the cost of the time of the expert witness.

DDCS Directive 9

When requiring an expert witness, DDCS counsel shall determine if the requisite and appropriate expertise is available, firstly, in the CF and, secondly, in DND or elsewhere in the Government of Canada.

In instances where the requisite and appropriate expert witness is not available from within the CF, DND or elsewhere in the Government of Canada, counsel is required to locate the expertise from the civilian sector. In this respect, payment of expert witness fees will be borne by DDCS.

DDCS Directive 10

DDCS counsel shall obtain the approval of the Director prior to retaining an expert witness whenever the travel costs and expert witness fee together exceed $2,000.

Before an expert witness is allowed to voice an opinion on a matter the court must be satisfied that the matter is within the special knowledge of that witness.[28] Accordingly, counsel must ensure that the proposed expert witness possesses the necessary qualifications.[29] Factors that are considered in determining a witness's status as an expert include the following:

- formal education;
- academic qualifications;
- specialized training;
- membership in professional societies;
- publication of articles or authoritative reports about the area of expertise;
- professional or special awards relating to the area of expertise;
- length and quality of experience in the area of expertise; and
- previous experience as a qualified expert witness in the area of expertise.

As with all witnesses, preparation of the expert witness is important. The effectiveness and value of even the best of experts can be greatly diminished if the expert witness does not appear when testifying to be knowledgeable, thorough and persuasive. The goal is to have the expert witness present his or her testimony in such a manner as to render weak by comparison any conclusions reached by any comparable prosecution expert witness. The following will assist counsel in achieving this goal:

[28] MRE R. 63(1).

[29] MRE R. 81(*b*).

- Become generally acquainted with and knowledgeable about the subject matter before meeting with the expert witness. — This will enable counsel to become aware of what questions are required to be asked, what areas of the case are weak and what areas should be highlighted. While the expert witness can assist in this regard, it will be more effective for counsel to do this prior to meeting with the expert witness.

- Prepare the expert witness to give testimony by explaining the process and going over the anticipated evidence very carefully. — In order that the expert witness may be able to maximize his or her contribution to the case, counsel must ensure that the expert witness knows the weaknesses of the case and what points of evidence are important and are to be emphasized.

- Prepare the expert witness for cross-examination. — Counsel must ensure that the expert witness understands the importance of answering only the question asked and of not volunteering information that is not asked for. Counsel should also remind the expert witness to state his or her views firmly and calmly, to not appear rigid and unreasonable, to not argue with the prosecutor, and that it is not detrimental to agree with reasonable propositions advanced by the prosecutor.

FINANCIAL MATTERS

The DDCS has been entrusted with the administration of a budget for all DDCS-related activities. Except for the temporary duty expenses of the accused to attend the court martial and associated proceedings, which are borne by prosecutorial authorities, all expenses related to the conduct of the defence are borne by DDCS. This includes temporary duty expenses[30] for DDCS counsel and military defence witnesses; temporary duty expenses for the accused when he or she is required to travel at the instance of DDCS counsel; fees and travel allowances for civilian defence witnesses;[31] and expert witness fees. Expenses, allowances and fees relating to witnesses are also borne by DDCS when civilian counsel is representing the accused at court martial, except for expert witness professional fees both for preparation and attendance at court, which remain the responsibility of the accused.

SCHEDULING COURTS MARTIAL

The Court Martial Administrator is responsible for determining the date and venue for a court martial.[32] Generally this is done in consultation with the Chief Military Judge, the Director of Military Prosecutions and counsel for the accused. Defence counsel deals

[30] QR&O art. 111.16 prescribes that "…legal counsel for the accused…shall not stay in quarters, notwithstanding that quarters may be available, unless it is impractical having regard to the location of the court martial and the constraints of military operations."

[31] Pursuant to NDA s. 251.2, these fees and allowances are paid at the scale set for proceeding in the Federal Court of Canada.

[32] QR&O art. 111.02(2)(*b*).

with scheduling with a view to being prepared to proceed when the trial is scheduled. Factors from a defence perspective that may influence either the date or the venue of the court martial are immediately brought to the attention of the Director of Military Prosecutions and the Court Martial Administrator.

THE COURT MARTIAL

CONTENTS:

GENERAL — THE COURT MARTIAL[1]

A court martial not only has the formality, decorum and dignity of a civilian superior court of criminal jurisdiction but also the flavour and decorum traditionally associated with formal military proceedings. Courts martial are generally conducted at the military establishment of or near the place of commission of the alleged offence(s). The accused's unit is responsible for providing the necessary administrative support "to the extent required to ensure that the court martial is conducted in a dignified and military manner."[2]

For all practical purposes, a court martial has four stages:

- preliminary proceedings;
- the trial proper;
- if there is a finding of guilty, the sentencing; and
- if there is a sentence of detention or imprisonment and if the offender applies, the release pending appeal.

COURT MARTIAL PROCEDURE

The procedure followed at a court martial is not unlike that at a civilian criminal court. The burden of persuasion incumbent on the prosecution is proof beyond a reasonable doubt.[3] One notable difference is that the admission of evidence is governed by the MRE,[4] which are merely a codification of the common law of evidence, albeit not completely up-to-date with the latest developments in common law.

In brief, the procedure[5] at a court martial is as follows:

a) witnesses are not admitted to the proceedings except when testifying or by leave of the court;[6]

b) the prosecution may make an opening address,[7] after which it adduces its evidence;[8]

---

[1] QR&O Chapter 112 sets out courts martial procedure.

[2] QR&O art. 111.12.

[3] QR&O art. 112.40(1).

[4] MRE R. 3 provides that the Rules apply to all court martial proceedings wherever they are conducted.

[5] The sequence of events in the procedure set out at QR&O art. 112.05 is not absolute and, at the discretion of the judge, may be varied to suit the ends of justice.

[6] NDA subs. 180(3).

[7] QR&O 112.05(10) and QR&O art. 112.28.

c) at the completion of the prosecution case, the defence may make an opening address,[9] after which it adduces its evidence, if any;

d) prosecution rebuttal witnesses, if any, testify;[10]

e) the prosecution and defence, respectively, make closing arguments;[11]

f) the finding is pronounced;[12]

g) if a finding of guilty is made, the military judge conducts a sentencing hearing and pronounces sentence;[13] and

h) if the judge imposes a sentence of detention or imprisonment, and if the offender applies, the court conducts a hearing to determine if the offender should be released from custody pending an appeal to the Court Martial Appeal Court.[14]

This procedure applies — with the necessary changes or variations — to all proceedings conducted as part of a court martial. The nature of the particular proceeding and the party having the burden of persuasion determines what changes or variations, if any, may be required. For example, when the defence makes an application or motion it has the burden of persuasion and must address the court and call evidence first. In this respect, the defence may be afforded some latitude from strict application of the rules governing examination-in-chief, which is "necessary to enable the accused to make full answer and defence."[15] As well, the defence has the opportunity to call rebuttal evidence and to reply to the prosecution's address on the matter.

---

[8] See QR&O art. 112.31 respecting the examination of witnesses.

[9] QR&O art. 112.05(14) and QR&O art. 112.29.

[10] QR&O art. 112.05(18).

[11] QR&O art. 112.05(19)(*a*) and (*b*), respectively. This is quite different from the procedure in a civilian criminal court where the defence makes the first closing argument if evidence has been called.

[12] QR&O art. 112.05(19)(*f*). See QR&O art. 112.40 for directions respecting findings.

[13] QR&O arts. 112.05(21) and 112.47 and QR&O arts. 112.48-112.55.

[14] QR&O Chapter 118.

[15] *R. v. Garofoli*, [1990] 2 S.C.R. 1421, per Sopinka J., at 1465. This addresses the situation where the defence must, as part of its application, call a witness who in all other respects is a prosecution witness — for example, in support of an application under subs. 10(*b*) of the Charter, the arresting police officer or the person in authority who took the accused's statement.

PRELIMINARY PROCEEDINGS

Prior to a plea being entered to the charge(s), the military judge assigned to preside at the court martial may conduct hearings on any question, matter or objection[16] provided that counsel requesting the hearing gives "reasonable notice in writing to the military judge and to the opposing party."[17] Typical preliminary proceedings include the following:

a) applications for a plea in bar of trial;[18]

b) applications for exclusion of evidence or other appropriate relief respecting a violation of the accused's rights under the *Canadian Charter of Rights and Freedoms*; and

c) motions respecting the admissibility of evidence (e.g., MRE Rule 42 — voluntariness of a statement by an accused to a person in authority or Military MRE Rule 22 — similar fact evidence).

In General Courts Martial, preliminary proceedings are generally conducted before the court martial panel assembles,[19] except for an application challenging a panel member.[20] In Standing Courts Martial, matters that would otherwise be the subject of preliminary proceedings are heard at the discretion of the military judge[21] either before or after the accused's plea to the charge(s).

Preliminary proceedings may, with the agreement of the prosecutor and the accused and with the approval of the judge, be conducted by any means that allow all of the parties to engage in simultaneous visual and oral communication.[22]

THE TRIAL PROPER

After the completion of any preliminary proceedings and other preliminary matters,[23] including objections to the military judge and pleas in bar of trial, the accused pleads to the charge(s).[24] In General Courts Martial, when the accused has pleaded not guilty to

[16] QR&O art. 112.03.

[17] QR&O art. 112.04(1).

[18] QR&O art. 112.24(1) lists the five grounds on which an accused may plead in bar of trial. QR&O art. 112.24(2) – (10) sets out the procedure to be followed.

[19] NDA subs. 187(*a*).

[20] NDA subs. 186(1). See QR&O art. 112.14 respecting objections to the constitution of the court martial.

[21] QR&O art. 112.03(2).

[22] QR&O art. 112.64.

[23] QR&O art. 112.05(3) – (5).

[24] QR&O art. 112.05(6). The procedure respecting the acceptance of guilty pleas is set out in QR&O art. 112.25. (See also Acceptance of Guilty Pleas, *infra*).

the charge(s), the panel assembles and objections to members of the panel,[25] if any, are heard. Following this, members of the panel take their oaths.[26] The remainder of the trial is then conducted as previously described.

FINDINGS

Findings in Standing Courts Martial are made by the military judge, while findings in General Courts Martial are determined by the unanimous vote of its members[27] and, after the judge has verified their legality,[28] are pronounced in open court by the senior member.[29] In all courts martial, the burden of proof incumbent on the prosecution is beyond a reasonable doubt.[30]

In certain circumstances it may be that the

- facts proved differ materially from the allegations in the charge but are sufficient to establish the commission of the offence(s) charged; and

- difference between the facts proved and the facts alleged was not prejudicial to the accused's defence.

In such instances, it is open to the court martial to pronounce a special finding[31] of guilty rather than pronounce a finding of not guilty. In pronouncing such a special finding the court martial must state the differences between the facts it has found and the facts charged. For example, the court would state that it finds the accused guilty of stealing a sum of one hundred dollars versus the one thousand dollars as alleged.

---

[25] QR&O art. 112.05(9)(*b*) and NDA subs. 186(1). There are no peremptory challenges to members of the court martial panel. The procedure respecting challenges to members of the court martial panel is set out in QR&O art. 112.14.

[26] QR&O art. 112.05(9)(*c*). See QR&O art. 112.17 for the form of oath.

[27] See NDA subs.192(2) and QR&O art. 112.41 for the procedure in determination of findings.

[28] QR&O arts. 112.05(19)(*e*) and 112.43.

[29] QR&O art. 112.05(19)(*f*).

[30] QR&O art. 112.40(1).

[31] NDA s.138.

SENTENCING

The sentence pronounced by a service tribunal may comprise one or more punishments.[32] As noted above, at a court martial the sentencing phase of the trial takes place immediately after the pronouncement of a guilty finding and is conducted by the military judge.[33] Unlike a civilian criminal trial, where defence counsel generally submit sentencing reports and speak to sentence in lieu of calling witnesses, in a court martial the testimony of witnesses is expected in support of such submissions. Otherwise, the procedure[34] is the same as for the trial proper:

- the MRE apply;[35]
- the prosecution and defence, respectively, call their evidence;
- the prosecution calls rebuttal evidence, if any, and if authorized by the military judge; and
- the prosecution and the defence, respectively, address the military judge.

In determining the appropriate sentence the military judge follows the principles of sentencing[36] applied by civilian criminal courts.[37]

The judge may take into consideration in determining sentence any previous service offence(s) similar in character to the offence(s) that are the subject of sentencing, provided the offender requests such and admits to having committed them.[38] The impact of such an admission by the offender is to preclude another court from passing a sentence in respect of such previous service offence(s).

---

[32] See NDA subs. 139(1) for the scale of punishments. QR&O Chap. 104 elaborates on each punishment.

[33] NDA ss. 174-175, 176-177 and 193.

[34] See QR&O art. 112.51 for sentencing procedure at a court martial.

[35] As a matter of practice in the sentencing phase of a court martial, military judges generally afford some latitude from the strict application of the MRE, except in the circumstances in QR&O art. 112.52 respecting disputed facts and QR&O art. 112.53 respecting aggravating facts.

[36] The accepted principles of sentencing are the protection of the public (which includes the CF); the punishment of the offender; specific and general deterrence; and reformation and rehabilitation of the offender.

[37] In addition, QR&O art. 112.48(2) specifically requires the judge to take into consideration any indirect consequence of the finding or of the sentence, and to impose a sentence commensurate with both the gravity of the offence(s) and the previous character of the offender — i.e., to impose a sentence that is "as low as is reasonably possible without minimizing the seriousness of the offence of which the [offender] has been convicted"(unreported reasons for judgement in *Captain Luc Paquette and Her Majesty The Queen*, CMAC # 418 dated 19 October, 1998, per Weiler JA, at 8).

[38] NDA subs. 194(1).

THE GUILTY PLEA

When an accused pleads guilty to a charge at a court martial, the court embarks on a detailed procedure[39] designed to ensure that the accused has made an informed decision respecting the guilty plea. The military judge is required to

- explain the offence(s) to which the accused has pleaded guilty;
- inform the accused of the maximum punishment that can be imposed;
- ask the accused if the particulars alleged in the charge(s) are accurate; and
- explain the difference in procedure if the guilty plea is accepted. [40]

The prosecution then informs the court of its position respecting acceptance of the plea[41] if the accused is pleading guilty to

- a less serious alternative charge;[42]
- a related or less serious offence prescribed in NDA sections 133-136;
- an attempt to commit the offence charged;[43] or
- facts that differ materially from the facts alleged in the charge but that are still sufficient to establish the offence.

If the prosecution concurs in the acceptance of the guilty plea,[44] and if the court is satisfied that the accused is making an informed plea,[45] the court may accept and record that plea. Otherwise, the court martial proceeds as if the accused had initially pleaded not guilty.[46]

A guilty plea is usually the result of plea and sentence negotiations between the prosecution and the defence. Such negotiations are an important and necessary part of the Canadian criminal justice system.[47] Guilty pleas help to accelerate the criminal trial

---

[39] See QR&O art. 112.25.

[40] QR&O art. 112.25(1).

[41] QR&O art. 112.25(2).

[42] See QR&O art. 107.05 respecting alternative charges.

[43] NDA s. 137.

[44] QR&O art. 112.25(3).

[45] QR&O art. 112.25(5).

[46] QR&O art. 112.25(6).

[47] See, for example, *R. v. S.K.* (1995), 99 C.C.C. (3rd) 376 (Ont. CA), at 382, and *R. v. Closs* (1988), 105 O.A.C. 392 (CA).

process and thus account for significant savings in time and resources. An accused's plea of guilty to an offence is a legitimate factor to be considered by the sentencing judge in the accused's benefit.

As a general rule, when a court martial accepts a guilty plea no evidence is called respecting the offence(s) in question. Instead, the prosecutor informs the court of the circumstances of the offence(s) to which the accused has pleaded guilty.[48] This statement of circumstances is comprised of those facts that could have been proved by admissible evidence at trial and is, often, prepared with input from the defence.

There may be cases where the accused wishes to plead guilty to the charge(s) but is not in agreement with the statement of circumstances proposed by the prosecution. If the prosecution concurs in the acceptance of the guilty plea, or the prosecution's concurrence is not required, the military judge may accept the guilty plea and conduct a hearing to determine the precise circumstances of the offence.[49]

Defence counsel will naturally endeavour to achieve a statement of circumstances that places the accused in the best light. However, in instances where the accused testifies in mitigation of punishment, defence counsel must ensure that any of the accused's testimony that may bear on an essential ingredient of the charge(s) in question is in consonance with the statement of particulars of the charge(s) and the statement of circumstances. Should there be an irreconcilable contradiction, the court martial may have no other choice but to direct that the guilty plea be altered to a not guilty plea and that a full trial be conducted with respect to the charge(s) in question.[50] In such circumstances the result may not be in the accused's best interests.

JOINT SUBMISSIONS ON SENTENCE

It is not unusual for plea, trial and sentence negotiations to culminate in a prosecution and defence agreement on sentence or on a sentencing range. While the regulations respecting court martial procedure nowhere specifically address this matter, it is becoming increasingly customary in courts martial that the prosecution and defence make a joint submission on sentence.

Joint submissions on sentence are not binding on a sentencing judge. However, it is established that a sentencing judge should observe the joint submission unless the proposed sentence would either bring the administration of justice into disrepute or would otherwise not be in the public interest.[51]

---

[48] QR&O art. 112.51(3).

[49] QR&O arts. 112.52 and 112.53.

[50] QR&O art. 112.26(1).

[51] *R. v. Taylor*, 2008 CMAC 1 (CMAC 497).

DDCS Directive 11

In instances where a joint recommendation respecting sentence is to be made by the prosecution and the defence, DCS counsel shall ensure that the client is aware that such is not binding on the military judge.

RELEASE PENDING APPEAL[52]

An offender who has been tried and sentenced by court martial has the right to appeal the legality of the finding(s) as well as the legality and severity of the sentence to the Court Martial Appeal Court.[53] When a court martial imposes a punishment of detention or imprisonment the offender may, within 24 hours of being sentenced, apply to the court martial[54] to be released from incarceration pending his or her appeal.[55]

To initiate the release pending appeal process the offender must, within 24 hours of the imposition of the custodial sentence, deliver either to the judge presiding at the court martial or to the person having custody of him or her a signed application[56] to be released pending appeal. The hearing for the application will be conducted at the earliest practical time after receipt of the application by the judge.[57]

The applicant has the burden at the application hearing to establish on a balance of probabilities that[58]

- he or she intends to appeal;
- if the appeal is against sentence only, it would cause unnecessary hardship if he or she were to remain in custody;
- he or she will surrender himself or herself into custody when directed to do so; and
- the custodial sentence is not necessary in the interest of the public or the CF.

---

[52] See QR&O Chapter 118.

[53] NDA s. 230.

[54] NDA s. 248.1. (QR&O art. 118.02.).

[55] QR&O art. 118.01 defines "release pending appeal" as "release from detention or imprisonment (a) until the expiration or the time to appeal referred to in…the [NDA] and (b) if there is an appeal…until determination of that appeal."

[56] QR&O art. 118.03(1).

[57] QR&O art. 118.03(4)(*a*).

[58] NDA s. 248.3. See also *R. v. Wilcox*, 2009 CMAC 7 (CMAC-536).

The procedure governing the conduct of this hearing[59] is quite similar to that governing the conduct of the court martial. In brief

- the applicant and prosecution, respectively, may make an opening statement;
- the applicant and the prosecution, respectively, adduce their evidence;
- the applicant and the prosecution, respectively, may make a closing address to the court; the applicant has a right to reply to any closing address by the prosecution; and
- the court determines whether the applicant has met the necessary burden and announces its decision.

The court may grant the application if the applicant has established his or her case on a balance of probabilities and gives a signed undertaking[60] to

- remain under military authority;
- surrender into custody when directed to do so; and
- comply with any other reasonable conditions the court may stipulate.[61]

Offenders who are sentenced to a custodial term by a court martial and who appeal the findings or sentence may, if they have not brought an application for release pending appeal at court martial, bring the application to the Court Martial Appeal Court.[62] In such instances, the offender may be represented by DCS counsel.[63]

[59] QR&O art. 118.04 sets out the procedure to be followed at the hearing.

[60] NDA s. 248.5. The form of the undertaking is at QR&O art. 118.08(2).

[61] Such "other reasonable conditions" may be the applicant's surrendering his or her passport, or undertaking to be of good behaviour, or to refrain from consuming alcoholic beverages or from attending certain establishments, etc.

[62] NDA s. 248.2.

[63] QR&O art. 101.20(3)(*b*).

POST-TRIAL MATTERS AND APPEALS

CONTENTS:

NOTICE OF APPEAL

Immediately after the termination of the court martial proceedings, DDCS counsel will discuss with the client the significance and the potential consequences of the verdict and, if applicable, the sentence. This discussion will include the rights of appeal by both the prosecution and the client.[1]

In cases where a guilty verdict has been registered, the officer of the court[2] should provide[3] the offender with Form A of the Notice of Appeal.[4] DDCS counsel will

- give the client preliminary views respecting an appeal;
- review the appeal form with the client; and
- assist in completing the appeal form should this be necessary.

Except for those instances where a letter of recommendation to the Appeal Committee is required, this will terminate DDCS counsel's representation of the client respecting the court martial proceedings.

DDCS Directive 12

DDCS counsel shall advise their clients who have been found guilty of an offence of their right to appeal and of the procedure to follow. When possible, DDCS counsel will give preliminary advice as to the merits of a potential appeal. In cases where their clients are found not guilty, DDCS counsel shall advise them that the prosecution has a right of appeal.

REVIEW OF UNDERTAKINGS

Either the offender or the Director of Military Prosecutions may seek a review by the Court Martial Appeal Court of undertakings respecting release pending appeal.[5] In such instances, DDCS counsel may represent the offender.[6]

---

[1] NDA subs. 230.1 and s. 230, respectively.

[2] QR&O art. 111.14. The officer of the court is the senior court orderly appointed by the commanding officer of the accused's unit and is responsible for the efficient functioning of the proceedings. See also the Chief Military Judge guide *Court Martial Procedures: Guide for Participants and Members of the Public.*

[3] See the Note to QR&O art. 115.06.

[4] See QR&O art. 115.08.

[5] NDA subs. 248.8(1).

[6] While not specifically addressed in QR&O arts. 101.20(2) or (3) or 118.23, DDCS has interpreted those provisions to include hearings for review of conditions of undertakings as a matter for which representation may be provided by DDCS.

The Court Martial Appeal Court may confirm or vary the conditions or may substitute other conditions.[7] If the original conditions are varied or substituted, the offender is required to sign a fresh undertaking agreeing to comply with the varied or substituted conditions imposed by the court.[8]

CANCELLATION OF RELEASE PENDING APPEAL

The Director of Military Prosecutions may apply to either a military judge or the Court Martial Appeal Court for cancellation of a direction for an offender's release pending appeal.[9] In such instances, DDCS counsel may represent the offender.[10]

If the application is brought before a military judge, the burden of persuasion is on the applicant (Director of Military Prosecutions) on a balance of probabilities to show that the release pending appeal should be cancelled. The procedure[11] at the cancellation hearing is similar to that at courts martial:[12]

- the respondent (offender) may object to the judge conducting the hearing;[13]
- the applicant (Director of Military Prosecutions) and respondent, respectively, may make an opening address;
- the applicant and respondent, respectively, adduce their evidence; and
- the applicant and the respondent, respectively, may make a closing address; the applicant has the right of reply to any address made by the respondent.

An offender whose release pending appeal has been cancelled is returned to custody. The military judge's determination may be appealed to the Court Martial Appeal Court by both the prosecution and the offender.[14]

---

[7] NDA subs. 248.8(1).

[8] NDA subs. 248.8(2).

[9] The application is made to a military judge if the release direction was made by a court martial (NDA subs. 248.81(2)(*a*)) and, if the release direction was made by the Court Martial Appeal Court, to that court (NDA subs. 248.81(2)(*c*)).

[10] QR&O art. 118.23.

[11] QR&O art. 118.21 sets out the procedure to be followed at cancellation application hearings before a military judge.

[12] QR&O art. 118.22.

[13] There is no provision in QR&O art. 118.21(3) regarding the right of the prosecution to object to the judge; however, this right may be available through QR&O art. 118.22.

[14] NDA subs. 248.9(1)(*b*).

THE COURT MARTIAL APPEAL COURT

The Court Martial Appeal Court[15] hears appeals[16] from all court martial proceedings respecting the following:

- the legality of the findings,[17] the whole or any part of the sentence,[18] the finding of unfit to stand trial or not responsible on account of mental disorder,[19] decisions terminating proceedings on a charge,[20] and dispositions in respect of persons found to be unfit to stand trial or found to be not responsible on account of mental disorder;[21]

- with leave of the Court or a judge thereof, the severity of a sentence, unless the sentence is one fixed by law;[22]

- applications for release pending appeal;[23] and

- orders by a military judge respecting applications to cancel a direction that an offender be released pending appeal.[24]

DDCS provides legal counsel to the offender for both appeals initiated by the prosecution[25] and, with the approval of the Appeal Committee,[26] for appeals or applications for leave to appeal initiated by the offender.[27]

Appeals or applications for leave to appeal to the Court Martial Appeal Court respecting findings, sentence, and findings and dispositions respecting fitness to stand trial are

---

[15] The Court Martial Appeal Court is established by NDA subs. 234(1). NDA subs. 234(2) provides that the judges comprising the court are judges of the Federal Court of Canada and of superior courts of criminal jurisdiction.

[16] QR&O Ch. 115 contains the regulations respecting appeals to the Court Martial Appeal Court.

[17] NDA subss. 230(*b*) and 230.1(*b*).

[18] NDA subss. 230(*c*) and 230.1(*c*).

[19] NDA subss. 230(*d*) and 230.1(*e*).

[20] NDA subs. 230.1(*d*).

[21] NDA subss. 230(*e*) and 230.1(*f*).

[22] NDA subss. 230(*a*) and 230.1(*a*).

[23] NDA subss. 248.9(1)(*a*) and (2).

[24] NDA subss. 248.9(1)(*b*) and (2).

[25] QR&O art. 101.20(2)(*g*).

[26] The Appeal Committee is established by QR&O art. 101.21(1) and is composed of a person appointed by the JAG and a person appointed by the Chief of the Defence Staff.

[27] QR&O art. 101.20(2)(*h*).

initiated by a Notice of Appeal[28] that must be filed with the Court Registry[29] within 30 days of the termination of court martial proceedings.[30]

THE APPEAL COMMITTEE

An application to the Appeal Committee for provision of legal counsel by DDCS must be accompanied by a legal opinion provided by the lawyer who represented the offender at court martial indicating whether, in his or her opinion, the appeal has professional merit.[31] In instances where offenders were represented at court martial by civilian counsel, it is normally the responsibility of civilian counsel to provide the opinion. DDCS will, however, provide the required opinion should civilian counsel fail to so do.

Cases concerning applications for extension of time to file an appeal indicate that the higher standard on that issue is that of a "reasonable chance of success"; the lower standard is that of an "arguable case".[32]

Offenders applying for provision of DDCS counsel for appeals or applications for leave to appeal have no right to submit a grievance respecting any matter concerning the Appeal Committee.[33]

DDCS Directive 13

In those cases where an offender who has been found guilty and sentenced by a court martial wishes to apply to the Appeal Committee for representation by DDCS, the DDCS counsel who acted at trial shall as soon as practical prepare a letter making recommendations respecting the merit of a potential appeal.

APPEALS TO THE SUPREME COURT OF CANADA

Both the Director of Military Prosecutions and the offender may appeal decisions of the Court Martial Appeal Court on any question of law[34]

- on which a judge of the Court Martial Appeal Court dissents; or

[28] NDA subs. 232(1).

[29] QR&O art. 115.07 provides that the Notice of Appeal may be delivered to a superior officer when it is impractical to deliver it to the Court Registry.

[30] NDA subs. 232(3). NDA subs. 232(4) provides that the court or a judge thereof may grant an extension of the 30 days.

[31] QR&O art. 101.21(4). The term "professional merit" is otherwise not defined.

[32] *R. v. Waugh*, [1993] NBJ No. 152 (NBQB).

[33] QR&O art. 101.21(7).

[34] NDA subss. 245(1) and (2).

- if leave to appeal is granted by the Supreme Court of Canada.

A person who is the subject of an appeal to the Supreme Court of Canada has the same entitlements to provision of DDCS counsel as for appeals to the Court Martial Appeal Court.

MEDIA RELATIONS

CONTENTS:

INTRODUCTION

Historically, legal officers were strongly discouraged, if not prohibited, from having any dealings with the media. Recent years, however, have seen the CF and the Office of the JAG come under fairly close and continuing scrutiny. The public and the media have focused their interest on the military justice system — a focal point of which is courts martial.

As a result, attitudes concerning contact and relations with the media have undergone significant changes. In this regard, current CF policy encourages members to act as ambassadors to the public and to open and maintain positive relations with the media.[1] Furthermore, JAG policy requires legal officers to be "visible, accessible and answerable to the public…"[2]

DDCS MEDIA RELATIONS

Both DAOD 2008-0 and JAG Policy Directive 001/99 provide useful insight into the role of legal officers in general with respect to the media. Because of their vastly different role and their duty to serve the best interests of their clients with respect to the cases being defended, DDCS lawyers are under no obligation to adopt or participate in the CF and JAG policies on media relations where such conflicts with that duty. Nonetheless, to assist in serving the best interests of their clients, it behooves DDCS lawyers to be skilled in dealing with the media.

> **DDCS Directive 14**
>
> DDCS lawyers shall observe and apply the provisions of DAOD 2008-0 and JAG Policy Directive 001/99 to the extent that such does not conflict or interfere with their role, duties and responsibilities as defence counsel and their concomitant duty to serve the best interests of their clients. Matters of concern respecting contact and relations with the media shall be discussed with the Director.

The codes of professional conduct of the various law societies offer consistent guidance on lawyers' dealings with the media[3] — of note is the responsibility to serve the client's best interests. When asked to comment on a case either before or coming before a court martial, DDCS lawyers must remember that

- the prosecution's case, unlike that of the defence, is in the public arena and is generally known; and
- clients often do not wish to be the subject of publicity.

---

[1] DAOD 2008-0.

[2] Para. 5, JAG Policy Directive 001/99 — Media Relations.

[3] See the Canadian Bar Association *Code of Professional Conduct*, Chap. XVIII, and commentaries thereafter.

DDCS Directive 15

Except for information of a general nature, DDCS counsel shall not speak to the media about a case either before or coming before a court martial without the client's consent.

DDCS Directive 16

DDCS counsel shall be circumspect with regard to comments on the defence case or position and shall ensure that all comments to the media are well reflected,[4] having regard to the best interests of the client.

DDCS Directive 17

DDCS counsel shall disclose no personal information respecting a client without that client's consent.[5]

DEFENCE COUNSEL AND THE PUBLIC AFFAIRS OFFICER

A public affairs officer — whose role is that of a CF representative and spokesperson — will be present. While the public affairs officer may be of assistance to defence counsel in dealing with the media, defence counsel cannot forget that they should not appear or be perceived to appear to be aligned or closely associated with the system and, hence, the prosecution. Indiscriminate use by the defence of the public affairs officer as a spokesperson could result in such a perception by both the client and the public.

[4] Ibid., commentary 2.

[5] Indeed, to do so contravenes s. 8 of the *Privacy Act* and subs. 19(2)(*a*) of the *Access to Information Act*.

MISCELLANEOUS MATTERS

CONTENTS:

ARREST, CUSTODY AND RELEASE FROM CUSTODY[1]

The NDA places a continuing obligation on arresting and custodial authorities to justify retaining in custody a person who has been arrested. An arrested person is to be released from custody as soon as it is practicable after arrest unless the arresting person reasonably believes that retention in custody is necessary.[2] In making this determination, the arresting person must consider all of the circumstances of the situation, including[3]

- the gravity of the alleged offence;
- the need to establish the identity of the arrested person;
- the need to secure or preserve evidence of or relating to the alleged offence;
- the need to ensure that the arrested person will appear before a service tribunal;
- the need to prevent the continuation or repetition of the alleged offence or the commission of another offence; and
- the need to ensure the safety of the arrested person or of any other person.

The person delivering an arrested person to be retained in custody must furnish the custodian with an account in writing[4] that sets out why the arrested person is being committed to custody, and must provide a copy to the person retained in custody.[5] In turn, the custodial officer must, within 24 hours of the arrest, deliver to the custody review officer[6] a report of custody,[7] the account in writing and any representations made by or on behalf of the person retained in custody.[8] The custody review officer must review the report of custody and accompanying documents within 48 hours of the arrest[9] and direct the release of the person in custody unless he or she reasonably believes

[1] See QR&Os art. 105.12–105.30 for actions respecting arrest, custody and review of custody.

[2] NDA subss. 158(1)(*a*) to (*f*).

[3] NDA subss.158(1)(*a*) to (*f*).

[4] See QR&O art. 105.16(3) for the form of the account in writing.

[5] QR&O art. 105.16(2).

[6] NDA s. 153 defines "custody review officer" as a commanding officer or an officer so designated by a commanding officer.

[7] NDA subs. 158.1(1).

[8] NDA subs. 158.1(5).

[9] NDA subs. 158.2(1).

that it is necessary that the person be retained in custody, having regard to all the circumstances, including those set out in subsection 158(1).[10]

The custody review officer may require a person being released from custody to sign an undertaking[11] to comply with some or all of the following conditions:[12]

- to remain under military authority;
- to report at specified times to a specified military authority;
- to remain within the confines of a specified defence establishment or at a location within a geographical area;
- to abstain from communicating with specified persons or to refrain from attending specified places; and
- to comply with such other reasonable conditions as are specified.

Where an application is made to that effect, a direction to release a person from custody may be reviewed by[13]

- the custody review officer's commanding officer if the custody review officer was designated by a commanding officer; and
- the next officer in the disciplinary chain of command if the custody review officer is a commanding officer.

The officer conducting the review of the direction to release from custody, after affording both a representative of the CF and the subject of the release direction an opportunity to be heard, may impose any conditions of release from custody[14] set out in NDA sections 158.6(1)(*a*)-(*e*).

The custody review officer who does not direct release from custody must take the person before a military judge for a show cause hearing to have the matter reviewed.[15]

---

[10] NDA subs. 158.2(2). However, NDA subs. 158.4 requires *retention* in custody if the arrested person is charged with a "designated offence" as defined in NDA s. 153 (offences listed in s. 469 of the *Criminal Code*; offences contrary to subss. 5(3), 6(3) or 7(2) of the *Controlled Drugs and Substances Act* or conspiracy to commit those offences; offences the minimum punishment for which is life imprisonment; offences committed while at large after having been released in respect of another offence and for which a punishment greater than imprisonment for less than two years may be imposed; and a criminal organization offence).

[11] NDA subs. 158.6(1).

[12] Ibid., subss. (*a*) – (*e*). The form of the undertaking is set out in subs. (2).

[13] NDA subs. 158.6(2).

[14] NDA subs. 158.6(3).

[15] NDA subs. 159(1).

In such instances, the person in custody is entitled to DDCS counsel,[16] and the custody review officer is responsible for ascertaining the person's desires respecting counsel for the hearing.[17]

In most cases, the Director of Military Prosecutions will represent the CF at a show cause hearing. Should that not be possible, the custody review officer will appoint someone to be the representative of the CF.[18] Where the person in custody is not charged with a designated offence, the burden of persuasion (i.e., to show that custody should be continued) is on the representative of the CF on a balance of probabilities. However, in those cases where the person is charged with a designated offence, the burden (i.e., to show that release should be directed) is on a balance of probabilities on the person in custody who is seeking release from custody.

The procedure[19] at the show cause hearing is similar to that at other proceedings presided over by a military judge.

At the conclusion of the hearing, if the military judge releases the person in custody, he or she is returned to duty. However, the military judge may, at his or her discretion, direct release from custody upon the person's giving an undertaking or undertakings.[20] Both the CF and the person who is the subject of the hearing may appeal the military judge's direction to the Court Martial Appeal Court.[21]

FITNESS TO STAND TRIAL[22]

An accused person is considered "unfit to stand trial" when he or she is

> unable on account of mental disorder to conduct a defence at any stage of a trial by court martial before a finding is made or to instruct legal counsel to do so, and in particular, unable on account of mental disorder to
>
> a. understand the nature or object of the proceedings,
>
> b. understand the possible consequences of the proceedings, or
>
> c. communicate with legal counsel.[23]

---

[16] QR&O arts. 101.20(2)(*e*) and 105.26(2).

[17] QR&O art. 105.26(2)–(5).

[18] QR&O art. 105.27(1).

[19] The procedure at the show cause hearing is set out at QR&O art. 105.27. See also QR&O art. 105.29.

[20] NDA subs. 159.4(1). See QR&O art. 105.28 for the Form of Direction and Undertaking.

[21] NDA subs. 159.9(1).

[22] See QR&O art. 119.03–119.19.

[23] QR&O art. 119.02.

"Mental disorder", as used in the above definition, means a "disease of the mind."[24] This term includes any illness, disorder or abnormal condition that impairs the human mind and its functioning. The term does not include self-induced states caused by alcohol or drugs or transitory mental states such as hysteria or concussion.

An issue of fitness to stand trial that arises during a summary trial deprives the summary trial of jurisdiction,[25] and the presiding officer must refer the matter to a court martial for determination.[26] Accused persons are presumed fit to stand trial unless the contrary is established on a balance of probabilities.[27]

Accused persons at hearings to determine fitness to stand trial are entitled to be represented by DDCS counsel.[28] The issue of fitness to stand trial can be brought

- as a preliminary proceeding, by either the defence or prosecution;[29]
- as a plea in bar of trial, by the defence;[30] or
- at any time during the court martial, at the instance of either party or of the judge.[31]

If the issue is brought by either the defence or the prosecution, that party has the burden of persuasion.[32] In arriving at a determination of the issue, a court martial may, of its own volition or at the insistence of either the defence or prosecution,[33] order an assessment[34] of the accused.[35]

---

[24] Ibid.

[25] NDA subss. 163(1)(*e*) and 164(1)(*e*) and QR&O art. 108.16(1)(*a*)(iv).

[26] At General and Disciplinary Courts Martial, the issue of fitness to stand trial is a matter to be determined by the panel.

[27] NDA subs. 198(1).

[28] QR&O arts. 101.20(2)(*b*) and 119.07.

[29] QR&O art. 112.05(5)(*b*) and (*e*).

[30] QR&O art. 112.24(1)(*e*).

[31] NDA subs. 198(2).

[32] NDA subs. 198(3).

[33] QR&O art. 119.05(2).

[34] See QR&Os arts. 119.53–119.59 for the regulations respecting assessment orders and assessment reports.

[35] NDA subs. 198(4).

If the issue of fitness to stand trial is raised as a preliminary proceeding or as a plea in bar of trial, the procedure for such proceedings is followed. In all other instances a *voir dire* is conducted[36] in which the applicant followed by the other party, respectively,

- makes an opening statement;
- adduces their evidence; and
- makes their closing addresses, with the applicant having the right of reply.

A court martial that finds an accused unfit to stand trial sets aside any plea that was entered and holds a disposition hearing.[37] A military judge[38] conducts the disposition hearing "in as informal a manner as appropriate in the circumstances."[39] Nonetheless, the parties may adduce evidence, make oral or written submissions, call witnesses and cross-examine witnesses called by the other party.[40] The disposition[41] subsequently ordered is "the least onerous and least restrictive to the accused person"[42] of either of the following:

- release from custody, subject to such conditions as the court martial considers appropriate; or
- detention in custody in a hospital or other appropriate place, subject to such conditions as the court martial considers appropriate.[43]

However, psychiatric or other treatment of the accused may not be ordered without the consent of the accused.[44]

Where an accused person is found by a court martial to be unfit to stand trial, the Review Board[45] of the province or territory where the court martial was held is required to hold a hearing either to review the disposition made by the court martial or to make its

[36] QR&O art. 119.10(1).

[37] NDA subs. 200(2). See QR&O arts. 119.44–119.52 for the regulations respecting disposition hearings.

[38] QR&O art. 119.44(2).

[39] QR&O art. 119.44(3).

[40] QR&O art. 119.44(9).

[41] See QR&O arts. 119.12–119.19 for the regulations respecting dispositions.

[42] NDA subs. 201(1).

[43] NDA subss. 201(1)(*a*) and (*b*).

[44] NDA subs. 201(2).

[45] NDA s. 197 defines the Review Board as "the Review Board established or designated for a province pursuant to subsection 672.38(1) of the *Criminal Code*." Under s. 35 of the *Interpretation Act* "province" includes "territory".

own disposition.[46] Where the court martial was held outside of Canada the Review Board with which the Minister of National Defence has made arrangements for the benefit and welfare of the accused person is required to hold the hearing.[47]

PROOF OF A *PRIMA FACIE* CASE[48]

Not later than two years after a finding that an accused was unfit to stand trial — and every two years thereafter — a court martial

> must hold an inquiry and determine whether sufficient admissible evidence can be adduced at that time to put the accused person on trial.[49]

Accused persons are entitled to be represented by DDCS counsel at this *prima facie* case inquiry.[50] The procedure[51] followed at the inquiry is, once again, similar to that at other proceedings presided over by a military judge.

If the prosecution fails to establish a *prima facie* case, the court martial must find the accused not guilty of the charge(s) in question.[52]

---

[46] NDA s. 202.25.

[47] Ibid.

[48] See QR&O arts. 119.23–119.31.

[49] NDA subs. 202.12(1). For military personnel, a Standing Court Martial conducts the inquiry; for civilians, a Special General Court Martial conducts the inquiry.

[50] QR&O art. 101.20(3)(*c*).

[51] See QR&O art. 119.29.

[52] NDA subs. 202.12(2).

POLICY DIRECTIVE

Judge Advocate General
Juge avocat général

POLICY DIRECTIVE

Directive

Directive # : 009/00 **Directive # :** 009/00	**Original Date :** 23 Mar 00 **Date d`émission :** 23 mar 00	**Update :** **Mise à jour: :**
Subject : General instructions in respect of defence counsel services **Sujet :** Lignes directrices concernant les services d'avocats de défense	**Cross Reference :** Section 249.2(2) of *NDA* **Autre référence :** Section 249.2(2) de la *LDN*	

23 Mar 00

Distribution List

GENERAL INSTRUCTIONS IN RESPECT OF DEFENCE COUNSEL SERVICES

1. This general instruction is issued to the Director of Defence Counsel Services pursuant to my authority under section 249.2(2) of the *National Defence Act*.

2. In accordance with the requirements of an open, transparent and accountable military justice system, I am

Le 23 mar 00

Liste de diffusion

LIGNES DIRECTRICES CONCERNANT LES SERVICES D'AVOCATS DE DÉFENSE

1. La présente directive générale est donnée au Directeur du service d'avocats de la défense conformément aux pouvoirs qui me sont conférés en vertu du paragraphe 249.2(2) de la *Loi sur la défense nationale*.

2. Désireux de rendre le système de justice militaire transparent, responsable et conforme aux pratiques en matière de

instructing you to develop, implement and make publicly available defence policies in the following areas :

a. DDCS counsel's relationships with clients, including :

- solicitor/client privilege
- conflict of interest.

b. DDCS counsel's relationship with the Canadian Forces chain of command;

c. professional conduct; and

d. media relations.

3. These policies are to come into effect no later than 31 March 2000.

défense, je vous enjoins d'élaborer des politiques en matière de défense, de les appliquer et de les mettre à la disposition du public pour tout ce qui touche les domaines suivants :

a. La relation entre les avocats du service de la défense et leurs clients, particulièrement :
- le privilège entre avocats et clients
- les conflits d'intérêts.

b. la relation entre les avocats du service de la défense et les autorités des Forces canadiennes;

c. la conduite professionelle; et

d. la relation entre les avocats du service de la défense et les médias.

3. Ces lignes directrices doivent entrer en vigueur au plus tard le 31 mars 2000.

Le JAG
Bgén

//SIGNED / SIGNÉ//
Jerry S.T. Pitzul
BGen
JAG
992-3019/996-8470

DISTRIBUTION LIST

Action
DDCS

Information
All Legal Officers

LISTE DE DIFFUSION

Exécution
DSJD

Information
Tous les avocat(e)s militaires

DDCS DIRECTIVES

(Page numbers of DDCS Manual are in parentheses.)

DDCS Directive 1 (3-3)

DDCS counsel shall be knowledgeable of and adhere to their law society's code or rules of professional conduct as well as the Canadian Bar Association *Code of Professional Conduct*. DDCS counsel who may be uncertain about a particular activity or course of conduct respecting any aspect of the discharge of their duties and responsibilities are to consult with the Director and their law society as required.

DDCS Directive 2 (3-4)

DDCS counsel shall at all times treat the chain of command with respect and in such a manner so as not to be perceived to be submissive to it or to otherwise cast doubt respecting their allegiance to the client.

DDCS Directive 3 (5-6)

In order to foster a trusting relationship with their clients, DDCS counsel shall ensure that their clients understand the nature, extent and limitations of the solicitor-client privilege.

DDCS Directive 4 (5-7)

DDCS counsel shall remain alert to

- the existence and danger of, and shall avoid, compromising or potentially compromising situations and influences that could give rise to the threat of either actual or perceived conflict of interest; and
- conflicts of interest or perceptions of a conflict of interest respecting two or more clients advised or represented presently or previously by DDCS counsel.

DDCS Directive 5 (5-7)

DDCS counsel are to report to the Director all instances of actual or perceived conflict of interest.

DDCS Directive 6 (5-7)

DDCS counsel who may be uncertain about the existence of or the perception of the existence of an actual or potentially compromising situation shall inform and consult with the Director and with the appropriate member of their law society as necessary.

DDCS Directive 7 (5-7)

In the event of the existence of a conflict of interest or of a perception of a conflict of interest respecting two or more clients advised or represented by DDCS counsel, either presently or in the past, the DDCS counsel shall cease to advise or to represent the persons involved.

DDCS Directive 8 (6-5)

DDCS counsel shall refrain from doing anything that may detract from providing the best representation for the client. DDCS counsel shall consult with the Director before agreeing to any undertaking requested by the prosecution respecting restrictions on material to be disclosed.

DDCS Directive 9 (6-9)

When requiring an expert witness, DDCS counsel shall determine if the requisite and appropriate expertise is available, firstly, in the CF and, secondly, in DND or elsewhere in the Government of Canada.

DDCS Directive 10 (6-9)

DDCS counsel shall obtain the approval of the Director prior to retaining an expert witness whenever the travel costs and expert witness fee together exceed $2,000.

DDCS Directive 11 (7-9)

In instances where a joint recommendation respecting sentence is to be made by the prosecution and the defence, DDCS counsel shall ensure that the client is aware that such is not binding on the military judge.

DDCS Directive 12 (8-2)

DDCS counsel shall advise their clients who have been found guilty of an offence of their right to appeal and of the procedure to follow. When possible, DDCS counsel will give preliminary advice as to the merits of a potential appeal. In cases where their clients are found not guilty, DDCS counsel shall advise them that the prosecution has a right of appeal.

DDCS Directive 13 (8-5)

In those cases where an offender who has been found guilty and sentenced by a court martial wishes to apply to the Appeal Committee for representation by DDCS, the DDCS counsel who acted at trial shall as soon as practical prepare a letter making recommendations respecting the merit of a potential appeal.

DDCS Directive 14 (9-2)

DDCS lawyers shall observe and apply the provisions of DAOD 2008-0 and JAG Policy Directive 001/99 to the extent that such does not conflict or interfere with their role, duties and responsibilities as defence counsel and their concomitant duty to serve the best interests of their clients. Matters of concern respecting contact and relations with the media shall be discussed with the Director.

DDCS Directive 15 (9-3)

Except for information of a general nature, DDCS counsel shall not speak to the media about a case either before or coming before a court martial without the client's consent.

DDCS Directive 16 (9-3)

DDCS counsel shall be circumspect with regard to comments on the defence case or position and shall ensure that all comments to the media are well reflected, having regard to the best interests of the client.

DDCS Directive 17 (9-3)

DDCS counsel shall disclose no personal information respecting a client without that client's consent.