Interviewing Represented Military Suspects: *U.S. v. Finch* (CAAF 2006) and the Sixth Amendment Right to Counsel

Captain Anthony W. Bell[1]
Captain Jon B. Stanley[2]

Introduction

On 29 September 2006, the Court of Appeals for the Armed Forces (CAAF) published its decision in *United States v. Finch*[3], effectively overturning its prior decision in *United States v. McOmber*.[4] The overturning of *McOmber* had been widely predicted since MRE 305(e)(2) was changed in 1994 to more accurately reflect the present state of the law as governed by Supreme Court decisions on the Sixth Amendment right to counsel.[5] Both *Finch* and *McOmber* address the United States' duty to honor the attorney client relationship during a criminal investigation. In *McOmber,* the Court of Military Appeals[6] ruled that as soon as an investigator is on notice that a military suspect is represented by counsel in a military criminal investigation, further questioning of the suspect, without affording counsel notice and a reasonable opportunity to be present, renders a statement involuntary and inadmissible. However, suspects who themselves initiated the contact could be questioned without notice to and the presence of counsel. The *Finch* decision dramatically changed the legal landscape and brought military practice in line with federal, civilian criminal practice. What practical effect will the *Finch* decision have on criminal investigations in the military? What are the potential pitfalls for military prosecutors when advising government agents to contact[7] a military member who is represented by counsel?

The Sixth Amendment Right to Counsel and MRE 305(e)

The Sixth Amendment right to effective assistance of counsel is triggered by the initiation of "adversarial judicial proceedings," and is guaranteed at any critical stage of a prosecution.[8] In the federal, civilian criminal justice system, the Sixth Amendment right to counsel is triggered by way of a formal charge (indictment or information) or the initial appearance, whichever occurs first.[9] Once formal proceedings begin, police may <u>not</u> deliberately elicit statements from a defendant without notice to and approval of counsel or defendant's express waiver of the right to counsel. This is true even in a non-custodial setting and even when the person being questioned does not know the questioner is the police.[10] In the military, criminal justice system, an accused's Sixth Amendment right to counsel is triggered when charges are preferred.[11] After charges are preferred the accused may not be questioned about the charged offense(s) unless counsel is present or unless the accused initiates the contact.[12] In accordance with *McOmber*, statements taken, even before prefferal of charges, by investigators with knowledge that the suspect is represented by counsel are involuntary and inadmissible. CAAF, in overturning *McOmber,* has effectively removed an extra, procedural protection for military members subject to the military justice process. The following examples illustrate just how far the *Finch* decision has withdrawn the protection of counsel to service members.

EXAMPLE 1: On 13 Oct 06, the Air Force Office of Special Investigations (AFOSI) receives a letter from the Area Defense Counsel (ADC) stating that the ADC represents SSgt Snuffy, and not to talk to SSgt Snuffy without consulting the ADC. SSgt Snuffy is not currently under investigation. Two hours later, OSI receives an allegation that SSgt Snuffy is a suspect in an aggravated assault. Since charges have not been preferred, OSI may contact SSgt Snuffy directly to talk to him about the allegation even though OSI knows that SSgt Snuffy is represented by the ADC. It is up to SSgt Snuffy to request an attorney or assert his right to remain silent (under Art. 31(b) and/or *Miranda/Tempia).*

EXAMPLE 2: On 1 Nov 06, charges are preferred against A1C Doe for use of cocaine. Agents cannot contact A1C Doe about the charged use of cocaine without first calling her ADC. However, agents could directly contact A1C Doe to talk to her about an unrelated charge of assault. Agents must comply with Art. 31(b), as usual, but it is up to A1C Doe to decide whether or not she wants to speak to OSI about the assault charge or talk to her lawyer.

EXAMPLE 3: On 3 Dec 06, 1st Lt Berry is placed in pretrial confinement. When advised under Art. 31(b) and *Miranda/Tempia*, he asks for a lawyer. While he is in pretrial confinement, OSI receives an allegation that 1st Lt Berry has also committed larceny. Government agents are barred from going to confinement and interviewing 1st Lt Berry about either the larceny or rape charge without his attorney being present. On 10 Dec 06 1st Lt Berry is released from pretrial confinement. Charges have not been preferred. OSI may interview him (under rights advisement) for the larceny, the rape, or any other offense, without first going through 1st Lt Berry's lawyer.

The examples illustrate how dramatically the *Finch* decision has changed the way government investigators can conduct criminal investigations. Prior to the decision in *Finch*, investigators would generally only get one bite at the apple when interviewing a suspect because it was common for the suspect to seek assistance from the Area Defense Counsel shortly after an interview had occurred. The Area Defense Counsel in turn would place the government on notice that the suspect was represented by counsel using the commonly issued notice of representation letter. Now, after *Finch*, investigators are not bound by the notice of representation and may re-interview a suspect who is represented by counsel, provided charges have not been preferred.

Contacting Represented Parties and the Air Force Rules of Professional Conduct Rule 4.2[13]

Even though *Finch* has changed the rules of engagement for contact by investigators, judge advocates who advise government agents still need to be sensitive to the pre-preferral attorney-client relationship and when approaching the apple on the second bite. Criminal investigators must understand that there are ethical constraints on military attorneys that can impact the advice they give regarding interviewing represented suspects. The Air Force Rules of Professional Conduct contain a "no contact" provision. Specifically, Rule 4.2 prevents a lawyer from communicating with a person who the lawyer knows to be represented by another lawyer in the same matter.[14] The purpose of Rule 4.2 is to protect the integrity of the attorney-client relationship. Federal circuits have made clear that when a government agent acts as the alter-ego

of the lawyer, the "no contact" rule can reach the conduct of the agent and therefore the lawyer.[15] In other words, a lawyer cannot get someone else to do what the lawyer cannot ethically do. For example, the judge advocate, who advises the local OSI detachment to conduct a re-interview of a represented accused, may have crossed the ethical line between "mere knowledge" and "active encouragement".[16] The ethical inquiry is highly fact specific and will hinge on the level of involvement between the judge advocates and the investigators. The greater the involvement the more likely the investigator becomes an agent of the judge advocate. Thus, judge advocates often counsel cautiously when an accused is represented by counsel.

Lawyers can be disbarred for ethical violations. Federal courts, at least in criminal cases, have been reluctant to suppress statements or exclude evidence because of an ethical violation, provided all other evidentiary and Constitutional requirements have been satisfied.[17] That said, however, there is no guarantee that future courts will be so kind. A false step that is particularly egregious may warrant suppression, undoing a successful prosecution of a case. Where re-interviews with a member represented by counsel are of concern, judge advocates may restrict their input to avoid any ethical entanglement on the second bite.

Conclusion

With one fell stroke of the pen (or keyboard), CAAF overturned *McOmber* and changed almost thirty years of standard military justice practice. By negating the protections of the notice of representation letter for an accused in the early stages of a criminal investigation, CAAF has opened new opportunities for suspect interviews and more closely aligned military practice with long standing civilian practice.

---

[1] Captain Anthony W. Bell is the Staff Judge Advocate and Instructor at USAFSIA (OSI Academy) and detailed to the Legal Division at the Federal Law Enforcement Training Center, Glynco, GA. Previously, Capt Bell was the Area Defense Counsel at Eglin AFB.

[2] Captain Jon B. Stanley is the Chief of Military Justice at Charleston AFB. Previously, Capt Stanley was the Area Defense Counsel at Tyndall AFB.

[3] *United States v. Finch*, 64 M.J. 118 (2006).

[4] *United States v. McOmber*, 1 M.J. 380 (1976).

[5] MANUAL FOR COURTS-MARTIAL, App. 22, M.R.E 305(e).

[6] In 1994, Congress renamed the Court of Military Appeals the Court of Appeals for the Armed Forces.

[7] The words contact and re-interview are used interchangeably throughout this article. Understand that in both instances an interrogation would occur so that investigators would be required to advise the military member of their Article 31(b) and potentially Miranda/Tempia rights. The word interrogation is deliberately not used to avoid a discussion about Art. 31(b) and the 5th Amendment, as that analysis is outside the scope of this article.

[8] *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Maine v. Moulton*, 474 U.S. 159, 171 (1985).

[9] *Fellers v. U.S.*, 124 S. Ct. 1019 (2004).

[10] *Michigan v. Jackson*, 475 U.S. 625 (1986).

[11] MANUAL FOR COURT-MARTIAL, MIL. R. EVID. 305(d)(1)(b).

[12] *United States v. Harvey*, 37 M.J. 140 (C.M.A. 1993); *United States v. Wattenbarger*, 21 M.J. 41 (C.M.A. 1985).

[13] In the federal criminal justice system the prohibition against using agents to contact represented parties can be found at 28 USC 530B (McDade Act). The Attorney Generals guidelines regarding contacting represented parties, state ethics rules and local district rules.

[14] AIR FORCE RULES OF PROFESSIONAL CONDUCT Rule 4.2 (2005).

[15] *United States v. Jamil*, 707 F.2d 638, 645 (2d Cir. 1983).

[16] *Miano v. AC&R Adver*., 148 F.R.D. 68, 83 (S.D. N.Y. 1993). *See also, Holdren v. GMC*, 13 F. Supp. 2d 1192, 1195 (D.Kan. 1998).
[17] *United States v. Guerrerio*, 675 F. Supp. 1430, 1433 (S.D.N.Y. 1987).