

§ 776.45

tribunal, or other official by means prohibited by law or regulation;

(2) Communicate ex parte with such a person except as permitted by law or regulation; or

(3) Engage in conduct intended to disrupt a tribunal.

(b) [Reserved]

§ 776.45 **Extra-tribunal statements.**

(a) *Extra-tribunal statements:*

(1) A covered attorney shall not make an extrajudicial statement about any person or case pending investigation or adverse administrative or disciplinary proceedings that a reasonable person would expect to be disseminated by means of public communication if the covered attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding or an official review process thereof.

(2) A statement referred to in paragraph (a)(1) of this section ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, discharge from the Naval service, or other adverse personnel action, and the statement relates to:

(i) The character, credibility, reputation, or criminal record of a party, suspect in a criminal investigation, victim, or witness, or the identity of a victim or witness, or the expected testimony of a party, suspect, victim, or witness;

(ii) The possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by an accused or suspect or that person's refusal or failure to make a statement;

(iii) The performance or results of any forensic examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(iv) Any opinion as to the guilt or innocence of an accused or suspect in a criminal case or other proceeding that could result in incarceration, discharge from the Naval service, or other adverse personnel action;

(v) Information the covered attorney knows or reasonably should know is

likely to be inadmissible as evidence before a tribunal and would, if disclosed, create a substantial risk of materially prejudicing an impartial proceeding;

(vi) The fact that an accused has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the accused is presumed innocent until and unless proven guilty; or

(vii) The credibility, reputation, motives, or character of civilian or military officials of the Department of Defense.

(3) Notwithstanding paragraphs (a)(1) and (a)(2)(i) through (a)(2)(vii) of this section, a covered attorney involved in the investigation or litigation of a matter may state without elaboration:

(i) The general nature of the claim, offense, or defense;

(ii) The information contained in a public record;

(iii) That an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law or regulation, the identity of the persons involved;

(iv) The scheduling or result of any step in litigation;

(v) A request for assistance in obtaining evidence and information necessary thereto;

(vi) A warning of danger concerning the behavior of the person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(vii) In a criminal case, in addition to paragraphs (a)(3)(i) through (a)(3)(vi) of this section:

(A) The identity, duty station, occupation, and family status of the accused;

(B) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(C) The fact, time, and place of apprehension; and (D) The identity of investigating and apprehending officers or agencies and the length of the investigation.

(4) Notwithstanding paragraphs (a)(1) and (a)(2)(i) through (a)(2)(vii) of this

section, a covered attorney may make a statement that a reasonable covered attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the covered attorney or the attorney's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(5) The protection and release of information in matters pertaining to the DON is governed by such statutes as the Freedom of Information Act and the Privacy Act, in addition to those governing protection of national defense information. In addition, other laws and regulations may further restrict the information that can be released or the source from which it is to be released (e.g., the Manual of the Judge Advocate General).

(b) [Reserved]

**§ 776.46 Attorney as witness.**

(a) *Attorney as witness:*

(1) A covered attorney shall not act as advocate at a trial in which the covered attorney is likely to be a necessary witness except when:

(i) The testimony relates to an uncontested issue;

(ii) The testimony relates to the nature and quality of legal services rendered in the case; or

(iii) Disqualification of the covered attorney would work substantial hardship on the client.

(2) A covered attorney may act as advocate in a trial in which another attorney in the covered attorney's office is likely to be called as a witness, unless precluded from doing so by § 776.26 or § 776.28 of this part.

(b) [Reserved]

**§ 776.47 Special responsibilities of a trial counsel.**

(a) *Special responsibilities of a trial counsel.* A trial counsel shall:

(1) Recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;

(2) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given

reasonable opportunity to obtain counsel;

(3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights;

(4) Make timely disclosure to the defense of all evidence or information known to the trial counsel that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the trial counsel, except when the trial counsel is relieved of this responsibility by a protective order or regulation;

(5) Exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the trial counsel from making an extrajudicial statement that the trial counsel would be prohibited from making under § 776.45 of this part; and

(6) Except for statements that are necessary to inform the public of the nature and extent of the trial counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.

(b) *Role of the trial counsel.* (1) The trial counsel represents the United States in the prosecution of special and general courts-martial. See Article 38(a), UCMJ, and R.C.M. 103(16), 405(d)(3)(A), and 502(d)(5), MCM, 1998. Accordingly, a trial counsel has the responsibility of administering justice and is not simply an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Paragraph (a)(1) of this section recognizes that the trial counsel does not have all the authority vested in modern civilian prosecutors. The authority to convene courts-martial, and to refer and withdraw specific charges, is vested in convening authorities. Trial counsel may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction. See *United States v. Howe*, 37 M.J. 1062 (NMCMR 1993).