

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(1) Recommend to the convening authority that any charge or specification not warranted by the evidence be withdrawn;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

**§ 776.48**

Such action should be undertaken only after consultation with a supervisory attorney and the convening authority. See also § 776.42 of this part, governing ex parte proceedings. Applicable law may require other measures by the trial counsel. Knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of § 776.69 of this part.

(2) The “ABA Standards for Criminal Justice: The Prosecution Function,” (3rd ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with this part, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases. See *United States v. Howe*, 37 M.J. 1062 (NMCR 1993); *United States v. Dancy*, 38 M.J. 1 (CMA 1993); *United States v. Hamilton*, 41 M.J. 22 (CMA 1994); *United States v. Meek*, 44 M.J. 1 (CMA 1996).

**§ 776.48 Advocate in nonadjudicative proceedings.**

(a) *Advocate in nonadjudicative proceedings.* A covered attorney representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of § 776.42, § 776.43, and § 776.44 of this part.

(b) [Reserved]

**§ 776.49 Truthfulness in statements to others.**

(a) *Truthfulness in statements to others.* In the course of representing a client a covered attorney shall not knowingly:

(1) Make a false statement of material fact or law to a third person; or

(2) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by § 776.25 of this part.

(b) [Reserved]

**§ 776.50 Communication with person represented by counsel.**

(a) *Communication with person represented by counsel.* In representing a client, a covered attorney shall not

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communicate about the subject of the representation with a party the covered attorney knows to be represented by another attorney in the matter, unless the covered attorney has the consent of the other attorney or is authorized by law to do so.

(b) [Reserved]

**§ 776.51 Dealing with an unrepresented person.**

(a) *Dealing with an unrepresented person.* When dealing on behalf of a client with a person who is not represented by counsel, a covered attorney shall not state or imply that the covered attorney is disinterested. When the covered attorney knows or reasonably should know that the unrepresented person misunderstands the covered attorney’s role in the matter, the covered attorney shall make reasonable efforts to correct the misunderstanding.

(b) [Reserved]

**§ 776.52 Respect for rights of third persons.**

(a) *Respect for rights of third persons.* In representing a client, a covered attorney shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) [Reserved]

**§ 776.53 Responsibilities of the Judge Advocate General and supervisory attorneys.**

(a) *Responsibilities of the Judge Advocate General and supervisory attorneys.*

(1) The JAG and supervisory attorneys shall make reasonable efforts to ensure that all covered attorneys conform to this part.

(2) A covered attorney having direct supervisory authority over another covered attorney shall make reasonable efforts to ensure that the other attorney conforms to this part.

(3) A supervisory attorney shall be responsible for another subordinate covered attorney’s violation of this part if:

(i) The supervisory attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or