

# The Viability of *United States v. McOmber*: Are Notice to Counsel Requirements Dead or Alive?

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## Introduction

You are the Chief of Military Justice for the 83d Airplane Division. As you dig through your in-box one sunny day, you realize that you have some vital post-trial documents that you must serve on defense counsel immediately. You gather these documents together (along with some certificates of service) and stroll over to the local trial defense service (TDS) office. Once there, you see several soldiers reclining on the couch in the office waiting room. You recognize one of them as Sergeant (SGT) Rock, a soldier who works in your battalion personnel action center (PAC). After saying hello and thinking no further, you stride into the office of the senior defense counsel and serve the post-trial documents.

A few days pass and you receive a call from one of the post Criminal Investigation Command (hereinafter CID) agents, Special Agent (SA) Simone. He asks to come over to your office to brief you on some new cases and request some titling opinions. As he reads through his case list, he comes to a new barracks larceny case on none other than (you guessed it) SGT Rock. As he sets out the evidence, SA Simone tells you that he has already interviewed SGT Rock. He states that he considers SGT Rock a suspect in the case. Special Agent Simone tells you that he placed SGT Rock in custody and read him his Fifth Amendment rights against self-incrimination using a DA Form 3881, Rights Warning Procedure/Waiver Certificate.<sup>1</sup> Special Agent Simone tells you that after carefully reading and then indicating that he understood the DA Form 3881, SGT Rock invoked his right to counsel and refused to provide any oral or written statement. Special Agent Simone states that he then released SGT Rock from custody. He asks if you see any prob-

lems with the case since he wants to interview SGT Rock again. You reflect back on your many years of legal training and criminal practice and cannot think of anything wrong other than your chance encounter with SGT Rock in the TDS office a few days ago. You tell SA Simone you do not think there is a problem, but you will contact him tomorrow to discuss the case further.

After SA Simone leaves, you ponder the Fifth Amendment right to counsel and other related topics and decide to call your old friend Major (MAJ) Max Righteous, the senior defense counsel, to see if SGT Rock consulted counsel. You wonder if you have been overly cautious and whether the old notice to counsel rule,<sup>2</sup> the requirement to notify the suspect's defense counsel of the interrogation, even exists in any context today. You think about both the legal and ethical implications of the notice to counsel rule and how the rule may apply to your case. With these thoughts in mind, this article explores the notice to counsel rule.<sup>3</sup>

In *United States v. McOmber*,<sup>4</sup> the Court of Military Appeals (COMA) established a bright-line rule regarding notice to counsel. Soon thereafter, Military Rule of Evidence (MRE) 305(e)<sup>5</sup> codified that rule as follows:

When a person subject to the code who is required to give warnings under subdivision (c) intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to that offense, the

1. U.S. DEP'T OF ARMY, FORM 3881, RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE (Nov. 1989) [hereinafter DA Form 3881]. Investigators use DA Form 3881 to advise soldiers suspected of a Uniform Code of Military Justice (UCMJ) offense of their rights against self-incrimination. The form incorporates rights protected by Article 31, UCMJ, and *Miranda v. Arizona*, 384 U.S. 436 (1966). In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the Court of Military Appeals (COMA) applied *Miranda* to military investigations. Using DA Form 3881, the investigator advises the soldier of the right to remain silent and that anything the soldier says can be used against him in a criminal trial. The investigator further advises the soldier of the right to counsel in context of custodial interrogation. The soldier may complete the waiver portion of the form and agree to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with him. Alternatively, the soldier may complete the non-waiver portion of the form and indicate that he wants a lawyer and does not want to submit to questioning or say anything. The investigator must ensure that the soldier clearly understands these rights before proceeding with any questioning and cannot question a soldier who invokes these rights.

2. Military Rule of Evidence (MRE) 305(e) contained the notice to counsel rule. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1984) [hereinafter 1984 MCM]. The 1994 amendments to the MCM deleted the notice to counsel provisions of MRE 305(e).

3. The ethical implications of the notice to counsel rule impact upon its application in practice. As such, the article will briefly address this aspect of the rule.

4. 1 M.J. 380 (C.M.A. 1976).

5. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

counsel must be notified of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.<sup>6</sup>

Any statement obtained in violation of MRE 305(e) was involuntary and therefore, inadmissible under MRE 304.<sup>7</sup>

While no military court has overruled the *McOmber* case, the military has abandoned the notice to counsel requirement. In 1994, an amendment to MRE 305(e) deleted any reference to notice to counsel.<sup>8</sup> This amendment responded to the Supreme Court's decisions in *Minnick v. Mississippi*<sup>9</sup> and *McNeil v. Wisconsin*.<sup>10</sup> This article considers these cases and their relevance to the notice to counsel requirements.<sup>11</sup> This article also analyzes the viability of the *McOmber* notice to counsel requirements considering recent military decisions.<sup>12</sup>

In addition, this article considers the ethical implications of the demise of *McOmber*. Even if a reasonable practitioner concludes that notice to counsel requirements no longer exist, the practitioner must also consider the ramifications of the government directly communicating with a represented party.<sup>13</sup> The "government" here means either military investigators or the trial counsel acting through the military investigator. Trial counsel must consider the guidelines contained in their service's rules of professional responsibility and their state bar rules.

This article concludes that *McOmber* notice to counsel requirements are no longer legally viable. While no military court has directly overruled *McOmber*, the 1994 amendments to the MREs and the United States Court of Appeals for the Armed Forces (CAAF)<sup>14</sup> non-application of the requirements since these amendments have rendered *McOmber* legally dead. Although the notice to counsel rule is legally dead, ethical rules may still require applying it in certain circumstances.

## Background

### *The McOmber Rule*

The COMA decision in *McOmber* issued a warning order to all criminal investigators who wished to question an accused once the investigator was on notice that legal counsel represented the accused. In *McOmber*, Air Force investigators initially advised Airman McOmber of his *Miranda* rights concerning a larceny allegation.<sup>15</sup> McOmber immediately requested counsel. Investigators terminated the interview and provided McOmber with the name and telephone number of the area defense counsel.<sup>16</sup> Two months later, after investigators knew that counsel represented McOmber, they contacted McOmber again and interviewed him concerning the original larceny offense and nine related larcenies.<sup>17</sup> McOmber's counsel was not present during the interview, and investigators did not contact his counsel before proceeding. After a rights warning and waiver, McOmber confessed to the larceny.<sup>18</sup> The gov-

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6. *Id.*

7. Military Rule of Evidence 304(a) stated: "Except as provided in subsection (b), an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule." 1984 MCM, *supra* note 2, MIL. R. EVID. 304(a).

8. Effective 9 December 1994, Military Rule of Evidence 305(e) was amended by deleting the notice requirement to defense counsel. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e) (1998) [hereinafter MCM].

9. 498 U.S. 146 (1990).

10. 501 U.S. 171 (1991).

11. The drafter's analysis to the 1994 amendments to MRE 305(e) and 305(g) discusses these cases in detail. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305 analysis, app. 22, at A22-15 (1994).

12. This article discusses several recent military cases in detail. See *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990); *United States v. LeMasters*, 39 M.J. 490 (C.M.A. 1994); *United States v. Vaughters*, 44 M.J. 377 (1996); *United States v. Faisca*, 46 M.J. 276 (1997); *United States v. Payne*, 47 M.J. 37 (1997); *United States v. Young*, 49 M.J. 265 (1998).

13. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 4.2 (1 May 1992) [hereinafter AR 27-26].

14. Regarding case citations, the reader should further note that on 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purposes of this article, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. See *United States v. Sanders*, 41 M.J. 485 n.1 (1995).

15. *United States v. McOmber*, 1 M.J. 380, 381 (C.M.A. 1976).

16. *Id.*

17. *Id.*

ernment used the confession against McOmber in his court-martial.

On appeal before the COMA, the court held:

If the right to counsel is to retain any viability, the focus in testing for prejudice must be readjusted where an investigator questions an accused known to be represented by counsel. We therefore hold that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code.<sup>19</sup>

In reversing the ruling of the Air Force Court of Military Review, the COMA did not resolve McOmber's Sixth Amendment claim. The COMA did not base its opinion specifically on the Fifth Amendment right to counsel either. Instead of using a constitutional basis to overrule the lower court, the COMA used a statutory basis. The court cited Article 27, Uniform Code of Military Justice (UCMJ).<sup>20</sup> It stated that "to permit an investigator, through whatever device, to persuade the accused to forfeit the assistance of his appointed attorney outside the presence of counsel would utterly defeat the congress-

sional purpose of assuring military defendants effective legal representation without expense" under Article 27.<sup>21</sup>

### *Military Rule of Evidence 305*

Airman McOmber won a great victory that day when the COMA ruled that the trial judge erred in admitting his confession into evidence. Shortly thereafter, MRE 305(e) codified the notice to counsel requirements under *McOmber*.<sup>22</sup> These requirements remained in effect until the 1994 amendments to MRE 305(e) removed them from the rule.<sup>23</sup>

The pre-1994 MRE 305(e) afforded the suspect even more deference than required by the *McOmber* decision. Under MRE 305(e), interrogators who intended to question a suspect or accused had to meet a standard of "knew or should have known" regarding the appointment or retention of counsel by the suspect or accused.<sup>24</sup> In reality, however, military courts imposed a less onerous "bad faith" standard upon military investigators. In *United States v. Roy*,<sup>25</sup> the Army court held that in the absence of bad faith, a criminal investigator who interviewed the accused one day before the scheduled Article 32 investigation did not violate *McOmber* because he was unaware of the appointment of counsel.<sup>26</sup> Military courts developed an elaborate set of factors to analyze whether an interrogator reasonably should have known that an individual had counsel for purposes of the notice to counsel rule.<sup>27</sup>

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18. *Id.* Airman McOmber's trial defense counsel made a timely objection to the admission of this confession, but the military judge overruled this objection. On appeal to the U.S. Air Force Court of Military Review, Airman McOmber contended that the second interview infringed upon his Sixth Amendment right to counsel because investigators interviewed him without first notifying his attorney and affording him a right to have his attorney present. The Air Force Court of Military Review ruled against the accused and in favor of the government regarding this contention. At the time of the second interview, the government had not yet preferred charges against McOmber and his Sixth Amendment right to counsel had not yet attached. *United States v. McOmber*, 51 C.M.R. 762 (A.F.C.M.R. 1975).

19. *McOmber*, 1 M.J. at 383.

20. UCMJ art. 27 (1998).

21. *McOmber*, 1 M.J. at 383.

22. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

23. *Id.*

24. *Id.*

25. 4 M.J. 840 (A.C.M.R. 1978).

26. *Id.* at 841. The court's decision focused on whether the criminal investigator knew that Roy had counsel. The court could have (but did not) focus upon the 6th Amendment right to counsel. Presumably, if Roy's Article 32 investigation was scheduled for the next day, then the government must have preferred charges before the interview occurred. Had the court employed a 6th Amendment analysis, then a *McOmber*-type of analysis would have been unnecessary.

27. The drafter's analysis to MRE 305(e) lists these factors for consideration:

Whether the interrogator knew that the person to be questioned had requested counsel; Whether the interrogator knew that the person to be questioned had already been involved in a pretrial proceeding at which he would ordinarily be represented by counsel; Any regulations governing the appointment of counsel; Local standard operating procedures; The interrogator's military assignment and training; and The interrogator's experience in the area of military criminal procedure.

1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-15.

The notice to counsel rule under the pre-1994 MRE 305(e) had no civilian equivalent either in the Federal Rules of Evidence or in case law. Despite this, military courts followed the *McOmber* decision and enforced the pre-1994 MRE 305(e) notice to counsel provisions for several years. It was not until the Supreme Court took a closer look at the right to counsel that the military eventually abandoned the rule. This article next considers Supreme Court decisions that are responsible for the demise of the notice to counsel rule and the 1994 revisions to MRE 305(e) and 305(g).

### United States Supreme Court Decisions

There are no United States Supreme Court decisions directly addressing the notice to counsel requirement set forth in the *McOmber* decision. There are, however, three pivotal Supreme Court decisions that affected the notice to counsel requirement.<sup>28</sup> The drafter's analysis to 1994 amendments to MRE 305(e) and 305(g) specifically discusses and analyzes the cases considered below.<sup>29</sup>

The first case is *Edwards v. Arizona*.<sup>30</sup> This case considers invoking the Fifth Amendment (*Miranda*) right to counsel.<sup>31</sup> Under *Edwards*, when a subject invokes his right to counsel in response to a *Miranda* warning, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.<sup>32</sup> Once the suspect expresses his desire to deal with police through counsel, the interrogator cannot proceed until he makes counsel available to him.<sup>33</sup>

The only exception to this per se rule occurs when the accused himself initiates further communication, exchanges, or conversations with the police.<sup>34</sup> The *Edwards* rule, by design, prevents police badgering of an accused and also applies to police-initiated custodial interrogation relating to a separate investigation.<sup>35</sup> Although *McOmber* was decided before *Edwards*, *McOmber*'s rigid notice to counsel requirement certainly contemplates situations where police badgering of a suspect to give a statement without his attorney present would overcome the will of the accused and render the invoking of the right to counsel ineffective.

In the second case, *Minnick v. Mississippi*,<sup>36</sup> the Supreme Court established a firm rule regarding requests for counsel when a suspect is in continuous custody. Under *Minnick*, in cases of continuous custody, when a suspect requests counsel, interrogation must cease, and law enforcement officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.<sup>37</sup> Further, under *Minnick*, an accused or suspect can waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver.<sup>38</sup>

In 1994, military practice conformed to the *Minnick* decision with an amendment to MRE 305(g) by adding subsection 2(B)(i) and deleting any reference to the notice to counsel requirement. Military Rule of Evidence 305(g) allows for waiver of the right to counsel during custodial interrogation upon evidence that the suspect or accused initiated the communication leading to the waiver.<sup>39</sup> At the same time, an amendment to MRE 305(e) deleted *McOmber*'s notice to counsel rule. The pre-1994 rule was inconsistent with the *Minnick* decision.

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28. See *Edwards v. Arizona*, 451 U.S. 477 (1981); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *McNeil v. Wisconsin*, 501 U.S. 171 (1991). This article will consider each case's relationship with and application to the notice to counsel rule.

29. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-15, 16.

30. 451 U.S. 477 (1981).

31. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that before any custodial interrogation, a subject must be warned that he has a right: (1) to remain silent, (2) to be informed that any statement made may be used as evidence against him, and (3) to the presence of an attorney. In *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), the COMA applied *Miranda* to military interrogations. The requirement for *Miranda* warnings is triggered by initiating of custodial interrogation. Under MRE 305(d)(1)(A), a person is in custody if he is taken into custody or otherwise deprived of his freedom in any significant way. Custody is evaluated based on an objective test from the perspective of a "reasonable" subject. MCM, *supra* note 8, MIL. R. EVID. 305(d)(1)(A).

32. *Edwards*, 451 U.S. at 484-85.

33. *Id.*

34. *Id.*

35. See *Arizona v. Roberson*, 486 U.S. 675, 679 (1988).

36. 498 U.S. 146 (1990).

37. *Id.* at 154.

38. *Id.* at 156.

Although the COMA based its decision in the *McOmber* case on Article 27 of the UCMJ, Airman McOmber alleged violations of his Sixth Amendment right to counsel. While the COMA deftly avoided the Sixth Amendment issue,<sup>40</sup> the court extensively analyzed the Fifth Amendment right to counsel. In the *Minnick* case, the Supreme Court established strict protection of a suspect's Fifth Amendment right to counsel when the suspect requests counsel while in continuous custody.<sup>41</sup> Under *Minnick*, however, a suspect or an accused can waive his Fifth Amendment right to counsel even after having previously exercised that right at an earlier custodial interrogation.<sup>42</sup> To do so, the suspect must initiate the subsequent interrogation leading to the waiver.<sup>43</sup> Under the old *McOmber*-based rule, such a waiver would have been virtually impossible absent notice to (and arguably consent of) the suspect's counsel.

In the final case, *McNeil v. Wisconsin*,<sup>44</sup> the Supreme Court considered both the Fifth and Sixth Amendment right to counsel. The Court drew a firm distinction between these two rights. In that case, McNeil's counsel argued that the triggering of his Sixth Amendment right to counsel upon counsel representing him at a bail hearing, implicitly triggered his Fifth Amendment right to counsel when police interrogated him in custody concerning unrelated offenses.<sup>45</sup> The Supreme Court disagreed.<sup>46</sup> The majority stated that a person cannot "invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve."<sup>47</sup>

The Court also distinguished the protections of these rights. The Fifth Amendment protects a suspect from police overreaching during a custodial interrogation.<sup>48</sup> Under the Sixth Amendment, an accused is entitled to representation at critical confrontations with the government after initiating adversary proceedings.<sup>49</sup> Here, the right attached during McNeil's bail hearing where counsel represented him. The Sixth Amendment right is specific to those offenses charged.<sup>50</sup> McNeil waived his Fifth Amendment right to counsel concerning the second set of allegations.<sup>51</sup> The Sixth Amendment request for counsel at the bail hearing was not a Fifth Amendment invocation of the right to counsel on the unrelated charges under any strained interpretation. Moreover, the Sixth Amendment right to counsel, which attached during the bail hearing on the unrelated charge, had no effect on the second set of allegations.<sup>52</sup>

Additionally, the *McNeil* decision also provided critical guidance concerning the situation when a suspect asserts the Fifth Amendment right to counsel while in continuous custody. The majority stated:

If the police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would

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39. Military Rule of Evidence 305(g)(2)(B)(i) now reads:

(B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of evidence that—

(1) the accused or suspect initiated the communication leading to the waiver; . . . .

MCM, *supra* note 8, MIL. R. EVID. 305 (g)(2)(B)(i). This change became effective 9 December 1994.

40. *McOmber*, 1 M.J. at 380, 382.

41. *Minnick*, 498 U.S. at 154.

42. *Id.* at 154-55.

43. *Id.*

44. 501 U.S. 171 (1991).

45. *Id.* at 174-75.

46. *Id.* at 175.

47. *Id.* at 182.

48. *Id.* at 176.

49. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). In the military, the right attaches upon preferral of charges. MCM, *supra* note 8, MIL. R. EVID. 305(e)(2) (1998).

50. *McNeil*, 501 U.S. at 175.

51. *Id.* at 174.

52. *Id.* at 176.

be considered voluntary under traditional standards. This is “designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights” . . .<sup>53</sup>

The parenthetical language cited above is highly relevant to military practice. The 1994 amendment to MRE 305(g) reflects its significance. The amendment added subsection (g)(2)(B)(ii).<sup>54</sup> Under the new rule, when the request for counsel and waiver occur when the suspect or accused is subject to continuous custody a coercive atmosphere is presumed, which invalidates a subsequent waiver of counsel rights.<sup>55</sup> Under this rule, however, the prosecution can overcome the presumption when there is a significant break in custody following the invocation of the right to counsel dissipating the taint of the coercive atmosphere.<sup>56</sup> Analysis of the adequacy of the break in custody and subsequent waiver of the right to counsel is fact specific.<sup>57</sup>

The Supreme Court’s decision in *McNeil* further obviates the need for the *Mcomber* rule by stating that a person cannot invoke his *Miranda* rights preemptively in situations other than a custodial interrogation.<sup>58</sup> This language, if read in conjunction with the Court’s dicta concerning the effect of a break in custody on the right to counsel,<sup>59</sup> emphasizes the need to ana-

lyze the factual situation when a suspect asserts the right to counsel. A significant break in custody sufficiently dissipates the coercive atmosphere. If the suspect makes a knowing and conscious decision to waive the right to counsel after a significant break in custody, his right to counsel is not violated.<sup>60</sup> Given the protections concerning the right to counsel afforded a suspect under *Minnick* and *McNeil*, the ironclad notice to counsel rule in *Mcomber* is not needed.<sup>61</sup> The military cases that interpret the 1994 changes to MRE 305 in light of the *Minnick* and *McNeil* decisions turn primarily upon the free and conscious decisions of the suspect concerning his Fifth Amendment right to counsel. Although these cases embrace *Mcomber*-like scenarios, the military courts fail to employ a *Mcomber*-type analysis, thus ignoring the notice to counsel rule.

Several recent military cases have considered the suspect’s right to counsel as addressed in the *Edwards*, *Minnick*, and *McNeil* cases. These cases also embrace situations in which the *Mcomber* notice to counsel rule should apply, but *United States v. Schake*<sup>62</sup> represents the first case in the military court’s transition away from *Mcomber*. Although *Schake* raises a notice to counsel issue, the COMA ignored the issue. The court, however, considered a difficult factual scenario in which there is a

53. *Id.* at 177 (citations omitted) (emphasis added).

54. Military Rule of Evidence 305 (g)(2)(B)(ii) reads:

(B) If an accused or suspect interrogated under circumstances described in subdivision (d)(1)(A) requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offense is invalid unless the prosecution can demonstrate by a preponderance of evidence that . . .

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii). This change became effective 9 December 1994.

55. *Id.*

56. MCM, *supra* note 8, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

57. See *United States v. Schake*, 30 M.J. 314 (C.M.A. 1990) (holding that re-interrogating the accused after a six-day break in custody provided a real opportunity to seek legal advice); *United States v. Vaughters*, 44 M.J. 377 (1996) (holding that re-interrogating the accused after being released from custody for nineteen days provided a meaningful opportunity to consult with counsel); *United States v. Faisca*, 46 M.J. 276 (1997) (holding that re-interrogating the accused after a six-month break in custody was permissible); *United States v. Young*, 49 M.J. 265 (1998) (holding that re-interrogating the accused after two-day break in custody allowing him to consult with friends and family was permissible).

58. *McNeil*, 501 U.S. at 182.

59. *Id.* at 177.

60. *Id.*

61. No military court has yet overruled the *Mcomber* decision. The 1994 amendment to MRE 305(e) removed the notice to counsel requirement. Telephone Interview with LTC(P) Borch, Staff Judge Advocate, Fort Gordon, Georgia (January 5, 1999) (regarding his role in the revision of MRE 305). In 1994, LTC Borch served on the committee responsible for revisions to the MCM. Lieutenant Colonel Borch stated that the committee intended to correct many deficiencies in the 300 series of the MREs. The amendment to MRE 305 deleting the notice to counsel requirement merely brought the rule in line with cases like *McNeil*, *Minnick*, and *Schake* (discussed below). Lieutenant Colonel Borch noted that there is not (nor was there ever) an equivalent of the *Mcomber* rule in the federal system. This article analyzes these ethical considerations concerning the government’s contact with represented parties in a later discussion. *Id.*

62. 30 M.J. 314 (C.M.A. 1990). *McNeil* was decided in 1991. *Schake*, therefore, did not apply the *McNeil* break in custody analysis.

break in custody after a suspect invokes the Fifth Amendment right to counsel.

In the case, Air Force Office of Special Investigations (OSI) interviewed Specialist (SPC) Schake on 18 September 1997 concerning an arson.<sup>63</sup> During the interview, SPC Schake requested to see a lawyer.<sup>64</sup> At the time, counsel represented SPC Schake on unrelated charges.<sup>65</sup> The OSI released SPC Schake from the police station and allowed him unrestricted freedom of movement from 18-24 September 1987 (six days).<sup>66</sup> On the latter date, Schake voluntarily submitted to a polygraph examination that resulted in a confession.<sup>67</sup> In a post-polygraph statement to OSI, SPC Schake incriminated himself concerning one of the arson charges.<sup>68</sup> The court notes that “when he returned to the station on [24 September] 1987, [he] was fully advised of his *Miranda-Tempia* rights, as well as his right to refuse to take the polygraph examination.”<sup>69</sup> During this re-interrogation, Schake received a complete rights advisement.<sup>70</sup>

The COMA held that the six-day break in continuous custody dissolved Schake’s claim of an *Edwards* violation.<sup>71</sup> The court noted that Schake “was actually represented by counsel on another charge at the time of his release, and it cannot otherwise be said that his release did not provide him a real opportunity to seek legal advice.”<sup>72</sup> In essence, the court held that the “counsel made available” requirement of *Edwards*, triggered when a suspect invokes his right to counsel in response to a custodial interrogation, is satisfied when there is a significant

break in custody and the suspect has a meaningful opportunity to consult with counsel.<sup>73</sup>

In the *Schake* decision, the COMA could have, but did not, apply *McOmber*. The court offered no guidance regarding the notice to counsel rule. The court’s dispositive focus in the case is on the passage of six days “between his unwarned interview and his ultimate admission, during which time [Schake] was completely free to acquire new counsel for the arson charge or consult with the counsel then representing him on the other alleged offense.”<sup>74</sup> While the court did not explicitly eliminate the notice to counsel rule in *Schake*, it limited the rule’s applicability. The most liberal reading of *Schake* would, at a minimum, limit *McOmber*’s application to interrogations by law enforcement concerning offenses directly related to the suspect’s previous representation by counsel.<sup>75</sup>

The court’s failure to apply the notice to counsel rule in the *Schake* case is significant. *Schake* foreshadows the demise of the *McOmber* rule. Specialist Schake had counsel on unrelated charges before his admissions concerning the arson charges during his post-polygraph interview on 24 September 1987.<sup>76</sup> While his trial defense counsel raised the issue of whether the polygrapher knew that SPC Schake had counsel,<sup>77</sup> the COMA did not focus on this issue in rendering its decision. While the COMA could have addressed the notice to counsel rule, it did not. Instead, the COMA noted that SPC Schake’s six-day break in custody (between 18 and 24 September 1987) dissolved any claim of an *Edwards*-type violation.<sup>78</sup> Further, the COMA

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63. *Id.* at 315.

64. *Id.*

65. *Id.*

66. *Id.* at 319.

67. *Id.* at 315-16.

68. *Id.* at 316.

69. *Id.* at 319. Schake agreed to take the polygraph on 18 September 1987. As noted, the OSI advised Schake on 24 September 1987 that he was not then required to submit to the polygraph examination which was about to be given to him. The facts do not unequivocally state whether Schake or the OSI initiated the 24 September meeting.

70. *Id.*

71. *Id.*

72. *Id.* at 320.

73. *Id.* at 319.

74. *Id.*

75. This interpretation of the *McOmber* rule is consistent with the COMA’s later decision in *United States v. LeMasters*, 39 M.J. 490 (1994). A full discussion of the *LeMasters* case follows.

76. *Schake*, 30 M.J. at 315-16.

77. *Id.* at 316.

skirted the notice to counsel issue by stating that SPC Schake “was actually represented by counsel on another charge at the time of his release, and it cannot otherwise be said that his release did not provide him a real opportunity to seek legal advice.”<sup>79</sup> While *McOmber*-type issues abound in the *Schake* case (as noted above), the majority’s silence concerning these issues is deafening and a strong indication that the *McOmber* rule would soon be dead.

Until the line of cases beginning with *United States v. Schake*, military courts rigidly enforced the notice to counsel requirements of *McOmber* rule.<sup>80</sup> The courts strictly construed the requirements and deemed any statement obtained in violation of pre-1994 MRE 305(e) involuntary and inadmissible under MRE 304.<sup>81</sup> The notice to counsel provision was viewed as non-waivable until the COMA’s 1994 decision in *United States v. LeMasters*.<sup>82</sup>

In *LeMasters*, Air Force OSI suspected Senior Airman LeMasters of drug-related misconduct. Upon questioning by OSI on 15 May 1989, LeMasters requested an attorney and the OSI terminated the interview.<sup>83</sup> On 5 July 1989, LeMasters visited the office of the area defense counsel. He later entered into an attorney-client relationship with Major Dent.<sup>84</sup> From 15 May until 14 July 1989, no investigator attempted to interview LeMasters again.<sup>85</sup> On 12 July 1989, Philippine Narcotics Command (NARCOM) apprehended LeMasters at his off-post residence and kept him in custody until 13 July 1989.<sup>86</sup> On that date, NARCOM released LeMasters to the OSI. On 13 July

1989, before LeMasters left the OSI office, an OSI agent instructed him “to contact Major Dent and to return to the OSI office to make a statement if appellant so desired *after consulting with his attorney*.”<sup>87</sup> On 14 July and 2, 3, and 11 October 1989, LeMasters contacted the OSI and gave statements. On each occasion, he did not request counsel.<sup>88</sup> Here, LeMasters initiated contact with the OSI. In *LeMasters*, the court held that the *McOmber* rule, by design, protects the right to counsel when the police initiate the interrogation.<sup>89</sup> Accordingly, if the suspect initiates contact, and the prosecution can show that the suspect was aware of his right to have counsel notified and present, but that he affirmatively waived those rights, then the court can find a valid waiver.<sup>90</sup>

The court noted that both the *McOmber* and *Edwards* rules are “designed to prevent police badgering.”<sup>91</sup> The pre-1994 MRE 305(e), in effect at the time of the *LeMasters* decision, protected the right to counsel when the police initiate the interrogation. In *LeMasters*, there was no evidence of police overreaching, badgering, or attempting to deprive LeMasters of his right to counsel. LeMasters was aware of his right to have his counsel notified and present at his interrogation.<sup>92</sup> He waived that right on four separate occasions.<sup>93</sup> The COMA stated, “We reject the idea that there is an indelible right of notice to counsel under [MRE]. 305(e). Like other Constitutional rights, a suspect may make a knowing and intelligent waiver.”<sup>94</sup> The court found a valid waiver in the *LeMasters* case. Although the decision of the court preceded the 1994 amendments to the *Manual for Courts-Martial*, it is consistent with the revisions to MRE

78. *Id.* at 319.

79. *Id.*

80. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

81. 1984 MCM, *supra* note 2, MIL. R. EVID. 304. A non-exhaustive list of cases in which the COMA discussed and applied the *McOmber* rule includes *United States v. McDonald*, 9 M.J. (C.M.A. 1980); *United States v. Muldoon*, 10 M.J. 254 (C.M.A. 1981); *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983); *United States v. Roa*, 24 M.J. 297 (C.M.A. 1987); *United States v. King*, 30 M.J. 59 (C.M.A. 1990).

82. 39 M.J. 490 (C.M.A. 1994).

83. *Id.* at 491.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 490 (emphasis added).

88. *Id.*

89. *Id.* at 492.

90. *Id.* at 492-93.

91. *Id.*

92. *Id.*

93. *Id.*

305(g) adding subsection 2(B)(i) which allows for waiver of the right to counsel during custodial interrogation upon evidence that the suspect or accused initiated the communication leading to the waiver.<sup>95</sup>

Although the COMA did not overrule *McOmber* in the *LeMasters* decision, it diluted its impact and foreshadowed the demise of the notice to counsel rule. The court distinguished the factual scenario in *LeMasters* from that contained in *McOmber*.<sup>96</sup> In *LeMasters*, unlike *McOmber*, the OSI did not attempt any subterfuge to deprive LeMasters of the assistance of counsel by failing to notify his counsel of questioning. LeMasters waived his right to counsel four times by a knowing and conscious decision on each occasion. The protections of the pre-1994 MRE 305(e) triggered when an investigator initiated interrogation of someone.<sup>97</sup> On 14 July and 2, 3, and 14 October 1989, LeMasters voluntarily returned to the OSI office. On the latter three occasions, LeMasters himself contacted the OSI and gave statements without requesting counsel.<sup>98</sup> LeMasters affirmatively waived his right to notice to counsel when he initiated contact with the OSI.<sup>99</sup>

*United States v. Vaughters*<sup>100</sup> addresses a similar scenario and further supports *McOmber*'s demise. On 10 February 1993, Air Force security police interviewed Staff Sergeant (SSgt) Vaughters about his involvement with illegal drugs.<sup>101</sup> Staff Sergeant Vaughters invoked his Fifth Amendment right to counsel. The security police released SSgt Vaughters from custody. On 1 March 1993, after SSgt Vaughters tested positive for

the presence of cocaine during a urinalysis, Air Force OSI called him to their office for an interview.<sup>102</sup> The OSI did not know that SSgt Vaughters had previously invoked his right to counsel. The OSI advised SSgt Vaughters of his rights to remain silent and to have an attorney.<sup>103</sup> He waived those rights and agreed to an interview. Staff Sergeant Vaughters then admitted to using cocaine at a local nightclub.<sup>104</sup> The government later used this statement against SSgt Vaughters in his court-martial. The CAAF considered SSgt Vaughters's case based upon his contention that the Air Force Court of Criminal Appeals erred when it ruled that his confession was admissible when the OSI agents reinitiated a custodial interrogation after SSgt Vaughters had requested counsel.<sup>105</sup> The CAAF concluded that the lower court did not err in holding that his confession was admissible.<sup>106</sup>

In its decision, the CAAF did not address the notice to counsel issue directly. Instead, the court focused upon the nineteen-day break in custody between SSgt Vaughters' first interview (and invocation of the right to counsel) and the second interview during which he confessed to using cocaine.<sup>107</sup> The CAAF cited the service court's opinion in which it noted that during the nineteen day period, SSgt Vaughters suffered no police badgering.<sup>108</sup> The court further noted that SSgt Vaughters had previously sought advice from a military defense counsel regarding nonjudicial punishment and that he did not contact any attorney for assistance regarding the drug allegation.<sup>109</sup> Therefore, the CAAF found no *Edwards* violation.<sup>110</sup> The court agreed with the Air Force Court of Criminal Appeals

94. *Id.* at 493.

95. MCM, *supra* note 8, MIL. R. EVID 305(g)(2)(B)(i).

96. *LeMasters*, 39 M.J. at 492-93.

97. 1984 MCM, *supra* note 2, MIL. R. EVID. 305(e).

98. *United States v. LeMasters*, 39 M.J. 490, 491 (C.M.A. 1994).

99. *Id.* at 492.

100. 44 M.J. 377 (1996).

101. *Id.*

102. *Id.* at 378.

103. *Id.*

104. *Id.*

105. *Id.* at 377.

106. *Id.*

107. *Id.* at 378.

108. *Id.*

109. *Id.*

110. *Id.* at 379.

that “custodial interrogation may be reinitiated without counsel being present where a suspect had been released from custody for [nineteen] days, provided a meaningful opportunity to consult with counsel, and subsequently waived his right to counsel.”<sup>111</sup>

Like *Schake*, the CAAF’s focus was on the Fifth Amendment right to counsel. In a case that would seemingly trigger a *Mcomber* discussion, the court again remained silent lending further support to the proposition that the *Mcomber* rule is no longer valid. It is interesting to note that during their 1 March 1993 interview of SSgt Vaughters, the OSI neither knew nor asked him whether he previously invoked his right to counsel. The CAAF did not address this fact in its decision. Instead, the court focused on the break in custody issue to dispose of the case.<sup>112</sup> The CAAF’s failure in this case to mention the notice to counsel rule indicates further the rule’s death—at least where the suspect has a significant break in custody coupled with the opportunity to consult with counsel.<sup>113</sup>

In *United States v. Faisca*,<sup>114</sup> the CAAF again addressed the effect of a break in custody upon the exercise of the Fifth Amendment right to counsel. During a CID custodial interrogation concerning the theft of government property, the accused invoked his Fifth Amendment right to counsel.<sup>115</sup> The CID agents conducting the interrogation immediately ceased their questioning. The following day, Staff Sergeant (SSG) Faisca “consulted with a military attorney who advised him that he could and should contact the attorney if he were approached for further questioning.”<sup>116</sup> Six months later, a different CID agent initiated contact with SSG Faisca and arranged for another

interrogation. During the later interrogation, the accused affirmatively waived his self-incrimination rights and made a statement.<sup>117</sup> The court found no *Edwards* violation since the accused unequivocally waived his right to counsel after a break in custody of more than six months.<sup>118</sup>

The CAAF noted that the CID agent’s “reinitiation of contact [with SSG Faisca] was not made because of an attempt to circumvent the Fifth or Sixth Amendments, but rather was undertaken in an effort to learn if appellant had sought or retained counsel and, if so, counsel’s identity.”<sup>119</sup> Staff Sergeant Faisca was not in custody when the agent requested the information about his counsel. Consequently, the encounter had no pressures associated with a custodial interrogation.<sup>120</sup> Staff Sergeant Faisca told the CID agent that he neither had nor wanted counsel.<sup>121</sup> He subsequently met the agent at the CID office. After receiving proper Article 31(b), UCMJ, and *Miranda* warnings, SSG Faisca “affirmatively waived his Fifth and Sixth Amendment rights and made [a] statement.”<sup>122</sup> The CAAF noted that “all of these circumstances constitute an affirmative waiver under [MRE] 305(g)(1), [MCM].”<sup>123</sup>

The CAAF’s focus in this case upon a significant break in custody and SSG Faisca’s affirmative waiver of the right to counsel, again undercuts the viability of the notice to counsel requirement in at least the context of the factual scenario that existed here. The court, at a minimum, could have discussed applying of the *Mcomber* rule in SSG Faisca’s case due to his invoking the right to counsel during his first interrogation. The CAAF did not discuss the notice to counsel rule or cite the *Mcomber* decision. This provides further support for the

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111. *Id.*

112. *Id.* at 379, 380.

113. An alternate explanation is that the notice to counsel requirement simply is not applicable in this case since Vaughters’ earlier representation by counsel related to nonjudicial punishment and not the drug charges which were the subject of his interrogation and subsequent court-martial. See discussion *supra* notes 75-76 and accompanying text regarding the *Schake* and *LeMasters* cases.

114. 46 M.J. 276 (1997).

115. *Id.* at 277.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 278.

120. *Id.*

121. *Id.* at 277.

122. *Id.*

123. *Id.* at 278. In a footnote to this passage, the CAAF highlighted the 1994 amendment to the *MCM* that removed the notice to counsel provision contained in MRE 305(e). The new version of MRE 305(e) had not taken effect at the time of SSG Faisca’s trial in August 1994. Thus, the implication exists that if the CAAF had believed the old notice to counsel provision of MRE 305(e) should have been applied here, then the court would have done so. The CAAF deftly avoided any direct ruling concerning the viability of the notice to counsel rule.

observation and conclusion that the CAAF has consistently refused to apply *McOmber* since the 1994 changes to MRE 305.

Recently, in *United States v. Payne*,<sup>124</sup> the CAAF turned its attention to the issue of notice to counsel. It reached the issue under a unique set of facts. In 1991, the CID investigated SSG Payne, a military intelligence analyst, for the rape of a thirteen-year old girl.<sup>125</sup> Payne denied the rape and, after consulting military counsel (CPT Hanchey), refused to take a government-requested polygraph. The CID did not resolve the investigation, and SSG Payne departed five months later for another assignment in Korea.<sup>126</sup> Payne then requested reinstatement of his security clearance. The Defense Investigative Service (DIS) initiated a personal security investigation regarding SSG Payne's request.<sup>127</sup> During the investigation, SSG Payne agreed to take a polygraph examination. After a series of interviews and polygraphs, Payne confessed to the rape.<sup>128</sup> A general court-martial later convicted SSG Payne of the rape.<sup>129</sup>

It is significant that during his questioning by the DIS, SSG Payne informed the investigators that military counsel represented him during the earlier CID investigation. The DIS did not ask SSG Payne if military counsel still represented him, and they did not notify counsel about the questioning. On appeal, SSG Payne alleged a violation of the notice to counsel protection of the pre-1994 MRE 305(e) which was in effect at the time of Payne's trial.<sup>130</sup> This rule, however, only applied to situations in which Article 31(b) warnings were required. The court determined that the notice to counsel rule did not apply here because Article 31(b) did not apply.<sup>131</sup> The court noted that the

DIS agents were not subject to the Code and that Article 31(b) did not bind them.<sup>132</sup> The court found that since the DIS:

[H]ad no duty to warn appellant of his rights under Article 31, the duty to notify counsel under [MRE] 305(e) was not triggered. Accordingly, we need not decide whether [Captain] Hanchey was still appellant's counsel or whether SA Gillespie knew or reasonably should have known that [Captain] Hanchey was appellant's counsel. Likewise, we need not decide whether the [twenty-] month break in custody and [two] reassignments were a sufficient hiatus to obviate the requirement to contact [Captain] Hanchey.<sup>133</sup>

The CAAF cleverly avoided a ruling on the *McOmber* notice to counsel requirement by finding it inapplicable in this case. The court's focus, instead, was on SSG Payne's voluntary polygraph examination. Further, the court noted that the DIS advised Payne of his rights under the Privacy Act, the Fifth Amendment and Article 31, and *Miranda*; and, he waived them. Based on these facts, the court found SSG Payne's confession to the rape voluntary.<sup>134</sup> Although this case lends minimal support to *McOmber*'s continued viability, it emphasizes that the court applied the pre-1994 version of MRE 305.

The most recent CAAF decision impacting upon notice to counsel is *United States v. Young*.<sup>135</sup> Immediately following an unambiguous request for counsel, the investigator, prior to

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124. 47 M.J. 37 (1997).

125. *Id.* at 38.

126. *Id.*

127. *Id.*

128. Staff Sergeant Payne objected to the use of the term "rape" in his written statement to the DIS polygrapher, SA Gillespie. Staff Sergeant Payne, however, did admit the elements of the rape offense in his written statement to SA Gillespie. He admitted that his victim resisted when he tried to remove her shorts. Staff Sergeant Payne stated that "she was still fighting me when I got on top of her and put my penis in her vagina." *Id.* at 40.

129. *Id.* at 37.

130. *Id.* at 41.

131. *Id.* The CAAF noted that "the military judge denied the motion to suppress on the ground that SA Gillespie [the DIS polygrapher] was not required to notify Captain Hanchey because she was not a person subject to the code" who is required to give Article 31 warnings." *Id.* at 42. The CAAF held that the military judge did not err in his decision. The CAAF also dismissed SSG Payne's argument that SA Gillespie's acts were in some way in furtherance of a military investigation.

132. *Id.* at 43.

133. *Id.* See *United States v. Vaughters*, 44 M.J. 377, 378 (1996) (holding that the right to counsel was not violated by police-initiated questioning after a nineteen-day break in custody).

134. Judge Sullivan's concurring opinion indicated that *McOmber* has not lost all utility for CAAF. Judge Sullivan stated: "Finally, the decision of this [c]ourt in *United States v. McOmber*, *supra*, does not render appellant's confession inadmissible. See *United States v. LeMasters*, 39 M.J. 490 (CMA 1994). This [c]ourt has not chosen to expand *McOmber* to situations where the accused voluntarily initiates further questioning without his counsel being present." *United States v. Payne*, 47 M.J. 37, 44-45 (1997).

135. 49 M.J. 265 (1998).

leaving the interrogation room, told the accused, Sergeant (SGT) Young: "I want you to remember me, and I want you to remember my face, and I want you to remember that I gave you a chance."<sup>136</sup> As the investigator exited the room, the accused indicated he wanted to talk and confessed to participating in a robbery.<sup>137</sup> The service court held that the investigator did not intend to elicit an incriminating response and did not improperly reinitiate interrogation in violation of *Edwards*.<sup>138</sup> The accused's statements were the result of his spontaneously re-initiating the interrogation.

Two days after his first statement, SGT Young returned to the military police station. After a proper rights advisement, SGT Young waived his rights and provided a second confession.<sup>139</sup> The court found no *Edwards* violation regarding either statement.<sup>140</sup> The court noted that:

Appellant's second statement, which was far more damaging than the first, was made after a two-day interval and after appellant had been released from custody and was free to speak with his family and friends. This two-day break in custody precludes an *Edwards* violation as to the second statement.<sup>141</sup>

The CAAF again failed to reach the issue of notice to counsel. In fact, there is no indication in the facts of the case that SGT Young even sought counsel. The court indicated that the mere release from custody is enough to satisfy counsel requirements under *Edwards*. The court's silence about the *McOmber* rule further indicates that the notice to counsel rule is no longer

applicable where there is a break in custody coupled with the reasonable opportunity to seek counsel.

### The *McOmber* Notice to Counsel Rule is Legally Dead

Several factors lead to the conclusion that the *McOmber* notice to counsel requirement is dead.<sup>142</sup> The first factor is the cumulative effect of appellate decisions, both military and Supreme Court, which ignore a notice to counsel rule. Next, the 1994 amendments to MRE 305(e) and MRE 305(g) implemented the Supreme Court's decisions in the *Minnick* and *McNeil* cases, and eliminated any notice to counsel requirement.

By implication, the CAAF has eliminated the notice to counsel requirement. In *United States v. LeMasters*,<sup>143</sup> the court noted that the pre-1994 MRE 305(e), in effect at the time of its decision, protected the right to counsel when the police initiate the interrogation.<sup>144</sup> The court rejected the "indelible right" to notice to counsel under MRE 305(e) particularly as in the *LeMasters* case where the suspect re-initiates contact and waives that right.<sup>145</sup> The court's decision in *LeMasters* is consistent with the 1994 amendment to MRE 305(e)<sup>146</sup> that removed the notice to counsel requirement and the 1994 change to MRE 305(g) that added subsection (2)(B)(i).<sup>147</sup> The new rule provides that an accused or suspect can validly waive his Fifth Amendment right to counsel, after having previously exercised that right at an earlier custodial interrogation, by initiating the subsequent interrogation leading to the waiver.<sup>148</sup> The CAAF precisely applied the principles of this rule in the *LeMasters* case.<sup>149</sup>

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136. *Id.* at 266.

137. *Id.*

138. *Id.* The CAAF noted that the military judge found the CID agent made his statement as a "parting shot" by a "frustrated" investigator. The court went on to say "even assuming that the judge's findings are clearly erroneous, we hold that appellant was not prejudiced." *Id.* at 267. The CAAF, in essence, treated the comments as if they were an interrogation.

139. *Id.* at 266.

140. *Id.* at 267-68.

141. *Id.* at 268. *Edwards* does not apply when there has been a break in custody which affords the suspect an opportunity to seek counsel. See *United States v. Vaughters*, 44 M.J. 377 (1996).

142. It is significant to note the *McOmber* rule died progressively and not as the result of any one case or statutory amendment.

143. 39 M.J. 490 (C.M.A. 1994).

144. *Id.* at 492.

145. *Id.* at 493.

146. MCM, *supra* note 8, MIL. R. EVID. 305(e).

147. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(i).

148. In the drafter's analysis of the 1994 amendment to MRE 305(g), which added subsection (2)(B)(i), the drafters noted that the addition conformed military practice with the Supreme Court's decision in *Minnick v. Mississippi*, 498 U.S. 146 (1990). 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

Additionally, the 1994 change of subsection (2)(B)(ii)<sup>150</sup> to MRE 305(g) does not bode well for the future of the notice to counsel requirement. That subsection “establishes a presumption that a coercive atmosphere exists that invalidates a subsequent waiver of counsel rights when the request for counsel and subsequent waiver occur while the accused or suspect is in continuous custody.”<sup>151</sup> Under a line of cases starting with *United States v. Schake*,<sup>152</sup> military courts recognized that the presumption can be overcome when it is shown that a break in custody occurred that sufficiently dissipated the coercive atmosphere. The courts recognize no specific time limit but instead focus on how the break in custody allows the suspect to seek the assistance of counsel.<sup>153</sup> In *United States v. Young*,<sup>154</sup> the CAAF considered a two-day break in custody after invocation to consult with “friends and family” adequate, and found the suspect’s subsequent waiver of the right to counsel valid even though investigators did not attempt to notify counsel.<sup>155</sup>

The courts also analyze how the break in custody vitiates the coercive atmosphere and police badgering contemplated by the Supreme Court in the *Edwards* case.<sup>156</sup> In *United States v. LeMasters*, the COMA noted that both the *McOmber* and *Edwards* rules are “designed to prevent police badgering.”<sup>157</sup> In the *Minnick* case, the Supreme Court determined that the Fifth Amendment right to counsel protected by *Edwards* requires

that when a suspect in custody requests counsel, interrogation shall not proceed until counsel is actually present.<sup>158</sup> Government officials may not reinitiate custodial interrogation in the absence of counsel whether or not the accused has consulted with his attorney.<sup>159</sup>

This does not apply, however, when the suspect or accused initiates re-interrogation regardless of whether the accused is in custody.<sup>160</sup> Consider a military scenario where there is a break in custody, the suspect has had a meaningful opportunity to consult with counsel, the suspect reinitiates contact with law enforcement, subsequently waives his rights and makes an incriminating statement. In this scenario, the notice to counsel rule serves no valid purpose because the suspect knowingly and consciously waives his Fifth Amendment right to counsel and voluntarily provides a statement. The police do not badger the suspect in this situation. The suspect simply decides to give a statement to the police without assistance of counsel and under no coercion or duress.

The source of military courts’ reluctance to find an *Edwards* violation of the right to counsel<sup>161</sup> where there is a break in continuous custody appears to be dicta language in the Supreme Court’s opinion in *McNeil v. Wisconsin*.<sup>162</sup> The Supreme Court focused on the situation where a suspect is subject to continu-

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149. The actions of Senior Airman LeMasters mirror those contemplated in the post-1994 MRE 305(g)(2)(B)(ii). LeMasters invoked his Fifth Amendment right to counsel upon initial questioning by the OSI. He later initiated contact with and gave statements to investigators, after waiving his rights, on four separate occasions. *United States v. LeMasters*, 39 M.J. 490, 491-92 (C.M.A. 1994).

150. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii).

151. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

152. 30 M.J. 314 (C.M.A. 1990).

153. The CAAF considers the effect of a break in custody upon the waiver of the Fifth Amendment right to counsel in several cases. See *United States v. Vaughters*, 44 M.J. 377 (1996); *United States v. Faisca*, 46 M.J. 276 (1997); *United States v. Young*, 49 M.J. 265 (1998). See discussion *supra* note 57.

154. 49 M.J. 265 (1998).

155. *Id.* at 268.

156. *Edwards v. Arizona*, 451 U.S. 477 (1981).

157. *United States v. LeMasters*, 39 M.J. 490, 492 (C.M.A. 1994).

158. *Minnick v. Mississippi*, 498 U.S. 146, 154 (1990).

159. *Id.* at 150-52.

160. *Id.* at 154-55.

161. Under *Arizona v. Roberson*, 486 U.S. 675 (1988), the *Edwards* rule is not offense-specific. Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, investigators may not reapproach him regarding any offense unless counsel is present. *Id.* at 677-78.

The Sixth Amendment right to counsel, however, is offense specific. Military Rule of Evidence 305(e)(2) applies the Sixth Amendment right to counsel to military practice. MCM, *supra* note 8, MIL. R. EVID. 305(e)(2). In the context of military law, the Sixth Amendment right to counsel normally attaches when the government prefers charges. Under MRE 305(e)(2), when a suspect or accused is subjected to interrogation, and the suspect or accused either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed. *Id.* Thus, the Sixth Amendment requires notice to counsel in this situation. Under *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Fifth Amendment right to counsel cannot be inferred from the suspect invoking the Sixth Amendment right. *Id.* at 180. The *McOmber* notice to counsel rule becomes an issue when there is a break in custody after a suspect asserts his Fifth Amendment right to counsel.

ous custody after an initial invocation of the right to counsel. The Supreme Court intended to protect a suspect in continuous custody where police initiate contact with him.<sup>163</sup> In this situation, even after a voluntary waiver and statement by the suspect, the suspect's statement would still be inadmissible as substantive evidence. Implicitly, the Supreme Court did not intend that a suspect receive this same protection when there is a break in custody.<sup>164</sup>

The drafter's analysis of the 1994 amendments to MRE 305(g) that added subsection (2)(B)(ii) specifically cites the *McNeil* case.<sup>165</sup> In *United States v. Vaughters*, the CAAF stated that *Minnick* "was a continuous custody case and did not purport to extend the *Edwards* rule to the break-in-custody situation."<sup>166</sup> In doing so, the court referred to *McNeil* and stated parenthetically that *McNeil* "dictum suggests *Edwards* not apply when there has been a break in custody."<sup>167</sup>

The 1994 amendment to MRE 305(e) deleted the notice to counsel requirement. The additions to MRE 305(g), which conformed military practice to the Supreme Court's decisions in the *Minnick* and *McNeil* cases, essentially made the *McOmber* irrelevant. Moreover, military courts have supported this position by failing to apply *McOmber* to situations that clearly warrant the analysis. Military Rule of Evidence 305(g) contemplates the situation where, after the suspect invokes the right to counsel, the suspect either reinitiates contact with the police or there is a significant break in custody.

While not inconceivable that the notice to counsel requirement could be applied in the situation of police-initiated interrogation of a suspect during a period of continuous custody, there are no reported military cases addressing this kind of scenario. Presumably, the suspect has other protections in this kind of situation. Military Rule of Evidence 305(g)(2)(B)(ii),<sup>168</sup> based on the Supreme Court's decision in *McNeil*,<sup>169</sup> would pro-

tect a military suspect by requiring counsel to be present before the interrogation could proceed.

Military case law applying *Minnick* to suspect-initiated interrogations and waiver of the right to counsel, and *McNeil* to waivers of the right after a break in continuous custody, has sounded the death knell for the *McOmber* notice to counsel rule. The CAAF has been virtually silent regarding the *McOmber* rule. The need for the rule no longer exists today as it did when the COMA decided *McOmber* and later when the President created the MRE 305(e) notice to counsel provision. Interestingly, the *McOmber* decision predated even the Supreme Court's decision in *Edwards v. Arizona*.<sup>170</sup> Both the Supreme Court and military courts have clearly defined the Fifth and Sixth Amendment right to counsel. The Supreme Court's decisions in the *Minnick* and *McNeil* cases clarified any remaining ambiguities about the right to counsel.

The military followed suit quickly by amending MRE 305 to bring the rule in line with pertinent Supreme Court cases. The 1994 amendments to MRE 305(g) added subsections (2)(B)(i) and (ii) signaled the death of the *McOmber* rule. The amendments are the direct result of *Minnick* and *McNeil*, which recognized protections under the Fifth Amendment that have overshadowed *McOmber*. Military courts have followed Supreme Court precedent and the changes to MRE 305. The CAAF's failure to either raise or apply *McOmber* in appropriate cases strongly suggests that the *McOmber* rule is no longer a legal requirement. Until further notice from the CAAF, the notice to counsel requirement appears dead.

### Is the Notice to Counsel Rule Really Dead?

The notice to counsel requirement may be a dead legal issue, but it is not a dead ethical issue.<sup>171</sup> In virtually every factual

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162. The Court wrote:

If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.

*McNeil*, 501 U.S. at 177. The parenthetical dicta focuses upon a break in custody situation.

163. *Id.*

164. *Id.*

165. 1984 MCM, *supra* note 2, MIL. R. EVID. 305 analysis, app. 22, at A22-16.

166. *United States v. Vaughters*, 44 M.J. 377, 379 (1996).

167. *Id.*

168. MCM, *supra* note 8, MIL. R. EVID. 305(g)(2)(B)(ii).

169. *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991).

170. The COMA decided *McOmber* in 1976. *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976). The Supreme Court decided *Edwards* in 1981. *Edwards v. Arizona*, 451 U.S. 477 (1981).

scenario, there is no legal requirement for investigators to notify a suspect's counsel before questioning.<sup>172</sup> Investigators, trial counsel, and defense counsel must be concerned, however, about the ethical issue of a government representative communicating with a service member who is represented by a defense counsel. *Army Regulation (AR) 27-26, Rules of Professional Conduct for Lawyers*, offers guidance about communicating with a person who has representation by counsel.<sup>173</sup> In particular, Rule 4.2 states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."<sup>174</sup> This rule applies to the situation where a trial counsel *knows* that defense counsel represents a suspect and the trial counsel wishes to communicate with the suspect. Presumably, the rule also applies when an investigator wishes to question a suspect at the direction of the trial counsel.

No military cases or professional responsibility opinions have addressed this type of situation since the 1994 amendment to MRE 305(e) removed the notice to counsel requirement.<sup>175</sup> A wily defense counsel would further complicate the situation by informing the trial counsel and military investigators that they can only communicate with his client through the defense counsel. Rule 4.2 does not address the legal concerns surrounding the admissibility of a confession, that is situations where a suspect initiates contact with an investigator or when a significant break in custody occurs after a suspect invokes the right to counsel.

Practical counsel will view Rule 4.2 as an ethical guidepost and not a straightjacket. An obvious reading of the rule makes

it improper for a trial counsel to deal directly with a represented suspect particularly if the defense counsel has instructed him not to do so.<sup>176</sup> Regarding military investigators, military courts place no specific prohibition on the questioning of suspects who initiate contact with the investigator. Further, military courts place few restrictions on investigators questioning a suspect after there has been a significant break in custody after the suspect invokes the Fifth Amendment right to counsel. Determining the propriety of an investigator questioning a suspect in this situation would be fact specific and focused on whether the suspect voluntarily waived his rights and voluntarily provided a statement.<sup>177</sup> Further, the determination would be based upon whether the suspect had a meaningful opportunity to consult with counsel during the break in custody. Whether the suspect actually sought the advice of counsel during the break in custody is another relevant factor in the determination. Purported ethical violations by an investigator in this situation would not affect the legal admissibility of the suspect's statement unless the investigator either violated the suspect's due process rights or extracted an involuntary statement from the suspect.<sup>178</sup> An investigator, however, cannot do what ethical rules would prohibit a prosecutor from doing. Clearly, a trial counsel violates Rule 4.2 if he advises an investigator to question a suspect who he knows is represented by counsel.<sup>179</sup>

Precise answers do not exist regarding every ethical question concerning communication with a represented party. While a prosecutor cannot communicate with a suspect who he knows has counsel, the situation is considerably less clear when an investigator, acting on his own, communicates with such a suspect. When faced with this ethical quandary, a trial counsel should first consult his own supervisory chain of command. If no adequate solution results, the trial counsel should consult

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171. Telephone Interview with Mr. Dean S. Eveland, Professional Conduct Branch, United States Army Standards of Conduct Office (Jan. 4, 1999) [hereinafter Eveland Interview]. Mr. Eveland's candid comments concerning legal ethics and the notice to counsel rule provided valuable insight on this topic.

172. Investigators must still exercise care regarding notice to counsel in a continuous custody situation. Investigators should seek further guidance from the trial counsel before proceeding with questioning in this situation. See MCM, *supra* note 8, MIL. R. EVID. 305(g).

173. AR 27-26, *supra* note 13, app. B, Rule 4.2.

174. *Id.*

175. Civilian cases in this area provide no uniform guidance concerning an appropriate remedy when a prosecutor violates Rule 4.2. An egregious violation of Rule 4.2 may warrant suppression of a suspect's admission or confession. See *State v. Miller*, No. C4-98-635 (Minn. Ct. App. Nov. 17, 1998) (currently on appeal to the Minnesota Supreme Court). See also *Illinois v. Olivera*, 246 Ill. App. 3d 921 (1993). In this case, an Illinois appellate court considered a situation in which an Assistant State's Attorney interviewed a defendant without his counsel present. The court stated that "common civility" dictates that a prosecutor should call a defendant's lawyer when he knows the defendant has retained counsel. Inexplicably, however, the court found nothing in the ethical rules prohibiting a prosecutor from questioning a defendant that he believes has intelligently waived his right to counsel.

176. Eveland Interview, *supra* note 171. Mr. Eveland opined that a violation of Rule 4.2 would occur if a trial counsel contacted a suspect he knew was represented by defense counsel without notice to (and permission of) the suspect's counsel.

177. Military Rule of Evidence 304(c)(3) governs the voluntariness of confessions. Under this Rule, "a statement is 'involuntary' if it is obtained in violation of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement." MCM, *supra* note 8, MIL. R. EVID. 304(c)(3). Official coercion is a necessary element in showing a violation of due process. See *Colorado v. Connelly*, 497 U.S. 157 (1986); *United States v. Campos*, 48 M.J. 203 (1998).

178. UCMJ art. 31(d) (West 1998). See *United States v. Campos*, 48 M.J. 203 (1998).

179. AR 27-26, *supra* note 13, app. B, Rule 4.2.

with his state bar professional responsibility committee for further advice. Trial counsel must exercise great caution in this area since violating ethical rules may invite collateral attacks (through motions or otherwise) questioning the legal admissibility of a confession or admission.

The defense counsel must always be wary of the issue and should raise it in any motion to suppress a statement by his client, if applicable. Defense counsel could raise ethical violations in several different ways by alleging: (1) a violation of *Mcomber*, (2) an effect on the statement's voluntariness, or (3) a violation of accused's due process rights. By doing so, the defense counsel preserves the issue for appeal and avoids a complaint for ineffective assistance of counsel by failing to raise the issue.

### Conclusion

Consider again this article's opening hypothetical case of SGT Rock and SA Simone. The facts of the case are important in determining the correct course of action. First, recall that as the Chief of Military Justice, you observed SGT Rock at the local TDS office before your meeting with SA Simone. Special Agent Simone then briefed you that he had interviewed SGT Rock as a suspect in a barracks larceny case. He properly advised SGT Rock of his rights against self-incrimination before asking any questions about the allegation and SGT Rock invoked those rights without providing any written or oral statement. Recall that, based on his investigation, SA Simone considers SGT Rock a likely suspect in the case. He wants your

astute and legally correct opinion on whether he can re-interrogate SGT Rock.

Legally, the investigator has no requirement to notify counsel. As discussed in this article, while military courts have not directly overruled *Mcomber*, several factors lead to the conclusion that it is invalid. These factors include: (1) the 1994 amendment to MRE 305(e) eliminating the notice to counsel rule, (2) the lack of either Supreme Court or other federal court recognition of the notice to counsel rule, and (3) the military court's silence regarding *Mcomber* since the 1994 amendments to MRE 305(e).

Although you are satisfied that there are no legal concerns, you are not yet comfortable with advising SA Simone to re-interview SGT Rock. You consider *AR 27-26, Rules for Professional Conduct for Lawyers*, and the guidance offered in Rule 4.2, Communication with Person Represented by Counsel.<sup>180</sup> Because you are not certain whether SGT Rock has defense counsel, you decide that the best course of action is to call MAJ Max Righteous, the senior defense counsel. Major Righteous tells you that SGT Rock is represented.

After due consideration of the matter, you telephone SA Simone and tell him not to interview SGT Rock at this time. You advise him to continue to work on physical evidence and witness interviews but not to re-interview SGT Rock. You tell him to inform you immediately if SGT Rock makes any contact with him. You are convinced that you gave SA Simone sound advice based upon both your legal research and ethical instincts.

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180. *Id.*