Zealous Advocacy, Professionalism, and the Military Justice Leader

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Leadership is solving problems.
The day soldiers stop bringing you their problems is the day you have stopped leading them.1

I. Introduction

Military justice managers are leaders. They exist to develop, mentor, and assist their subordinate counsel. In the foreword to Army Doctrine Publication 6-22, Army Leadership, General Raymond Odierno charges leaders to “[b]e your formation’s moral and ethical compass.”2 This duty is particularly true for the military justice manager. Judge advocates work in an occupational field governed by a specific code of ethics and professionalism. They have the responsibility of both advocating for their clients with zeal and the administration of justice within the bounds of the law and ethical rules.3 Zeal, the law, and ethical rules are broad, nebulous, and often difficult concepts to apply to a specific case. In practice, the boundary between competent advocacy and unethical conduct can quickly become blurred—particularly for inexperienced judge advocates.4 Recognizing this boundary is critical to the ethical and professional practice of law.

Equal parts leader and lawyer, military justice managers serve as the moral and ethical compass for their subordinates and guide them through difficult professional and ethical decisions. Successful military justice managers must themselves have a solid understanding of zealous representation and the relationship between it and legal ethics. They must also recognize common advocacy conduct that exceeds the bounds of the law and ethical rules. The proceeding discussion focuses on these areas.

The article will first define zealous advocacy. In defining zealous advocacy, an important distinction must be

drawn between the concept of zealous advocacy and the concept of a zealot. Next, the role of the military justice manager in teaching and mentoring ethical and professional practice is explored. An emphasis is placed on the topics of discovery and civility as areas where issues with zealous advocacy frequently manifest themselves. Finally, the opinion in United States v. Stellato5 is analyzed from the standpoint of both the trial counsel and military justice leadership; examples of misguided zealous advocacy and unprofessionalism in the case are discussed.

II. Zealous Advocacy

Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client . . . Zealous advocacy is the modern day plague which infects and weakens the truth-finding process and makes a mockery of the lawyers' claim to officer of the court status.6

A. What is Zealous Advocacy?

The concept of zealous advocacy is illusive. Defining it in the context of trial advocacy is often paradoxical. Black’s Law Dictionary defines zealous advocacy as “[t]he doctrine that a lawyer acting as an advocate must, within the established bonds of legal ethics, maximize the [chances] that his or her client will have a favorable outcome.”7 The definition of zealous advocacy seems straightforward. Confusing the doctrine of zealous advocacy with the ideology of a zealot, however, creates problems for the practitioner.

A zealot is “someone who is an immoderate, fanatical, or overzealous adherent to a cause or ideal . . . . The noun zealot has derogatory connotations that are much attenuated,

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2 U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP foreword (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22].
3 U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 6(b) (1 May 1992) [hereinafter AR 27-26].

if not absent altogether, in the cognates zeal and zealous.”

The distinction between zealous advocacy and being a zealot is dramatic. It is so significant that an attorney simply cannot be a “zealot” in the context of representing their client. The conflation of the two concepts is a leading cause of professional and ethical misconduct. The evolution of the term zealous advocacy in professional and ethical rules highlights this conflation as a historical problem in the legal profession.

The term “zealous advocacy” is a holdout from Canon 7 of the ABA Model Code of Professional Responsibility, which was widely replaced in most jurisdictions by Rule 1.3 of the current ABA Model Rules of Professional Conduct. Canon 7 was criticized precisely because “zealousness” might be interpreted as “zealotry,” and used as an excuse for wrongful lawyer conduct on behalf of a client or to imply a personal involvement in a client’s cause rather than a professionally detached commitment.12

The duty for judge advocates to represent a client’s interests with zeal comes from the rules of professional conduct (Service Rules) for the various services. The Service Rules are largely direct adaptations of the ABA Model Rules of Professional Conduct. Like our civilian counterparts, zealousness on the part of a judge advocate is always subordinate to legal and ethical regulations.15

B. Zealous Advocacy and the Military Justice Manager

As leaders, military justice managers occupy a unique and critical role in ensuring compliance with the Service Rules within the judge advocate community and preventing ethical misconduct by their subordinates. In a recent opinion addressing prosecutorial misconduct, Judge Ohlson of the United States Court of Appeals for the Armed Forces (CAAF) in his dissenting opinion addressed the importance of the role of the military justice manager:

The nagging—if unspoken—question in this case is, “Where was the chief of justice?” As noted by the majority, trial counsel appeared to be not only “inexperienced” but also “unsupervised,” and she “repeatedly appeared unable to either understand or abide by the military judge’s rulings and instructions.” The issue of why this trial counsel did not receive the level of supervision, guidance, assistance, instruction, and training that she so obviously needed is not a matter before this Court. However, I find it appropriate to note that the responsibility to protect a service member's constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.16

New judge advocates are trained in law school to think like lawyers. Basic judge advocate training programs serve to introduce them to military law. Learning how to be a judge advocate, however, really begins at the first duty station. Without proper guidance from their military justice manager, inexperienced judge advocates may attempt to hide their insecurity and lack of experience through aggressive and belligerent conduct. Judge advocates are most likely to commit an ethical violation at the time they are learning to balance advocacy with the Service Rules. Military justice managers must take an interested and active role assisting inexperienced judge advocates bridging the gap between the theoretical and practical—between law school and the courtroom.

Basic leadership principles provide military justice managers the means of ensuring compliance with the Service Rules and creating ethical judge advocates. The decisions any leader must make are seldom obviously wholly ethical or unethical. Making correct moral and

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8 Zealot, BLACK’S LAW DICTIONARY (10th ed. 2014).
9 Revson v. Cinque & Cinque, P.C., 70 F. Supp. 2d 415, 442, (S.D.N.Y. 1999) (“Although an attorney must represent his client zealously, he cannot be a ‘zealot.’”). See also Minnesota v. Richardson, 514 N.W.2d 573, 576 (Minn. Ct. App. 1994) (“An attorney at trial is an advocate and, as an officer of the court, cannot be a zealot.”).
10 Harris, supra note 6, at 568.
11 Id. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (AM. BAR ASS’N 1980).
15 AR 27-26, supra note 3, Rule 1.3 (Comment); JAGINST, supra note 14, Rule 1.3 (Comment).
18 Id.
19 Id.
21 Cooke, supra note 4, at 2.
22 ADP 6-22, supra note 2, para. 26.
ethical decisions in difficult situations is a hallmark of character.\(^2\) Character is a derivative of integrity.\(^3\) The outward manifestation of integrity for a leader is unwavering adherence to laws, regulations, and standards; doing what is right legally and morally.\(^4\) To make correct moral and ethical decisions in difficult situations, a military justice manager must recognize two important facts: the fundamental purpose of the military legal system is to promote justice and all judge advocates have a duty to genuinely treat with consideration the rights of all persons involved in the court martial process.\(^5\) Only with that essential understanding can a military justice manager effectively assist their subordinates with navigating advocacy and the Service Rules.

Presence of leadership is vital for subordinates, particularly in ethically challenging and ambiguous situations.\(^6\) It is the sum total of a military justice managers words, actions, and appearance.\(^7\) Presence is how military justice managers convey the values of their personal identity they wish their subordinates to emulate.\(^8\) To provide good leadership through ethically difficult situations, military justice leaders must know their subordinates, communicate with them, and understand the issues they are experiencing.\(^9\)

Finally, the intellect of a military justice leader is important to applying critical and innovative thought to the many issues their subordinates will encounter.\(^10\) Effective military justice managers know their own strengths and weaknesses and will reach out to peers and other resources to assist them with making a sound judgment.\(^11\) Critical and innovative thought allows military justice managers to transform knowledge into sound advice and guidance to their subordinates.\(^12\) The combination of character, presence, and intellect results in a military justice manager who understands the obligations of his subordinates and assists them with navigating the pitfalls of those obligations through leadership by example and effective communication.\(^13\)

Maintaining an ethical and professional office is in the personal and professional best interest of a military justice manager. Basic leadership doctrine tells us that leaders are always responsible for the decisions, actions, accomplishments, and failures of their subordinates.\(^14\) Violations of the Service Rules by subordinates in certain circumstances may result in disciplinary consequences for supervisory counsel themselves.\(^15\) Military justice managers have many responsibilities and it is understandable some triaging of their time and attention must be done. The areas of discovery and civility among counsel typically present the most issues with zealous advocacy and warrant more attention from a military justice manager.\(^16\)

C. Discovery

If there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.\(^17\)

Law school teaches prospective lawyers the malleability of rules.\(^18\) Advocacy and the Service Rules themselves require judge advocates to discover and exploit uncertainties and ambiguity in rules and the law to the advantage of the client.\(^19\) Discovery, however, should not be considered an area where judge advocates can experiment with the boundaries of the rules.

The overall purpose of military law is to promote justice and courts-martial are truth-finding bodies.\(^20\) Discovery facilitates the truth-finding function of courts-martial.\(^21\) Judge advocates should heed the basic concept

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\(^1\) Id.
\(^2\) Id.
\(^3\) Id.
\(^4\) Manual for Courts-Martial, United States, pt. I, ¶ 3 (2016) [hereinafter MCM]; AR 27-26, supra note 3, Rule 4.4 (Comment) (“The duty of a lawyer to represent the client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”).
\(^5\) ADP 6-22, supra note 2, para. 26.
\(^6\) Id. para. 28.
\(^7\) Id. para. 27
\(^8\) Id. para. 28.
\(^9\) Id. para. 29.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.

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\(^13\) Id.
\(^14\) U.S. Dep’t of Army, Doctrine Pub. 6-0, Mission Command para. 2-31 (17 May 2012) [hereinafter ADP-6-0].
\(^15\) AR 27-26, supra note 3, Rule 5.1.
\(^16\) See, e.g., Robert N. Sayler, Rambo Litigation: Why Hardball Tactics Don’t Work, 74 Am. B. Ass’n J., 78 (March 1988); Harris, supra note 6, at 551; Browe, supra note 20, at 751.
\(^19\) Id.
\(^20\) MCM, supra note 26 pt. I, ¶ 3.
\(^21\) AR 27-26, supra note 3, para. 6(f).
“[d]iscovery does not belong to the adversary system.”44 Discovery deals with facts and advocacy deals with the presentation of those facts.

Military justice managers, because they are often charged with supervising inexperienced judge advocates, must be particularly cognizant of discovery issues. They must remind subordinates that their professional obligation to the court supersedes the personal desire of a judge advocate to have their cause prevail.45 Professionalism and respect for the court-martial process are not compatible with creative tactics when requesting, responding to, and litigating discovery.46

As representatives of the sovereign, prosecutors must be especially cognizant of the importance of their professionalism in the realm of discovery. Rule 3.8 of the Service Rules—entitled “Special Responsibilities of a Trial Counsel”47—states the following with regard to discovery:

A trial counsel shall . . . make timely disclosure to the defense of all evidence or information known to the lawyer 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 lawyer, except when the lawyer is relieved of this responsibility by a protective order or regulation.48

Service Rule 3.8 simply amplifies other discovery obligations owed by prosecutors.49 Discovery for the prosecutor is an ongoing truth-seeking endeavor, regardless of what the truth may be.50 When dealing with discovery, military justice managers must emphasize a focus on ascertaining the truth over what may eventually be admissible at trial. Rules of evidence operate at trial.51 Information does not have to be admissible at trial to be discoverable.52 The sheer abundance of discovery rules, be they ethical, statutory, or case derived, send an unambiguous message to prosecutors about discovery—turn the information over.

Defense counsel can likewise be tempted to abuse discovery in the name of zealous advocacy. Gamesmanship with the discovery process is not compatible with the Rules for Courts-Martial or ethical and professional practice.53 Zealous advocacy is not an excuse for creative and misleading characterizations of fact nor is it an excuse for a lack of due diligence.54 Filing of frivolous discovery requests, failing to conduct research into factual issues, sending prosecutors on a fishing expedition, and intentionally using court-martial procedure as a means of delay are unethical and violate the Service Rules.55

D. Civility

[D]o as adversaries do in law, [s]trive mightily, but eat and drink as friends.56

Civility between counsel is another victim of zealous advocacy. Civility is synonymous with professionalism.57 Ethics, as discussed thus far in the paper, is distinguishable from the concept of civility. Ethics and the Service Rules tell judge advocates what they must do;58 they direct a minimum standard of conduct below which we cannot fall. Civility and professionalism are the ideals judge advocates should aspire to achieve; they are what we should do.59

Much like the concept of zealous advocacy, civility eludes precise definition. It encompasses a broad spectrum of behavior covering the simply rude all the way to the intentionally unethical.60 Like the proper scope of zealous advocacy, civility is an area where experience plays a large role in understanding when conduct is approaching the unprofessional. Again, the military justice manager must set the example for their subordinates in this area and be engaged enough with them to know when they are straying into unprofessional conduct.

It is important military justice managers do this because the adverse effects of incivility can be pervasive.61 Incivility...

44 Id.
46 Wendel, supra note 39, at 895.
47 AR 27-26, supra note 3, Rule 3.8.
48 Id.
50 Harris, supra note 6, at 587.
51 Id. at 571.
52 Id.
53 MCM, supra note 26, RCM 701 analysis, at A21-31 (2016); AR 27-26, supra note 3, Rule 3.4.
54 Harris, supra note 6, at 574.
55 Cooke, supra note 4, at 12.
56 WILLIAM SHAKESPEARE, TAMING OF THE SHREW act 1, sc. 2.
58 Id.
59 Id.
60 Id.
61 Browe, supra note 20, at 756.
between judge advocates quickly creates an unnecessarily acrimonious environment between military justice shops, an environment in which judge advocates are prone to push the limits of ethical responsibility in a misguided attempt to be zealous advocates.\textsuperscript{62} Common manifestations of uncivil and unprofessional conduct are frivolous requests and motions, delay tactics, threats and embarrassment, and all other manner of scorched-earth tactics.\textsuperscript{63} A generalized lack of respect for persons involved in the court-martial process underlies this conduct.\textsuperscript{64}

Judge advocates who act unprofessionally have abandoned the interests of their client.\textsuperscript{65} Uncivil conduct is an expression of base personal motivations and not any professional obligation. Lack of civility can lead to dissatisfaction with the profession on the part of counsel, unnecessary litigation, and a loss of respect for and confidence in the legal process by the public.\textsuperscript{66}

Use of unprofessional tactics by opposing counsel can create the temptation to respond in kind. Military justice managers cannot allow this mindset to take hold within their offices. It is possible to remain civil when one is aggressive, upset, angry, and intimidating.\textsuperscript{67} Fulfilling the role of a calm and professional influence capable of reaching out to opposing counsel sets the right example for subordinate judge advocates. Failure to do so has very serious consequences.

III. \textit{United States v. Stellato} \textsuperscript{68}

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.\textsuperscript{69}

The \textit{Stellato} opinion showcases the consequences of misguided zealous advocacy and incivility. This case provides examples of discovery abuse, unprofessional conduct, and an apparent absence of supervision and mentorship. The trial judge dismissed the charges against the accused with prejudice.\textsuperscript{70} The ruling of the trial judge was later upheld by CAAF.\textsuperscript{71} Both the trial court and CAAF found discovery violations by trial counsel to be “continual and egregious;” his approach to discovery “recklessly cavalier;” and his actions overall “an almost complete abdication of discovery duties.”\textsuperscript{72}

\textit{Stellato} involved an Army reservist who allegedly molested his daughter.\textsuperscript{73} Originally, civilian law enforcement received the report and investigated the allegations.\textsuperscript{74} Civilian law enforcement seized a plastic banana, alleged to have been used in the assault, and the alleged victim was examined by a mental health professional.\textsuperscript{75} The mental health professional determined the sexual assault allegation made by the alleged victim was inconclusive, as there was no evidence demonstrating the accused committed a sexual assault of his daughter.\textsuperscript{76}

Throughout the period of investigation, the accused and his wife exchanged a series of emails, wherein the accused continuously denied any misconduct.\textsuperscript{77} The wife of the accused retained copies of these emails.\textsuperscript{78}

After the civilian investigation concluded without prosecution, the allegations were again made by the wife of the accused to Army Criminal Investigative Division (CID) and another investigation ensued.\textsuperscript{79} The CID investigation failed to uncover the plastic banana, mental health records associated with the civilian investigation, or the emails between the accused and his wife.\textsuperscript{80} The wife of the accused later identified a second alleged victim to CID.\textsuperscript{81} She claimed a friend of her daughter witnessed the previously

\textsuperscript{62} Major David L. Hayden, Major Willis C. Hunter & Major Donna L. Wilkins, \textit{Training Trial and Defense Counsel: An Approach for Supervisors}, ARMY LAW., Mar. 1994, at 22. “[S]upervisors need to stress . . . the trial attorney's responsibility . . . for frequent and expeditious coordination with judges and opposing counsel on all legal actions. Inviting judges and opposing counsel to office social events also can pay great dividends in the long run.” \textit{Id}.

\textsuperscript{63} Browe, \textit{supra} note 20, at 755; Ortego & Maleson, \textit{supra} note 57, at 58–59.

\textsuperscript{64} Ortego & Maleson, \textit{supra} note 57, at 58–59.

\textsuperscript{65} \textit{Id}.

\textsuperscript{66} Browe, \textit{supra} note 20, at 755.

\textsuperscript{67} Harris, \textit{supra} note 6, at 557.

\textsuperscript{68} United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015).

\textsuperscript{69} Berger v. United States, 295 U.S. 78, 88 (1935).


\textsuperscript{71} \textit{Id}.

\textsuperscript{72} \textit{Id}.

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} \textit{Id}.

\textsuperscript{76} \textit{Id}.

\textsuperscript{77} \textit{Id}.

\textsuperscript{78} \textit{Id}.

\textsuperscript{79} \textit{Id}.

\textsuperscript{80} \textit{Id}.

\textsuperscript{81} \textit{Id} at 478–79.
alleged molestation and was herself molested by the accused.\(^82\)

At the conclusion of the military investigation, trial counsel and the special victim prosecutor conducted a site visit to the home of the alleged victim and her mother.\(^83\) During the visit, the mother of the alleged victim informed the trial counsel of a box of evidence she gathered concerning the allegations.\(^84\) Inside the box of evidence were notes of conversations she had with the alleged victim concerning the allegations, journals she kept concerning the allegations, correspondence between her and the accused about the allegations, and a note on which she recorded a recantation of the allegations by her daughter.\(^85\)

Trial counsel did not instruct the mother of the alleged victim to preserve any of the evidence contained in the box.\(^86\) When later asked about the box of evidence by the court, trial counsel stated, “[The mother of the alleged victim] wanted to provide stuff [to me] and then have me make a judgment call on whether or not to turn it over to defense. And, I said I can’t do that, everything I get will go to defense.”\(^87\) Charges were preferred shortly after trial counsel met with the alleged victim and her mother and after he was made aware of the box of evidence.\(^88\) At the time of preferral, the Government provided the accused with some discovery, including the report of civilian law enforcement, the CID report, and the accused’s interrogations.\(^89\) Trial counsel did not inform the defense of the existence of the box of evidence or its contents.\(^90\)

Shortly after preferral and the initial discovery disclosure by the Government, defense filed an initial discovery request seeking:

“exculpatory evidence, impeachment evidence, evidence within the possession of the Government material to the preparation of the defense, results of physical and mental exams of [the alleged victim] and [the mother of the alleged victim], all previous statements by prosecution witnesses, and prior statements by the accused. This discovery request also sought preservation of evidence.”\(^91\)

The contents of the box of evidence clearly contained material relevant to this request and trial counsel was aware of the contents of the box at the time of the defense request.\(^92\) Trial counsel consulted with his supervisory counsel, the chief of justice, and they decided not to respond to the defense discovery request until closer to referral of charges.\(^93\) At some point near this time, trial counsel made comments to “the chief of client services that civilian defense counsel was ‘defending rapists,’ and he sent an e-mail to civilian counsel stating that she was ‘defending the guilty.’”\(^94\)

Trial counsel also had a troubled relationship with the special victim prosecutor detailed to the case. The court noted the “[special victim prosecutor] requested that [trial counsel] provide her feedback on his progress with the case relative to discussions with [mother of the alleged victim], but was repeatedly rebuffed to the point where she brought her concerns to both the former and current chief of military justice.”\(^95\) Finally, the court noted an unusually familiar relationship between trial counsel and the alleged victim and her mother; evidenced by a dinner with the alleged victim and her mother, with subsequent confusion as to who paid for it, and a gift from the alleged victim’s mother to the wife of trial counsel.\(^96\)

The case continued for the remainder of 2013.\(^97\) Throughout the year there were six judicial orders to compel discovery of witnesses and documents, and three continuances based on witness production and discovery issues.\(^98\) The plastic banana was initially declared by trial counsel as “lost evidence.”\(^99\) The banana was subsequently recovered from the evidence locker of civilian law enforcement and tests revealed none of the accused’s DNA.\(^100\) The mental health professional who examined the alleged victim during the civilian investigation and determined there was no evidence to support the allegations

\(^{82}\) Id.

\(^{83}\) Id. at 477.

\(^{84}\) Id.

\(^{85}\) Id.

\(^{86}\) Id.

\(^{87}\) Id. at 477–78.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id.

\(^{93}\) Id.

\(^{94}\) Id.


\(^{96}\) Id. at 506.


\(^{98}\) Id. at 482, 489.

\(^{99}\) Id. at 479.

\(^{100}\) Id.
died during the period of the continuances. The alleged witness and second victim were forensically interviewed and denied witnessing the allegations or being molested herself. After a change of trial counsel and the revelation of the “box of evidence” and its contents, the case was dismissed with prejudice by the trial judge.

In affirming the ruling of the trial judge, CAAF found five instances where the prosecution failed to comply with its discovery obligations. First, “the Government violated the accused's discovery rights when it did not investigate the existence of [the mother of the victim’s] mental health records following the accused's discovery request.”

Second, “the Government failed to take the necessary steps in response to a defense request to preserve evidence.”

Third, “the Government refused to produce a material witness and alleged victim.”

Fourth, “the Government violated R.C.M. 701(a)(2)(A) by failing to comply in a timely manner with the defense discovery request to inspect [physical evidence].” And finally, “the Government's untimely disclosure and production” of “[a box which] contained exculpatory material, including a note about [the alleged victim’s] recantation of certain allegations and e-mails in which the accused denied the allegations of molestation.”

A. The Counsel

The actions of trial counsel in Stellato are indicative of a misinformed and misguided concept of zealous advocacy. The symptoms of a misinformed concept of advocacy, as previously discussed, are present: disregard for discovery obligations, a lack of civility toward other attorneys in the process, and an apparent personal stake in the case. The actions of trial counsel show a stronger desire to win than to do justice. The court concluded it had “grave concerns” about his conduct and “at a minimum it appears that his handling of his discovery obligations in [the] case was grossly negligent.”

The record indicates trial counsel was generally aware of his discovery responsibilities as a prosecutor. He informed the mother of the alleged victim that any evidence she provided to him would have to be turned over to the accused. Specifically, trial counsel testified “[S]he wanted to provide stuff [to me] and then have me make a judgment call on whether or not to turn it over to defense. And, I said I can't do that, everything I get will go to defense.” Trial counsel’s statement above is true, in part; however, it demonstrates a woefully incomplete understanding of his duties.

The mother of the alleged victim made trial counsel aware of the existence of additional evidence that was exculpatory for the accused. On this point, CAAF stated “a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a Government witness instead of the Government.” The comments by CAAF reinforce the truth-finding purpose of courts-martial and the need for the prosecutor to focus not on winning, but on ensuring justice is done.

Even a written ruling from the trial judge did not adequately drive home the point that trial counsel was treading on dangerous ethical ground. “In a written ruling . . . the military judge cautioned the Government that its decision to ‘take a hard stand on discovery . . . invites disaster at trial.’” “[Trial counsel] testified that he continued his efforts to provide discovery based on ‘what [he] deemed relevant and necessary.’ In his words, he ‘considered’ the military judge’s warning but ‘chose not to [review the government responses to the defense discovery request and answer with more specificity].’”

The conduct of trial counsel toward both defense counsel and the special victim prosecutor demonstrated incivility. His comments to the defense counsel served no professional purpose and his refusal to cooperate with the special victim prosecutor is inexplicable. By themselves, the comments could be dismissed as inexperience and natural competitiveness getting the better of a young counsel, but they were not isolated events. The totality of the circumstances in this case suggest the comments to defense and the relationship with the special victim prosecutor were symptomatic of a much greater problem with trial counsel’s understanding of professional advocacy and the court-martial process.

101 Id. at 480.
102 Id. at 479.
103 Id. at 480.
104 Id. at 482.
105 Id.
106 Id.
107 Id.
108 Id.
109 Id. at 485.
110 Id. at 489.
111 Id. at 477–78.
112 Id.
113 Id. at 487.
115 Id. at 512.
The record indicates trial counsel became too personally involved with the alleged victim and her mother. The dinner and exchange of a gift between the trial counsel and the mother of the alleged victim suggest a personal stake in the case. Although we encourage counsel to be empathetic toward victims, that empathy cannot compromise professional obligations. The danger here is trial counsel will become compromised by this personal involvement, placing personal interest before his duties as an officer of the court. The nature of this relationship also raises an appearance of impropriety issue. A judge advocate should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession. In the final analysis, any trial counsel must remember he or she is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”

B. The Leadership

An analysis of the Stellato case is not complete without examining the involvement of the military justice leadership. Military justice managers must make reasonable efforts to ensure judge advocates under their supervision conform to the Service Rules and are adequately trained and competent to perform their duties. The conduct of trial counsel in Stellato undoubtedly fell below what is required by the Service Rules and he was certainly under the supervision of another judge advocate.

Two possible scenarios exist concerning the military justice leadership of the trial counsel in the Stellato case. Under the first scenario, the leadership could have been completely unaware of what the trial counsel was doing; trial counsel could have been a rogue actor hiding his actions and there was no way the leadership could have reasonably known of the issues in the case. In the second scenario, the leadership was aware of what the trial counsel was doing; knowledge of the actions of trial counsel is, at a minimum, tacit approval of his behavior.

The first scenario is the less likely of the two. It is difficult to imagine the attention of the chief of justice was not drawn to this case and this trial counsel after the lapse of a year after preferral, six judicial orders to compel discovery of witnesses and documents, and three continuances. To the contrary, the involvement of the chief of justice in this case is evidenced early on by his discussion with trial counsel concerning the Government response to the initial defense discovery request and the decision to delay that response.

That conversation, in the overall context of this case, carries with it the inference the trial counsel and chief of justice viewed discovery as a means of advocacy. In other words, the actions of trial counsel and the chief of justice in relation to the defense discovery request give the appearance of gamesmanship. Indeed, “gamesmanship” is a word CAAF specifically uses in the opinion to describe the overall actions of trial counsel concerning discovery.

In discussing the decision not to respond to the initial discovery request, CAAF also noted it was during the same pre-referral time period trial counsel “stated to the chief of client services that civilian defense counsel was ‘defending rapists,’ and he sent an e-mail to civilian counsel stating that she was ‘defending the guilty.’” Additionally, there was the lack of communication between the special victim prosecutor and the trial counsel. From the record, this issue was clearly brought to the attention of the chief of justice. The comments to defense and the existence of this troubled relationship between trial counsel and the special victim prosecutor should have served as an indication something was not right with the case and warranted some investigation or intervention on the part of the military justice leadership.

By themselves, each individual issue in Stellato could be regarded as an anomaly. All the actions of trial counsel, however, did not occur in a vacuum and their effect on the case was weighed in the aggregate by the court. The ignorance of the chief of justice is unlikely considering the repeated nature of trial counsel’s actions and the amount of time they continued. The court opinion makes no mention of any corrective actions taken by the leadership and none are evident based on how the events played out. These facts give the appearance that the environment of the office was at least conducive to the actions of trial counsel.

The ethical and professional atmosphere of the office is the responsibility of supervisory counsel and all leaders are ultimately responsible for ensuring their subordinates conform to the Rules of Professional Conduct. As Judge

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119 AR 27-26, supra note 3, Rule 5.1.
121 Id. at 477.
122 Id. at 481.
123 Id. at 477 n.3.
125 AR 27-26, supra note 3, Rule 5.1(b) (requiring all lawyers who directly supervise other lawyers to take reasonable measures to ensure that such subordinates conform their conduct to the rules). Under certain circumstances, supervisory attorneys can be held responsible for ethical violations of their subordinates. See id. at Rule 5.1(c) (“A lawyer shall be responsible for another lawyer’s violation of these Rules of Professional
Ohlson accurately stated, “the responsibility to protect a service member’s constitutional right to a fair trial does not rest solely with the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.” The responsibility Judge Olson contemplates is a holistic one. Military justice managers must be proactive in this regard. Failure to do so is a failure of obligations to one’s subordinates as a leader, the requirements of the Service Rules, and the military justice system.

IV. Conclusion

Military justice managers are critical to the ethical and professional practice of law in the judge advocate community. They establish, maintain, and regulate the ethical atmosphere within their shops. Striking the right balance between advocacy and professional obligations requires knowledge of the Service Rules and a healthy concept of civility and professionalism. With that balance a military justice manager will function as the moral and ethical compass for their subordinates. Exercise of basic leadership principles allows military justice managers to effectively engage with their subordinate counsel and accomplish this duty.

Applying ethical rules to the practice of law can quickly become confusing, particularly for inexperienced judge advocates. In addition to parsing and simply applying the rules, the competitive nature of advocacy can be difficult for judge advocates to separate from their duties as officers of the court. In these areas, the engaged presence of military justice managers can prevent issues like the ones addressed in Stellato.

The judge advocate community needs and deserves this type of leadership. With a healthy understanding of the Service Rules, in particular zealous advocacy and professionalism, military justice managers can guide their subordinates through some of the most difficult issues faced by inexperienced counsel. In doing so, military justice managers can avoid the unsavory consequences of discovery violations and other unprofessional behavior; bettering the military justice system and the counsel involved in its administration.