



# THE ARMY LAWYER

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## Lore of the Corps

### A “Fragging” in Vietnam: The Story of a Court-Martial for Attempted Murder and Its Aftermath

Fred L. Borch  
Regimental Historian & Archivist

*In a cold killing rage, I went to my hootch and grabbed a grenade, walked back to the bunker the XO was in, pulled the pin on the grenade, threw it into the bunker, closed the bunker door, and started back to the hootch. As I was walking back, I heard the explosion of the grenade.<sup>1</sup>*

*Some CID officers interviewed me, asking me why I tried to kill the executive officer. I was really tired of the bullshit, and I told them he was an asshole who deserved to die.<sup>2</sup>*

On 12 January 1973, Staff Sergeant (SSG) Alan G. Cornett pleaded guilty to attempting to murder Lieutenant Colonel (LTC) Donald F. Bongers, the Executive Officer of Advisory Team 40, “by means of throwing an M-26 fragmentation grenade into a bunker which the said Lieutenant Colonel Bongers occupied.”<sup>3</sup> Cornett also pleaded guilty to having .16 grams of heroin in his possession. The following day, he was sentenced by a panel of seven officers.<sup>4</sup> This is the story of his court-martial and its aftermath.

The evidence presented at the Article 32 investigation and the stipulation of fact introduced at trial revealed that the accused, a Ranger-qualified Special Forces medic who had served six and one-half years in Vietnam, was assigned to Military Assistance Command, Vietnam (MACV) Advisory Team 40. This team, located at Duc My, Vietnam, provided support to the Vietnamese Army.

For several months, SSG Cornett and his victim, LTC Bongers, had not been getting along. Cornett believed that Bongers was harassing him because the accused was married to a Vietnamese woman. The senior advisor in Team 40, Colonel (COL) Gilligan, who was Bongers’ boss, had told other Soldiers that he did not like “mixed marriages” and would not approve a Soldier’s request to marry a Vietnamese national. Bongers also had stated publicly that it was “morally wrong” for Americans to associate with Vietnamese women, and had called the accused’s wife a “prostitute.”<sup>5</sup> Not content to simply voice their views, Gilligan and Bongers had prohibited the accused from bringing his wife onto the Team 40 compound. This was embarrassing to the accused and put considerable strain on his marriage.

On 30 November 1972, at about 1545, LTC Bongers entered one of the team’s commo bunkers, where the accused was on radio watch. After watching the accused open a can of beer, Bongers relieved him for drinking on duty, and then told him to leave the commo bunker. Lieutenant Colonel Bongers then took over the accused’s radio watch duties.

Staff Sergeant Cornett went back to his hootch and began drinking more alcohol. As he told the Criminal Investigation Division (CID) later that day, he “drank a half a case of Budweiser beer, 12 cans, and also had about a pint of rum.” About an hour later, Cornett took an M-26 fragmentation grenade off his web belt and put it on his refrigerator. As Cornett explained to the CID agent:

*I kept looking at it and wondering if it was worth it . . . I took the tape off from around the grenade, pulled the safety pin, walked over to the commo bunker, stood there for about fifteen minutes deciding if I should kill him or just throw a scare into him. I decided not to kill him, but to scare him. I threw the grenade down the steps of the bunker . . . I stayed there until the smoke cleared.<sup>6</sup>*

Lieutenant Colonel Bongers was a lucky man that day. He saw the grenade roll into the commo bunker toward his chair, “got up and ran up the stairs and as he reached the second step the grenade exploded.”<sup>7</sup> Fortunately for Bongers, he was not injured in the blast.

As for SSG Cornett, he initially feigned ignorance about who had thrown the grenade but, when another Soldier told him that Bongers had accused him of trying to ‘frag’ him, the accused ran out of the orderly room and returned with his M-16. He then told another soldier in the orderly room: “If

<sup>1</sup> ALAN G. CORNETT, GONE NATIVE: AN NCO’S STORY 266 (2000).

<sup>2</sup> *Id.* at 277.

<sup>3</sup> Record of Trial, United States v. Cornett. No. CM429339, Charge Sheet (1973) [hereinafter Cornett ROT].

<sup>4</sup> The panel consisted of two colonels, one lieutenant colonel, two majors, one lieutenant and one chief warrant officer two. *Id.* at 23–30.

<sup>5</sup> *Id.* at 79–80, 82–83.

<sup>6</sup> *Id.* Sworn Statement of SSG Alan Gentry Cornett.

<sup>7</sup> *Id.* Prosecution Exhibit 1 (Stipulation of Fact).

that is what LTC Bongers thinks, then I'll kill him for sure."<sup>8</sup> Cornett was quickly disarmed, and taken into custody.

On 4 December, the accused was brought to the Saigon Military Police (MP) station and held in a detention cell until he could be moved to the stockade at Long Binh. A routine strip search of Cornett's person by the MPs "uncovered 9 packets containing .16 grams of heroin." The packets had been sewn into the hems around Cornett's upper shirt pockets.

Almost certainly on the advice of his two defense counsel (the accused had hired a civilian lawyer, Mr. Richard Muri, but also had Captain (CPT) William H. Cunningham as his detailed defense counsel), SSG Cornett entered into a pre-trial agreement with the convening authority. He agreed that, in exchange for pleading guilty to attempted murder and possession of heroin, his sentence would be capped at a dishonorable discharge, thirty years confinement at hard labor, total forfeitures of all pay and allowances and reduction to the lowest enlisted grade. The pre-trial agreement, however, contained one curious provision: the convening authority also agreed that "the sentence in excess . . . of confinement at hard labor for one year . . . [would] be suspended for such period of time as the Convening Authority deems appropriate."<sup>9</sup> The parties apparently intended that no matter how much jail time might be imposed—and both SSG Cornett and his defense counsel must have thought it would be considerable—Cornett would not serve more than one year behind bars.

During his guilty plea inquiry with COL Ralph B. Hammack, the military judge, Cornett agreed that he intended to kill Bongers. He also admitted that he had possessed a small amount of heroin. But Cornett denied being a drug user and told the judge that a "friend" might have sewn the heroin in his uniform pockets so that Cornett could say that he was "on drugs" at the time of the incident and perhaps not responsible for his actions.<sup>10</sup>

While Cornett's plea was accepted, and findings were entered by COL Hammack, events at sentencing did not proceed as expected. Rather, at least from the government's perspective, the case went very much awry. The trial counsel, CPT John G. Karjala, called LTC Bongers to testify how the accused had tried to kill him. One would think that this would be sufficient aggravation, and convince the panel

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Appellate Exhibit I (Offer to Plead Guilty).

<sup>10</sup> *Id.* at 81. Cornett testified that he and his friends had discussed the possibility that, if he had heroin in his possession, he could testify that he was under the influence of drugs when he threw the grenade and so was not responsible. However, he testified that he did not actually ask anyone to provide him with heroin, and was surprised to find the packets had been sewn into his uniform by persons unknown. (He was still able to plead guilty to knowing possession because he said he did not get rid of the packets once he found them.)

that a severe sentence was warranted. But the accused called a number of officers and noncommissioned officers (NCOs) who testified that he was a good Soldier who had been mistreated by his superiors. Lieutenant Colonel Thomas C. Lodge testified that Cornett was "an outstanding medic."<sup>11</sup> Captain Terrance W. Hoffman testified that the accused had been "treated unfairly" by COL Gilligan and LTC Bongers when they denied his request to bring his wife onto the Team 40 compound. Other witnesses testified that both COL Gilligan and LTC Bongers had, on more than one occasion, voiced their prejudices against Vietnamese women to the accused and to other Soldiers.<sup>12</sup>

Staff Sergeant Cornett also testified in his own behalf. He had been in Vietnam six-and-one-half years (with a return to the United States only for two three-month periods in 1966 and 1970) and had served as a Special Forces reconnaissance medic, trained Vietnamese Montanyards tribesmen to fight the Viet Cong, and participated as an intelligence analyst in Project Phoenix. He also had served as a platoon medic in the 101st Airborne Division. Cornett had been wounded in combat and his counsel introduced into evidence his citations for the Silver Star, Bronze Star and Vietnamese Cross of Gallantry. His citation for the Silver Star lauded his gallantry under fire while providing first aid to a Vietnamese soldier who had been wounded in a firefight with the North Vietnamese and Viet Cong. Cornett had also participated in "charges against the determined enemy" and his "dedicated and courageous example" had broken the enemy's counterattack.

After deliberating on an appropriate sentence, the all-officer panel sentenced SSG Cornett to be reduced to the lowest enlisted grade, forfeit all pay and allowances and be confined at hard labor for one year. There was no punitive discharge.

Major General M. G. Roseborough took action on Cornett's case on 1 March 1973, when he approved the sentence as adjudged. The accused, who had been in the stockade at Long Binh, was shipped to the Disciplinary Barracks at Fort Leavenworth, Kansas. Since he had not been sentenced to a punitive discharge, and had not received more than a year's confinement, Cornett was offered the opportunity to go to the U.S. Army Retraining Brigade at Fort Riley, Kansas. As Cornett tells it, he was told that the brigade "housed soldiers who had made mistakes and were given the opportunity to make amends. If they straightened out, they could stay in the Army."<sup>13</sup>

After completing nine weeks of "retraining," Cornett was offered a choice: either an honorable discharge or restoration to active duty. He chose to stay in the Army as a

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<sup>11</sup> *Id.* Review of the Staff Judge Advocate.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> Cornett, *supra* note 1, at 268–69.

medic. He remained at Fort Riley at the Irwin Army Hospital and, if Cornett is to be believed, it took him only six months “to recapture the grade of E-6.”<sup>14</sup>

In order to re-enlist, SSG Cornett had to obtain a waiver from the Department of the Army. With the support of his chain of command, he applied for and was granted a waiver. He then re-enlisted for six more years. After five years in Kansas, SSG Cornett had tours in Germany and at Fort Benning, Georgia, where he was an instructor in the Pathfinder Department and played football on the “Doughboys” team. Cornett also was an extra in the movie *Tank* (starring James Garner), which was filmed at Fort Benning.

Shortly after being promoted to sergeant first class, Cornett was sent to 10th Special Forces Group, Bad Tolz, Germany. While serving as the senior medic in this unit, Cornett was selected “below the zone” for promotion to master sergeant. After completing the First Sergeant’s Academy in Munich, Cornett was made First Sergeant, U.S. Army Special Operations Forces, Europe. Cornett retired as an E-8 with more than twenty years of active duty service.<sup>15</sup>

In retrospect, it is apparent that the court members, despite the serious nature of the “fragging” and drug charges, were impressed with Cornett’s soldiering. It was not unusual for career Soldiers in the Vietnam era to have two or even three one-year tours in Southeast Asia but it was extremely rare for any GI to have more than six years in South Vietnam—all in dangerous, high-profile combat-

related assignments. Additionally, evidence that Cornett was airborne, Ranger and Special Forces-qualified, and had been wounded and decorated for gallantry in action meant that the panel was loath to give him a punitive discharge that would stain his past record. But it must be assumed that the panel members would have been surprised to hear that, having served a year’s confinement, Cornett was eligible for retraining and restoration to active duty. They probably would have been more surprised to hear that the Soldier they had imprisoned for attempting to kill a superior commissioned officer ultimately retired as a senior NCO.

A final note: three other judge advocates of note were involved in the Cornett case. They were then-COL Joseph N. Tenhet, Jr., then-MAJ Robert E. Murray and then-CPT Dennis M. Corrigan. Tenhet was the MACV and U.S. Army, Vietnam Staff Judge Advocate (SJA); he retired as a brigadier general in 1978. Murray, who worked for COL Tenhet, signed the charge sheet referring the case to trial by general court-martial; he would later serve as The Assistant Judge Advocate General and retired as a major general in 1993. Corrigan, who twice served as the SJA, 1st Infantry Division (Forward) and finished his career as the senior military assistant to the Department of Defense General Counsel, retired as a colonel in 1996.

As for Cornett, his “uncensored unvarnished tale of one Soldier’s seven years in Vietnam” was published by Ballantine Books in 2000.<sup>16</sup>

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website

*Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.*

<sup>14</sup> *Id.* at 269.

<sup>15</sup> *Id.* at 270–75.

<sup>16</sup> *Id.* (front-cover description by publisher).

## Conquering Competency and Other Professional Responsibility Pointers for Appellate Practitioners

Major Jay L. Thoman\*

*While the same ethical rules apply to lawyers in[trial] court, the issues presented by these rules often have a far different impact in the appellate courts. Yet, relatively few published articles provide guidance concerning ethical issues that affect appellate practice.<sup>1</sup>*

Professional responsibility must be the first concern of any successful advocate, whether at the trial or appellate level. When appellate courts examine professional responsibility issues, they are almost always scrutinizing the actions of trial advocates, not appellate practitioners. This may indicate a high level of professionalism among the appellate bar, an absence of factors that lead to professional responsibility issues at the trial level,<sup>2</sup> or a reluctance of appellate attorneys to point accusatory fingers at other appellate counsel, their colleagues in a relatively small section of the legal profession.<sup>3</sup> Whatever the reason, the lack of appellate case law regarding appellate practitioners' professional responsibility deprives appellate counsel of a useful tool for improving their practice, especially since the lack of published decisions translates into a dearth of scholarship in this area.<sup>4</sup> This is troubling because appellate practice directly affects appellate decisions, which build the body of law that all subordinate courts must follow.<sup>5</sup> This

article seeks to add to the study of appellate professionalism by examining the principles of professional responsibility for appellate practitioners generally and giving practice pointers for military appellate counsel specifically.

This endeavor is made harder by the absence of specialized rules treating issues unique to appellate practice.<sup>6</sup> Most of America's civilian appellate courts,<sup>7</sup> like the military's, depend on the general ethical standards for attorneys within their jurisdictions, rules which do not speak directly to the concerns of appellate practice.<sup>8</sup> This is true despite the increasingly specialized nature of appellate practice.<sup>9</sup>

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<sup>1</sup> Nord Hunt & Eric J. Magnuson, Symposium, *Ethical Issues on Appeal*, 19 WM. MITCHELL L. REV. 659, 660 (1993) (emphasis added).

<sup>2</sup> Appellate advocates have little direct contact with either victims or accused. This allows some personal detachment from the case and reduces the temptation to bend the ethical rules to get the "right result" for "justice." They also do more prepared, written advocacy that can be reflected on before it is submitted. This reduces the opportunity to make extemporaneous comments that later prove improvident. Appellate practitioners are also generally more experienced, and so better prepared to face professional responsibility dilemmas occurring in appellate court.

<sup>3</sup> This is particularly true in military appellate practice. While each service has its own defense appellate division (DAD), all the attorneys within that section are co-located and these departments are all in the greater Washington D.C. area. A rare example of a military case where one appellate lawyer accused another of ineffective assistance (and thus, by implication, of shirking his ethical duty of competence) is *United States v. Tyler*. 34 M.J. 293 (C.M.A. 1992) (a civilian attorney before the Court of Military Appeals made the allegation against military appellate counsel at the Service court).

<sup>4</sup> The genesis of this article was an invitation from the Court of Appeal for the Armed Forces (CAAF) and the Judge Advocates' Association to speak at their annual Appellate Advocacy Symposium on the ethical issues for appellate practice. When I performed an initial electronic search in this area, I received so few results that I called the research attorney for the electronic legal research service that I was using, only to learn it was less of a problem with my research skills and more of a scarcity of material, cases and articles alike, that produced my meager results.

<sup>5</sup> While all CAAF decisions bind lower military and trial courts, the intermediate level service courts, the Army Court of Criminal Appeal

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(ACCA), the Navy-Marine Court of Criminal Appeals (N-MCCA), the Air Force Court of Criminal Appeals (AFCCA), and the Coast Guard Court of Criminal Appeals (CGCCA), produce multiple forms of decisions, with only the published decisions binding on their trial courts. Even an unpublished opinion from a service court is strong persuasive authority to a trial judge, so a badly decided one can still have pernicious effects on later cases.

<sup>6</sup> Each of the military appellate courts has its own Rules of Practice and Procedure, available at its website. As their names suggest, these rules are about practice and procedure, not professional responsibility. The procedural rules are typically enforced much more closely than at the trial level. Cf. Hunt & Magnuson, *supra* note 1, at 681 (noting that "the lawyer's conduct on appeal is often subject to closer scrutiny and more exacting measure than in the trial court").

<sup>7</sup> See Catherine Stone, *Appellate Standards of Conduct as Adopted in Texas*, 37 ST. MARY'S L.J. 1097, 1113 (2006). Texas is one of the notable exceptions in this area, having adopted Standards for Appellate Conduct. The rules themselves were published in the *Texas Bar Journal* by the Texas Supreme Court and Court of Criminal Appeals. See *Order of the Supreme Court of Texas and the Court of Criminal Appeals*, 62 TEX. B.J. 399 (1999). The Florida Bar Association has published continuing legal education material on the ethical duties of appellate counsel, though that state does not have separate ethics rules for them. See RAYMOND T. ELLIGETT, JR. & JOHN M. SCHEB, PROFESSIONAL RESPONSIBILITY OF APPELLATE ADVOCATES 1 (2010), available at [http://web2.westlaw.com/find/default.wl?sp=army-000&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.10&cite=aap+fl-cle+2-1&fn=\\_top&mt=133&vr=2.0](http://web2.westlaw.com/find/default.wl?sp=army-000&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.10&cite=aap+fl-cle+2-1&fn=_top&mt=133&vr=2.0).

<sup>8</sup> The American Academy of Appellate Lawyers, *Statement on the Functions and Future of Appellate Lawyers*, 8 J. APP. PRAC. & PROCESS 1, 10 (2006).

<sup>9</sup> See Hunt & Magnuson, *supra* note 1, at 659.

## Rule 1.1, Competence<sup>10</sup>

*If the primary function of an attorney is to competently and vigorously represent the interests of his client, then competence should be a primary concern.*<sup>11</sup>

Competence should be rule number one for advocates at any level. Maintaining the competence of the appellate bar is especially important because appellate decisions have the force of law and their effects stretch beyond the litigants of any one case.<sup>12</sup>

To evaluate a lawyer's competency, one must assess different skills at the trial and appellate levels.<sup>13</sup> As Senior Judge Ruggero Aldisert of the Third Circuit Court of Appeals stated, "[Appellate practice] draws upon talents and skills which are far different from those utilized in other facets of practicing law."<sup>14</sup> As he noted, appellate practitioners advocate to professional judges as opposed to juries without legal training. They deal heavily with the law in reasoned argument while trial lawyers stress facts in arguments that often contain strong emotional appeals.<sup>15</sup>

A basic issue that tests appellate attorneys' competence is selecting which issues to raise on appeal. This issue is

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<sup>10</sup> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. U.S. DEPT OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.1 (1 May 1992) (Competence).

<sup>11</sup> Arey, *infra* note 14, at 27.

<sup>12</sup> Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 447 (1982).

<sup>13</sup> As a default, courts assume competence of both government and defense counsel at the trial and appellate level until counsel give them cause to believe otherwise. *United States v. Gaskins*, 69 M.J. 569, 574 (A. Ct. Crim. App. 2010). With time and research, it is expected that an attorney should be able to develop the skill necessary to represent his client. If the attorney believes he or she is unable to reach the requisite standard, "he must (1) advise his client; (2) advise his superior, if he has one; (3) associate with another lawyer who is competent; or (4) attempt to withdraw from the case." While representation may continue with the informed consent of his client or because remaining on the case is required because a superior or a court decided he or she was competent to continue representation, the client has the right to challenge the effectiveness of his or her representation on further review and appeal. *United States v. Thomas*, 33 M.J. 768, 772 (N.M.C.M.R. 1991). In appellate practice, this is typically going to present itself in capital cases, where an advanced skill-set is required. *See, e.g., United States v. Gray*, 37 M.J. 730, 750 (A.C.M.R. 1992).

<sup>14</sup> D. Franklin Arey, III, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. APP. PRAC. & PROCESS 27, 29 (quoting RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT § 1.1, at 3 (Nat'l Inst. for Trial Advoc. rev. ed. 1996)). Judge Silberman from the District of Columbia Circuit Court of Appeals likewise wrote that "[p]ersuading juries takes different forensic and analytical skills than persuading appellate judges. . . . [T]he skills needed for effective appellate advocacy are not always found—indeed, perhaps, are rarely found—in good trial lawyers." Laurence H. Silberman, *Plain Talk on Appellate Advocacy*, 20 LITIG. 3, 3 (1994).

<sup>15</sup> ALDISERT, *supra* note 14, at 3, quoted in Arey, *supra* note 14, at 29.

treated below in the discussion of Rule 3.1. Even more fundamental is the issue of whether to raise any issues at all.<sup>16</sup> For example, a case may present only one issue: a non-frivolous claim for ineffective assistance by the trial defense counsel. The appellate defense counsel must understand that raising the issue will partly free the trial defense counsel from his duty of confidentiality, so that he may rebut the claim. He might, for example, have to reveal the client's admissions of adultery (which will destroy the client's marriage) in order to meet that claim. The appellate counsel must decide whether the risks outweigh the benefits of raising the issue.<sup>17</sup>

Preparation and training are vital to any lawyer's competence. They are carried out differently for appellate than for trial attorneys. In preparation, the importance of knowing what to expect from a particular judge is just as important, if not more so, on appeal as at trial. In preparing to appear before a given judge for the first time, a trial counsel is typically limited to attending the judge's gateway session, asking other trial attorneys about the judge, and perhaps sitting in on other cases that judge is trying. An appellate counsel can electronically search through the judge's prior opinions, looking for similar issues and circumstances. Additionally, many appellate courts, to include Navy-Marine Corps Court of Criminal Appeals (NMCCA),<sup>18</sup> Court of Appeals for the Armed Forces (CAAF),<sup>19</sup> and the U.S. Supreme Court,<sup>20</sup> now offer their oral arguments in downloadable audio files and verbatim transcripts, which are not so readily available at the trial court level.<sup>21</sup> These can be useful tools for learning the ways of a given court or judge. An appellate counsel who knows the court as well as the issues in his case has a better chance of drafting a successful argument. He also has a better chance of anticipating, and thus giving good answers to, the questions the court will raise at oral argument.

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<sup>16</sup> *See United States v. Tyler*, 34 M.J. 293, 295 (C.M.A. 1992) (raising, but not resolving, issue of whether appellate defense counsel rendered ineffective assistance by failing to file a brief with the Court of Military Review), *aff'd on remand*, 36 M.J. 641 (A.C.M.R. 1992), *rev. denied*, 39 M.J. 414 (C.M.A. 1994).

<sup>17</sup> This specific issue is treated below in the discussion of Rule 1.6 (Confidentiality of Information).

<sup>18</sup> *Oral Arguments*, U.S. NAVY JUDGE ADVOCATE GEN.'S CORPS, [http://www.jag.navy.mil/courts/oral\\_arguments.htm](http://www.jag.navy.mil/courts/oral_arguments.htm) (last visited Jan. 5, 2012).

<sup>19</sup> *Scheduled Hearings*, U.S. CT. OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/Calendar.htm> (last visited Jan. 5, 2012).

<sup>20</sup> *Argument Audio*, SUP. CT. OF THE U.S., [http://www.supremecourt.gov/oral\\_arguments/argument\\_audio.aspx](http://www.supremecourt.gov/oral_arguments/argument_audio.aspx) (last visited Jan. 5, 2012); *Argument Transcripts*, SUP. CT. OF THE U.S., [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts.aspx](http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx) (last visited Jan. 5, 2012).

<sup>21</sup> Many trial courts actually forbid the audio or visual recording of their proceedings. *See* ACCA. R. PRAC. & PROC. R. 6.3 ("Photographs, video and sound recordings (except those by the detailed court reporter or otherwise authorized by the military judge), and radio and television broadcasts shall not be made in or from the courtroom during any trial proceedings.").

Training for appellate practice is different from, but just as important as, training at the trial level.<sup>22</sup> At both levels, leaders need to be involved in prioritizing training and making it relevant.<sup>23</sup> Both levels involve public speaking, but a competent appellate advocate must be ready to respond to the rapid-fire questions and hypotheticals of judges, while being likewise prepared to fill his allotted time with a presentation of his case if the expected barrage of judicial inquisition never develops.<sup>24</sup> His training should reflect this. Just as trial counsel should observe trials whenever possible, appellate counsel should observe oral arguments and learn from both the good and the bad.<sup>25</sup>

<sup>22</sup> Although law students spend much of their time reading appellate cases, appellate judges have complained that law school does not prepare new attorneys well for appellate practice, so additional training is needed. See Amy D. Ronner, *Some In-house Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 866 (1996).

<sup>23</sup> See Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35 (discussing effective training of trial advocates). The U.S. Army Defense Appellate Division Standard Operating Procedure (DAD SOP) requires initial and periodic training, and the appointment of a training officer to make sure it happens, as well as "moot argument sessions" to prepare for oral arguments. U.S. ARMY LEGAL SERVS. AGENCY, DEFENSE APPELLATE DIVISION STANDARD OPERATING PROCEDURES 10, 28–29 (2008) [hereinafter DAD SOP].

<sup>24</sup> Unlike in trial court where counsel must focus on presenting witnesses and other evidence, the case in appellate court centers around written briefs. While there is oral argument, it is strictly limited in time, e.g., twenty minutes per side for the CAAF, with the party presenting first able to reserve time for rebuttal. While trial judges let counsel set the agenda for their own arguments, appellate judges often control the flow of information by asking back-to-back questions, with one judge following another in quick succession, so that counsel's prepared speech may never be given. One similarity between training or developing the competence of trial and appellate counsel is the need for a professional reading plan. Supervisors can make this happen by identifying relevant articles for their attorneys to read and setting aside time to discuss the contents. One good choice is Sylvia Walblot, *Twenty Tips from a Battered and Bruised Oral Advocate Veteran*, 37 LITIG., Winter 2011, at 4.

<sup>25</sup> Military appellate counsel are assigned to the greater Washington, D.C., area and as such have a plethora of appellate courts, military and otherwise, to observe. These include the U.S. Supreme Court, 1 First Street, NE, Wash., D.C. 20543, <http://www.supremecourt.gov/> (last visited Feb. 7, 2012); U.S. Court of Appeals for the District of Columbia Circuit, 333 Constitution Ave, NW, Wash., D.C. 20001, <http://www.cadc.uscourts.gov/internet/home.nsf/content/home+page> (last visited Feb. 7, 2012); D.C. Court of Appeals, Historic Courthouse, 430 E Street, NW, Wash., D.C. 20001, <http://www.dcappeals.gov/dccourts/appeals/index.jsp> (last visited Feb. 7, 2012); U.S. Court of Appeals for the Armed Forces, 450 E. Street N.W., Wash., D.C. 20442, <http://www.armfor.uscourts.gov/index.html> (last visited Feb. 7, 2012); ACCA 9275 Gunston Road, Fort Belvoir, Va. 22060-5546, <https://www.jagcnet.army.mil/8525749F007224E4> (last visited Feb. 7, 2012); Navy-Marine Corps Court of Criminal Appeals (NMCCA), 1254 Charles Morris St., SE Ste. 320, Wash. Navy Yard, D.C. 20374-5124, <http://www.jag.navy.mil/nmcca.htm> (last visited Feb. 7, 2012); Air Force Court of Criminal Appeals, 112 Luke Avenue, Ste. 205, Bolling Air Force Base, D.C. 20032-8000, <http://afcca.law.af.mil> (last visited Feb. 7, 2012); CG Court of Criminal Appeals, 4200 Wilson Blvd., Ste. 790, Arlington, Va. 20598-7160, [http://www.uscg.mil/legal/cca/Court\\_of\\_Criminal\\_Appeals.asp](http://www.uscg.mil/legal/cca/Court_of_Criminal_Appeals.asp) (last visited Feb. 7, 2012).

Minimum oral advocacy competence for appellate advocates goes beyond the basic tenets of public speaking, such as making eye contact, properly enunciating one's words, and speaking loudly enough to be heard. Competent oral argument is less about argument than about listening closely and artfully answering the questions asked. The worst approach is to avoid engaging the judges. The presenting attorney may think other issues are more important than the ones the judges are asking about, but he has already made those points in his brief, and need not repeat them.<sup>26</sup> Nothing undermines the court's trust in an advocate more rapidly than an evasive answer.<sup>27</sup>

While learning to handle oral arguments, appellate counsel must remember that "[n]inety-five per cent of appellate cases are won or lost on the basis of written briefs."<sup>28</sup> Competent brief writers understand that a brief serves the dual mission of informing and persuading the court.<sup>29</sup> Typically, no witnesses or new evidence is presented in an appellate hearing. Therefore, briefs must be prepared using the written record alone.<sup>30</sup> If the brief is to inform and persuade, it must keep the interest of the reader. As one judge wrote, "[i]t is not unconstitutional to be interesting in reporting what took place."<sup>31</sup> Yet the drafter must ensure legal and factual accuracy, with truth prevailing

<sup>26</sup> Arey, *supra* note 14, at 38–39. Some counsel take this to extremes, not only avoiding the questions asked but instead reading aloud verbatim extracts from their briefs to cover the points they want to cover. Judge Silberman finds this practice so "annoying" and "ineffective" that he recommends counsel bring no notes at all to the podium. Silberman, *supra* note 14, at 59–60.

<sup>27</sup> Silberman, *supra* note 14, at 60.

<sup>28</sup> See Aldisert, *supra* note 14, at 456.

<sup>29</sup> Arey, *supra* note 14, at 37.

<sup>30</sup> Even in cases where the appellate court believes the lower court record to be inaccurate, such as it did in *United States v. Peterson*, No. 200900688, 2010 WL 3637581, at \*3 (N-M. Ct. Crim. App. Sept. 21, 2010) (Maksym, Senior Judge, concurring). The verbatim transcript came to the court with what Judge Maksym suspected "represent[ed] a stenographer's error" based on the "incongruous" exchange between the defense counsel and the witness.

DC: Were you on drugs that night?

W: Yes.

DC: But [you] have done drugs?

W: Yes.

Judge Maksym noted that there was no further effort to clarify the witness' testimony, and suspected that the witness' transcribed error represented a "stenographer's error." However, because it was an "authenticated record . . . the court may not speculate beyond the four corners of the same." In rare cases the appellate courts will direct a lower court to perform a fact-finding function, take evidence, or make a recommendation to the appellate court in order to answer a question or questions the higher court needs resolved in order to decide a case. In the military, these are referred to as *DuBay* hearings after *United States v. DuBay*, 37 C.M.R. 411, 412 (C.M.A. 1967). See C.A.A.F. R. 27.

<sup>31</sup> See Aldisert, *supra* note 14, at 472.

over poetic license.<sup>32</sup> Brief writers need to support their factual claims with citations to specific volumes, pages, and preferably line numbers as well.<sup>33</sup> This will not only assist the readers, but increase their confidence in what the drafter asserts. It is better to over-cite than to under-cite to the record.<sup>34</sup>

Concise writing is critical for appellate advocates. As one federal court noted, “[a]ttorneys who cannot discipline themselves to write concisely are not effective advocates, and they do a disservice not only to the courts but also to their clients.”<sup>35</sup> Appellate courts limit the number of pages in briefs submitted to them, but that does not mean the drafter should strive to fill that many,<sup>36</sup> let alone submit more without permission.<sup>37</sup> Appellate writing is measured in quality, not quantity.<sup>38</sup>

No one sits down at the word processor and writes a concise, persuasive brief on the first try. While it is tempting to complete the last sentence in the last section and declare, *Laus tibi sit Christe, quoniam liber explicit iste*,<sup>39</sup> the skillful brief-writer knows his task is far from complete when that last sentence is written. The work of cutting, revising, and rearranging can be as difficult and time-consuming as the work of completing the first draft, yet it is vital. “The time to begin writing . . . is just when you think you have finished it to your satisfaction.”<sup>40</sup> Arguments that simply do not gel must be ruthlessly cut, no matter how much work went into them. The writer must remember that his purpose is to persuade the court, not show them how hard he worked.

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<sup>32</sup> Harriet E. Cummings, *Appellate Misconduct*, 14 NEV. LAW., Nov. 2006, at 42, 43.

<sup>33</sup> Arey, *supra* note 14, at 37.

<sup>34</sup> *Id.* at 44.

<sup>35</sup> ELLIGET & SCHEB, *supra* note 7, § 2.2.

<sup>36</sup> Appellate courts limit the length of briefs that parties can submit on appeal. Thus, Rule 24 of the CAAF *Rules of Practice and Procedure* limit parties to thirty pages for briefs and answers, and an additional fifteen for replies, though the court can waive its own rule and allow more.

<sup>37</sup> ELLIGET & SCHEB, *supra* note 7, § 2.5 (citing for example, *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145 (9th Cir 1997); *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 640 (2d Cir. 1995)). In *Weeki Wachi Springs, LLC, v. Sw. Fla. Water Mgmt.*, 900 So. 2d 594, 595 (Fla. App. 5 Dist. 2004), an appellate court imposed monetary sanctions against counsel who manipulated font sizes and spacing rules to squeeze an excessively long brief into that court’s fifty-page limit. The military appellate courts have recently acquired contempt powers under the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 848, 124 Stat. 4137. It remains to be seen whether monetary sanctions (up to \$1000) and jail (up to thirty days) await those who willfully flout these courts’ rules.

<sup>38</sup> Judge Joseph A. Del Sole (Ret.), *What Makes a Successful Appellate Advocate*, 10 LAWYERS J., Dec. 2008, at 5.

<sup>39</sup> “Thanks be to Christ, the book is finished.” (A common inscription by medieval monks at the end of hand-copied manuscripts.)

<sup>40</sup> MARK TWAIN, *More Maxims of Mark*, in 2 COLLECTED TALES, SKETCHES, SPEECHES & ESSAYS 942 (Louis J. Budd ed., 1992) (Mr. Twain was referring to articles, not appellate briefs, but the maxim still applies.).

Appellate advocacy has been well described as “building a case out of a record.”<sup>41</sup> Yet competent appellate counsel must also spot, assert, and substantiate issues that arise only on appeal. One such issue is post-trial delay.<sup>42</sup> Competent appellate defense counsel must not only recognize the problem of dilatory post-trial processing, but preserve and document it so their clients can get relief. Thus, in *United States v. Jones*, the appellant claimed to have been denied employment because he lacked a DD Form 214 discharge certificate, which he lacked because of the government’s post-trial delays (nine months to convening authority action, plus another year to service court action). Appellate counsel presented affidavits from a potential employer, showing that Jones would have been hired if he had been issued the certificate earlier. The Court of Appeals for the Armed Forces set aside Jones’ bad conduct discharge.<sup>43</sup> In *United States v. Bush*, the government’s post-trial delays were much longer (ten months from trial to convening authority actions, and *six years* more until service court action). Bush claimed the same kind of prejudice for the same reason as Jones, but his appellate counsel provided only Bush’s statement as evidence, with no supporting affidavits from potential employers. The CAAF denied the relief.<sup>44</sup> In *United States v. Gunderman*, the appellant claimed ineffective advice on his post-trial rights by his trial defense counsel. Appellate defense counsel submitted only an unsigned statement by the client to confirm this. The Army Court of Criminal Appeals refused even to consider the statement as evidence.<sup>45</sup> Such is the difference substantiation can make.

These published opinions do not reveal whether the fault lay with the appellants, their appellate counsel, or both. Bush’s counsel may well have asked him for an employer’s statement. Gunderman’s counsel averred that she was

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<sup>42</sup> When processing a case post-trial, the government has 120 days from trial to convening authority action and then an additional thirty days to forward the record of trial to the service court before creating a rebuttable presumption that the government has violated the appellant’s right to speedy post-trial review, so that he may be entitled to relief. *See United States v. Moreno*, 63 M.J. 129, 135–36 & 141–43 (C.A.A.F. 2006); *see also* Major Andrew D. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4 (arguing that the CAAF does not and should not actually grant relief, even when delays exceed these limits, in the absence of other prejudice); *United States v. Scott*, 2011 WL 6778538, at \*1–2 (A. Ct. Crim. App. Dec. 23, 2011) (granting relief for excessive post-trial delay in the absence of prejudice).

<sup>43</sup> *United States v. Jones*, 61 M.J. 80, 84–86 (C.A.A.F. 2005).

<sup>44</sup> *United States v. Bush*, 68 M.J. 96, 97, 104 (C.A.A.F. 2009). *See also United States v. Galloway* 2010 WL 3527599 at \*3–4 (A. Ct. Crim. App. Apr. 15, 2010) (refusing relief on ineffective assistance claim, when client’s affidavit listed potential character witnesses who might have provided statements on clemency, but was not corroborated by any affidavits from these witnesses stating that they would have done so); *United States v. Martin*, 2010 WL 3927493, at \*7 (A. Ct. Crim. App. Sept. 28, 2010) (refusing relief on ineffective assistance claim, when appellant claimed he had provided defense counsel with a long list of character witnesses who were never called, but no specific information or corroboration as to what those witnesses would have said).

<sup>45</sup> *United States v. Gunderman*, 67 M.J. 683, 688 (A. Ct. Crim. App. 2009).

unable to acquire a signed statement from her client during a ten-day delay granted by the appellate court, six months after the issue was raised.<sup>46</sup> She may have been unable to locate the client by then, a not uncommon situation in appellate practice. What these cases illustrate is that, when an appellate attorney learns that he will need substantiating statements from a client, it is imperative to obtain those statements early. The best policy is to immediately begin work to get the statements, even if the client is in confinement. Dealing with a distant confinement facility, often in a different time zone, is frequently a time-consuming process that involves considerable effort to get a document signed by a client. Even this can be easier than getting the same document signed by a client who has been released from confinement, and may prove impossible to contact.

### Rule 1.2, Scope of Representation<sup>47</sup>

*A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which these decisions are to be pursued.*<sup>48</sup>

The objective of representation for the appellate attorney is relatively straightforward: get the lower court's

<sup>46</sup> *Id.* at 686.

<sup>47</sup> AR 27-26, *supra* note 10, r. 1.2(a), (c)–(e) (Scope of Representation).

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d), (e), and (f), and shall consult with the client as to the means by which these decisions are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, and to the extent applicable in administrative hearings, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to choice of counsel as provided by law, a plea to be entered, selection of trial forum, whether to enter into a pretrial agreement, and whether the client will testify.

(c) A lawyer may limit the objectives of the representation if the client consents after consultation, or as required by law and communicated to the client.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by these Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

*Id.*

<sup>48</sup> *Id.* r. 1.2(a).

decision overturned. The best approach to make that happen is not always clear.<sup>49</sup> The general rule empowers the lawyer to make the technical and tactical decisions, such as which issues to raise on appeal, while deferring to the client on the outcome-oriented decisions, such as whether to waive the right to an appeal, whether to incur any expenses as part of the appeal, and whether to consider the effects of the appeal on a third party.<sup>50</sup> How to proceed with an appeal is the attorney's decision. Whether to appeal at all is the client's.<sup>51</sup>

Sometimes the client wants the attorney to engage in unethical behavior, or wants to use the attorney in a fraudulent manner. Appellate lawyers, like trial lawyers, cannot assist in such behavior.<sup>52</sup> While a simple "No" may end the discussion, it may also end a constructive relationship. Therefore the rules allow the lawyer to explain why the client's proposed course of action is improper.<sup>53</sup> Such an explanation may promote a continued working relationship.<sup>54</sup> A client who wants his counsel to pursue a frivolous point and is rebuffed may suspect that his counsel does not value his opinion or is too lazy to do what he asks. A clearly identifiable rule allows the attorney to decline with greater perceived justification. This is especially relevant to military appellate practice. The client cannot readily stop by the office of his appellate counsel as he could with his trial defense counsel, or build the same rapport. Thus, the appellate counsel has a greater need to explain his action or inaction, with citations to prevailing standards.<sup>55</sup>

Scope of representation concerns can arise in cases of dual representation. This situation is common in the military when the Defense Appellate Division (DAD) appoints a

<sup>49</sup> Donald R. Lundberg, *How Unappealing: Ethics Issues in Appointed Appellate Representation*, 52 RES GESTAE 37 (2008).

<sup>50</sup> AR 27-26, *supra* note 10, r. 1.2 cmt.

<sup>51</sup> Hunt & Magnuson, *supra* note 1, at 669. Most court-martial convictions will initiate the military's mandatory appeal to the service court, as detailed in Article 66, Uniform Code of Military Justice (UCMJ), but appeals to CAAF and beyond are discretionary. Even in cases triggering mandatory appeal to the service court, the accused can still waive their right to such a review in accordance with Article 61, UCMJ.

<sup>52</sup> *Id.* at 670.

<sup>53</sup> The appellate courts of Texas explicitly recognized this when implementing their new, separate Standards for Appellate Conduct. These standards were designed not only "to educate the Bar about the kind of conduct expected and preferred by the appellate courts," but to "give practitioners a valuable tool to use with clients who demand unprofessional conduct." Edward L. Wilkinson, *If One is Good, Two Must Be Better: A Comparison of the Texas Standards for Appellate Conduct and the Texas Disciplinary Rules of Professional Conduct*, 41 ST. MARY'S L.J. 645, 645–46 (2010)

<sup>54</sup> Clients who are pursuing a "win at all cost" policy are less likely to be placated when told that the attorney has rules to follow, but most others will understand if the attorney takes time to explain why he is refusing to accede to the client's wishes.

<sup>55</sup> If the specific issue is the client's desire to raise frivolous or counterproductive issues, military appellate counsel ethically can (and, if the client insists, must) let the client raise them in *Grosteffon* matters, discussed *infra* under Rule 3.1, Meritorious Claims and Contentions.

military attorney and the appellant also retains civilian counsel. Counsel will have to decide several questions between them: Who is responsible for what? Will both counsel sign the brief? Will each prepare a portion and just sign what they worked on? In the end, will just one counsel sign the brief?<sup>56</sup> Not only should these questions be discussed, but the answers should be documented from the outset, so as to avoid a situation where military counsel is expected to sign a brief he had little input in drafting and only a cursory opportunity to review. Counsel should avoid setting themselves up to sign a document that raises professional responsibility concerns.<sup>57</sup>

Military counsel must remember that, if their scope of representation has not been limited after consultation with the client, they are responsible for the entire appeal, even if they expect civilian counsel to take the lead. They must be prepared to timely submit at least a basic appeal that raises the needed issues if their co-counsel fail to meet the court's filing deadline or submit something deficient on its face.<sup>58</sup>

### Rule 1.3, Diligence, and Rule 1.4, Communication<sup>59</sup>

<sup>56</sup> Under the DAD SOP, the default position is that the civilian counsel is the lead counsel, with “[p]rimary responsibility for communicating with the client, selecting issues to brief, brief writing, and argument preparation.” Several supporting roles (such as proofreading civilian-prepared pleadings for compliance with court rules, ensuring that civilian-prepared pleadings are filed on time, and resolving client ID card issues) are listed as primary functions of assigned DAD counsel. DAD SOP, *supra* note 23, at 31 (2008).

<sup>57</sup> See, e.g., *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (finding that a partner who signed a memorandum that he did not draft, which made an improper accusation about the court, should be sanctioned despite his apology and the fact that the brief was written by someone else) (cited and discussed in Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 336–38 (2004)). See also *United States v. May*, 47 M.J. 478, 482 (C.M.A. 1998). In *May*, civilian appellate defense counsel failed to meet the filing deadline, and the court found ineffective assistance by the military appellate defense counsel for not filing anything in his place. In such cases, the court stated that four options were available: (1) a *pro se* pleading filed by the appellant, with the assistance of military appellate counsel unless appellant rejected such assistance; and a pleading filed by military appellate counsel explaining why a *pro se* pleading was being filed; (2) a *pro se* pleading filed by the appellant without assistance of military counsel; and a pleading filed by military appellate counsel explaining why a *pro se* pleading was being filed; (3) a pleading filed by military appellate counsel with the consent of the appellant; or (4) a pleading filed by military appellate counsel over appellant's objection, reciting appellant's objection to the pleading and stating whether appellant desired military appellate counsel to continue his representation.

<sup>58</sup> This is particularly true in light of *United States v. Rodriguez*, which established a strict sixty-day deadline for CAAF petitions. 67 M.J. 110, 116 (C.A.A.F. 2009). The court held that the statutory sixty-day period for filing petitions for review was jurisdictional, so that they did not have discretion to provide relief from it (though they had been doing so for decades). The CAAF seems unlikely to reverse this relatively new inflexible practice. *Rittenhouse v. United States*, 70 M.J. 266 (C.A.A.F. 2011) (denying petition for writ of error *coram nobis* on this issue).

<sup>59</sup> A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation. AR 27-26, *supra* note 10, r. 1.3; (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable

*A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.*<sup>60</sup>

What do appellate counsel do when they cannot even find their clients? Military appellate counsel face this conundrum far more often than their civilian counterparts, owing to the military's liberal automatic appeal standard.<sup>61</sup> A client who has been released from confinement is on excess leave<sup>62</sup>—somewhere—maybe not at the address he listed on his release paperwork.<sup>63</sup> Appellate counsel have an obligation to attempt to notify their clients of the status of their cases in order to comply with Rule 1.3 (Diligence). But how far does that obligation extend?

Although the rules do not provide great clarity, they seem to require an appellate counsel to do whatever he possibly can—from his desk.<sup>64</sup> This means calling the client

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requests for information; (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation. *Id.* r. 1.4(a), (b) (Communication).

<sup>60</sup> *Id.* r. 1.4(a).

<sup>61</sup> Article 66, UCMJ provides that

[t]he Judge Advocate General shall refer to a court of Criminal Appeals the record in each case of trial by court-martial—(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and (2) except in the case of extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

*Id.* If the client cannot be located and later seeks appellate relief, claiming ineffective assistance of appellate counsel who never spoke with him, his complaint will be tested for prejudice. *Fisher v. Commander, Army Reg'l Confinement Facility*, 56 M.J. 691, 695 (N-M. Ct. Crim. App. 2001) (applying prejudice test to appellate counsel). The CAAF has issued similar rulings for trial defense counsel who act for a client without first establishing an attorney-client relationship. *United States v. Howard*, 47 M.J. 104, 106 (C.A.A.F. 1997); *United States v. Miller*, 45 M.J. 149, 151 (C.A.A.F. 1996) (both holding that trial defense counsel improperly represented clients' interests post-trial without establishing attorney-client relationships, but holding any error harmless absent a showing of prejudice).

<sup>62</sup> Excess leave in this circumstance is typically involuntary and authorized at the direction of the general court-martial convening authority when a Soldier is sentenced to a punitive discharge, his confinement is already completed, and he is awaiting completion of appellate review. When in this status, the Soldier does not get paid and is released from any responsibilities at his previously assigned unit; however, the Soldier still retains his military ID card and is entitled to military health care, as well as access to the commissary and similar benefits. See U.S. DEP'T OF ARMY, REG. 600-8-10, LEAVES AND PASSES (15 Feb. 2006).

<sup>63</sup> “Adequate communications . . . are fundamental to effective representation” and should be relatively straightforward when the client is confined, see *United States v. Suarez*, No. 97-00646, 1998 WL 552648, at \*1 n.3 (N-M. Ct. Crim. App. Aug. 13, 1998), but they do not always happen. Since it only gets more difficult once the client is released, it is best to initiate the communication as soon as possible.

<sup>64</sup> In *United States v. Lang*, No. NMCM 93-01561, 1995 WL 934977, at \*2 (N-M. Ct. Crim. App. May 5, 1995), the appellant attempted to show

and leaving messages at the last known phone number and sending letters to the addresses listed on the post-trial and appellate rights form (PTAR) and release paperwork. It likely also means sending an email to the address listed on the PTAR and doing a Westlaw or Lexis search for the individual. It does not mean getting on a plane and flying to the client's last known address to knock on doors and hang "missing posters" on utility poles. While the military courts have not addressed this issue, several civilian courts have. "The reasonableness of an attorney's efforts to locate his or her client is a fact sensitive determination. What constitutes a reasonable effort to find the client depends on the circumstances of each case, including the extent to which the lawyer knows or has access to information which might reveal the client's current whereabouts."<sup>65</sup> In some cases, a letter to the client's last known address may constitute reasonable diligence.<sup>66</sup> In others, searching publicly available databases or speaking with known "contact persons" may be required.<sup>67</sup> Counsel would do well to document their efforts to locate a missing client.<sup>68</sup>

The Comment to Rule 1.3 states: "Unless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law, a lawyer should carry through to

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prejudice from his inordinately long post-trial process (five-and-a-half years for a thirty-eight-page record), claiming that the delay made him unable to confer with his substituted trial defense counsel. The court found no harm when his substituted trial defense counsel failed to reach him by registered mail, saying the appellant had the duty to keep in touch with his counsel. The court blamed the appellant, not the delay, and granted no relief. Presumably the court would expect nothing more from appellate counsel—registered mail from the U.S. Postal Service is sufficient.

<sup>65</sup> *Garrett v. Matisa*, 927 A.2d 177, 180–81 (N.J. Super. Ch. 2007) (citing Arizona Opinion No. 2001-08 (Sept. 2001) (internal quotations omitted)).

<sup>66</sup> *W.J.E. v. Dept. of Children & Family Servs.*, 731 So.2d 850 (Fla. 3d Dist. Ct. App. 1999) (counsel could have discharged his ethical duty to consult with hard-to-find client by sending a letter to his last known address); *Benefield v. City of New York*, 824 N.Y.S.2d 889, 895 (N.Y. Sup. 2006) (holding a letter "to an address where the client obviously no longer resides" to be an inadequate effort absent further evidence).

<sup>67</sup> *Garrett*, 927 A.2d at 181. *Garrett* contrasted two state bar ethics opinions. In one, from North Carolina, the client moved without warning, he left no forwarding address, and his telephone was disconnected. The attorney queried the client's employer, doctor, and auto insurance company, and searched property records. These efforts were held adequate. In the other, from Arizona, the client advised the attorney that he was being evicted from his apartment. The attorney's letter to that address (which was returned) and contact with the client's doctor were held inadequate; the state bar authorities held that he should have tried other friends and acquaintances and "readily available public information sources, such as telephone directories, and other available leads." See also *Monez v. Sec'y, Dep't of Health & Human Servs.*, 2006 WL 5612781, at \*2 (June 13, 2006) (at status conference before special master, "it was decided that petitioner's counsel shall attempt to locate his client using . . . an electronic search for his client's address and/or phone number, utilizing the Internet (e.g., Google, Yahoo!) or other electronic means (e.g., LexisNexis, Westlaw)," and also seek client's forwarding address from the U.S. Post Office).

<sup>68</sup> See *In re Salomon*, 402 Fed. Appx. 546, 553 (2d Cir. 2010) (refusing to accept disciplined attorney's claim that he could not locate his client, when the attorney provided no documentation of his efforts); *Benefield v. City of New York*, 824 N.Y.S.2d 889, 895 (N.Y. Sup. 2006); see also *Benefield*, 824 N.Y.S.2d at 895.

conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter, the relationship terminates when the matter has been resolved."<sup>69</sup> This is important in appeals above the service court level, which are not automatic. If an attorney cannot reach his client after an unfavorable result at the service court, the last communication on the issue of appeals determines the attorney's next action. If the client was left with the impression that his attorney would keep filing appeals as long as possible, an appeal to CAAF is appropriate. If counsel left his client with the understanding that the appeals to higher courts were separate actions, so that they would only decide whether to appeal after seeing what the service court did, then the attorney should refrain from filing further pleadings without further instructions from the client before the case is final under Article 71 of the of the UCMJ. It is incumbent on the attorney to make that distinction so the client knows at what stage their case is at and how it will proceed.<sup>70</sup> Appellate counsel may not initiate, and the CAAF will not consider, an appeal filed by counsel without permission from the client.<sup>71</sup>

A related issue is whether to inform the court if the appellant is incommunicado. A servicemember pending a punitive discharge may be required to take excess leave,<sup>72</sup> and, if so, has a duty to provide updated contact information to his commander.<sup>73</sup> An attorney should not volunteer that his client has violated this duty. However, the court may properly insist on knowing whether client and counsel have spoken, and if it does the attorney must tell. Thus, in one case where appellate counsel kept asking for additional time to respond, the Air Force Court of Criminal Appeals ordered counsel to state "whether counsel coordinated with the client before the request was made." When counsel objected, the court held that this information was not privileged, as it did

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<sup>69</sup> AR 27-26, *supra* note 10, r. 1.3 cmt.

<sup>70</sup> *Id.* There may be no harm in trying to make a discretionary appeal, given that the potential appellant does not pay counsel and maintains some military benefits, such as health care and commissary access, while the appeal is pending. Sometimes, however, the clients want the process to end so they can move on with their lives, especially when they need their DD Forms 214 to obtain employment.

<sup>71</sup> *United States v. Smith*, 46 C.M.R. 247, 248 (C.M.A. 1973) (client convicted in absentia and never spoke with trial or appellate defense counsel; counsel could not appeal for him); Eugene R. Fidell, *Guide to the Rules of Practice and Procedure of the United States Court of Military Appeals*, 131 MIL. L. REV. 169, 251 (1991). *But see* 10 U.S.C. § 870(c) (2006) (defense counsel will represent the accused before the CAAF when the government is represented there; thus, even an absentee client will be represented in the event of a government appeal).

<sup>72</sup> 10 U.S.C. § 876a (2006).

<sup>73</sup> *United States v. Gilbreath*, 58 M.J. 661, 664 (A.F. Ct. Crim. App. 2003); U.S. Dep't of Def., DD Form 2717, Voluntary/Involuntary Appellate Leave Action 3 (Nov. 199). Form 2717, which the departing prisoner must sign, includes the statement "I understand that I must provide information as to any change of address or telephone number without delay. . ." but does not give any authority for this proposition (besides a general cite to Articles 59 through 76A of the UCMJ, which do not appear to support the proposition).

not intrude into the substance of the attorney-client conversations.<sup>74</sup>

The duty to communicate with the client does not end when counsel's case is complete and submitted to the Service court. It is vital to notify clients whenever possible about the results of their appeals, and to let them know if CAAF has granted review. Clients have an obvious desire to find out if the courts have granted them relief. In the rare case where the court sets aside the findings and sentence, the appellant may want to return to active service. In the more common scenario, where the court has approved a discharge and CAAF has not granted review, the client's time in service is about to end. If he is not in confinement, his health, commissary, and other benefits will disappear, but he will also receive his DD Form 214 discharge paperwork, which may make finding employment much easier, a distinctive consideration for military appellants. Finally, prompt notification is important in case the client decides to retain civilian counsel for further appeals or petitions.

### Rule 1.6, Confidentiality of Information<sup>75</sup>

*A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to respond to*

<sup>74</sup> *United States v. Greska*, 65 M.J. 835, 839–40 (A.F. Ct. Crim. App. 2007), *rev. denied*, 67 M.J. 12 (C.A.A.F. 2008). The court described this information as “incident to the representation” and as such not privileged; and pointed out that court-martial procedure frequently requires inquiries more intrusive than this by a military judge (e.g., “Have you consulted with your defense counsel about your decision to plead guilty, and had the full benefit of his advice?”). *Id.* at 840–42.

<sup>75</sup> AR 27-26, *supra* note 10, r. 1.6 (Confidentiality).

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or significant impairment of national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(d) An Army lawyer may reveal such information when required or authorized to do so by law.

*Id.*

*allegations in any proceeding concerning the lawyer's representation of the client.*<sup>76</sup> [A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.<sup>77</sup>

The obvious restrictions prevent appellate defense counsel from revealing client confidences. Government Appellate Division (GAD) counsel face an unusual appellate twist: sometimes they must contact the former trial defense counsel for a response to a former client's allegation of ineffective assistance of counsel (IAC).<sup>78</sup> Rule 1.6 explicitly authorizes the former trial defense counsel to respond, and to reveal confidential communications in doing so. However, the confidences provided should be narrowly tailored to provide the minimum information necessary to rebut the allegations. Defense counsel accused of IAC may be tempted to write their response affidavits as “tell-all” exposés, but the urge must be resisted.<sup>79</sup> Likewise, a GAD attorney may not encourage another lawyer to violate his ethical obligation to “hold inviolate confidential information of the client.”<sup>80</sup> Similarly, a GAD attorney cannot advise the trial defense counsel not to cooperate with the appellate defense counsel.<sup>81</sup>

Defense Appellate Division counsel can help ensure a limited release of information by narrowly tailoring their pleadings in IAC cases. By avoiding “[a] broad-based attack on trial defense counsel,” DAD counsel prevent an equally broad response, “which may disclose information far more harmful to the accused than [justified by] the results he may anticipate by challenging the adequacy of his defense.”<sup>82</sup>

<sup>76</sup> *Id.* r. 1.6(c).

<sup>77</sup> *Id.* r. 1.6 cmt.

<sup>78</sup> This could happen for any number of reasons, such as appellant claiming his post-trial rights were not explained to him, as in *United States v. Fordyce*, 69 M.J. 501 (A. Ct. Crim. App. 2010) or *United States v. Hancock*, 38 M.J. 672 (A.F.C.M.R. 1993), where the appellant claimed his attorney did not prepare him or his case for trial. In both cases, the appellate court gave the trial attorney a chance to respond with an affidavit.

<sup>79</sup> AR 27-26, *supra* note 10, r. 1.6. *See also* *United States v. Dupas*, 14 M.J. 28, 30 (C.M.A. 1982) (“The [trial defense] attorney is not free to volunteer information that does not concern the issue of ineffective assistance of counsel.”). In fact, the accused counsel is not compelled to justify his actions or reveal anything “until a court of competent jurisdiction reviews an allegation of ineffectiveness, the government response, examines the record, and determines that the allegation and the record contain evidence which, if unrebutted, would overcome the presumption of competence.” *United States v. Lewis*, 42 M.J. 1, 6 (C.A.A.F. 1995). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (holding that “it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise [in response to an IAC complaint on appeal], will be justifiable”).

<sup>80</sup> AR 27-26, *supra* note 10, r. 1.6 cmt.

<sup>81</sup> *Dupas*, 14 M.J. at 32.

<sup>82</sup> *Id.* at 31–33. The comments in this case indicate the appellate court expects trial and appellate defense counsel to work together, with trial defense counsel allowing access to files and an overall cooperation when answering questions. The primary exception to this is the retention of any

## Rules 1.7, 1.8 and 1.9, Conflict of Interest<sup>83</sup>

*Loyalty is an essential element in the lawyer's relationship to a client.*<sup>84</sup>

Positional conflict, “where a lawyer takes inconsistent legal positions in different cases on behalf of different clients,”<sup>85</sup> is a particular concern to appellate practitioners.<sup>86</sup> An attorney can take diverging positions to different tribunals at different times without creating a disabling conflict, but must not enter into a situation that poses a “significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client.”<sup>87</sup>

How could this happen? Suppose one DAD counsel represents two Soldiers whose defense counsel occasionally nodded off during trial. One is a model inmate and the other is anything but, stealing from other confinees and trying to escape. The confinement facility has pursued only administrative remedies against the second client. DAD counsel for the first client has an incentive to argue that the drowsy defense counsel provided IAC. DAD counsel for the second might prefer to leave well enough alone, and argue that a little dozing is to be expected on the part of the trial defense counsel, given the ineptitude of trial counsel’s questioning. This because he sees that, if the court orders a

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information “provided to the lawyer on the promise that it will be kept in confidence—even with respect to his client.”

<sup>83</sup> AR 27-26, *supra* note 10, r. 1.7 (Conflict of Interest).

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless;

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless;

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*Id.*

<sup>84</sup> *Id.* r. 1.7 cmt.

<sup>85</sup> Narda Pierce, *Selected Appellate Ethics Issues*, PROF. LAW. 147, 151 (2001).

<sup>86</sup> Hunt & Magnuson, *supra* note 1, at 671.

<sup>87</sup> Pierce, *supra* note 85, at 151 (quoting the Ethics 2000 Commission draft proposal for comments to Rule 1.7, as of 8 March 2001).

new trial, the government may add additional charges based on the client’s new misconduct.<sup>88</sup> If the same DAD counsel represents both clients before the same court at about the same time, his success for one bodes ill for the other. The attorney should either advise the newer client to seek out other representation or alert his supervisor to the problem. This will likely result in the assignment of new counsel.<sup>89</sup>

The conflict of interest rules raise several issues specific to military appellate practice. First, on a practical level, only a few appellate defense counsel,<sup>90</sup> all working in the same section at the same location, handle most of the work for each Service. If an appellant fires his lawyer, it may become increasingly difficult to provide conflict-free appellate counsel.<sup>91</sup> Co-accused usually require separate counsel. To deal with conflicts, DAD is divided into two branches. When only two clients are co-accused, each gets counsel from one section, so that a branch chief is not supervising two counsel with opposing interests. In the rare case with more than two co-defendants, counsel can be assigned to work directly under the division chief or deputy.<sup>92</sup> The DAD also maintains a good working relationship with its sister Service counterparts, so that cases can be handed off to avoid conflicts.<sup>93</sup> Finally, judge advocates not assigned to DAD may be assigned to cases to avoid conflicts of interest.

Second, the career mobility of judge advocates sometimes brings them to see the same case from different vantages. The standard former client limitations found in

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<sup>88</sup> Per Rule for Court-Martial 810(d), a new trial normally cannot result in a higher sentence than the original trial; but if new charges are added, it can. The wiser course may be for the second client to waive appellate review completely. For this hypothetical situation, assume the client wants to appeal to prolong his case so his wife will continue to get medical benefits, or wants a different kind of relief for a post-trial delay issue, but fears the court will raise ineffective assistance of counsel (IAC) *sua sponte*.

<sup>89</sup> As in other conflict scenarios, counsel can resolve this one by informing the clients of the potential conflict and getting their consent, with signed waivers. If the conflict is clear, the better course is separate representation, since at some point the conflict will be too great to resolve with consent. Counsel should also consider the potential for loss of credibility to the panel by arguing opposing points of view, with similar facts, over a short time period.

<sup>90</sup> The Army, which has the largest defense appellate division, has about eighteen appellate defense counsel. JAG PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES 18–19 (2010–2011).

<sup>91</sup> *United States v. Parker*, 53 M.J. 631, 642 (A. Ct. Crim. App. 2000) (holding that appellant had acted unreasonably in discharging four appellate counsel in a row, and was therefore not entitled to another, yet ordering appointment of a fifth anyway) (citing *United States v. Bell*, 29 C.M.R. 122, 124 (C.M.A. 1960) (similar holding when client’s tactical decisions forced two appellate counsel to withdraw; court ordered a third appointed, but held that appellant would not be entitled to another if he forced this one to withdraw)).

<sup>92</sup> See *infra* note 257. In many cases, the Chief of GAD and DAD, as well as their deputies, will sign the briefs originating from their respective departments, in addition to the branch chief and actual counsel who prepared the brief.

<sup>93</sup> Interview with Colonel Mark Tellitocci, Chief, Def. Appellate Div., U.S. Army, in Charlottesville, Va. (Oct. 6, 2010).

Rule 1.9 apply. Thus, the accused's trial defense counsel cannot transfer to GAD and work against his former client's appeal. Less obviously, a former trial defense counsel should not later represent the same individual on appeal.<sup>94</sup> In *Martindale v. Campbell*, the trial judge who tried the appellant's case was reassigned as director of the Navy's Appellate Defense Division. The appellant petitioned the Service court to order the appointment of counsel from outside the Navy. He claimed apparent conflict of interest because his Navy appellate counsel worked for the individual whose ruling he wished to challenge. However,

[u]pon reporting to the Appellate Defense Division, the current Director disqualified himself from participating in the cases in which he had served as trial judge, from supervising counsel in those cases, or from reporting on counsel's involvement in those cases. He screened himself from being advised of the outcome of these cases and exhorted counsel to defend their clients' interests to the utmost of their abilities.

The court found these safeguards adequate and denied relief, finding "no risk that counsel's representation may be materially limited by his own interests in this case."<sup>95</sup>

Third, the issue of unlawful command influence (UCI) can make an appearance in military appellate practice, creating a conflict not between clients' interests, but between appellate counsel's own interests and those of his client. This is one reason why the CAAF requires appellate counsel to identify every issue their clients wish to present, even issues that appellate counsel do not wish to brief (i.e., *Grosteffon* matters). As the CAAF explained in *United States v. Arroyo*:

[S]ince appellate defense counsel are military officers who are part of the military hierarchy, it is quite consistent with the basic purpose of eliminating command influence to assure that the points which a military accused wishes to

<sup>94</sup> *United States v. Slocumb*, 24 M.J. 940, 942 (C.G.C.M.R. 1987). The court said, "it is asking too much of trial defense counsel to expect him as appellate counsel in such a situation to independently review the pretrial negotiations, plea bargain and providence inquiry with a view to challenging some aspect of those proceedings at the appellate level." *Id.* The court went on to say that an appellate defense counsel who was not previously involved with the case at the trial level assists the court by allowing them "to make our own independent review . . . unencumbered by a concern that dual, and possibly conflicting, roles of appellate counsel may have impeded the full presentation of issues for our consideration." *Id.* Most obviously, appellate counsel may be less likely to see and raise a genuine IAC issue against himself.

<sup>95</sup> *Martindale v. Campbell*, 25 M.J. 755, 756 (N-M.C.M.R. 1987). *See also United States v. Jones*, 55 M.J. 317 (C.A.A.F. 2001) (holding that an appellate judge's prior position as Director of the Appellate Government of the Navy-Marine Appellate Review Activity did not require recusal).

raise are, in fact, brought to attention of appellate tribunals—no matter what indirect or subtle pressure might be applied to the counsel who represent him.<sup>96</sup>

In *Arroyo*, the Service court panel had criticized this rule at some length, while refusing to grant sentence relief requested by the accused in *Grosteffon* matters. The CAAF interpreted this as an "inelastic disposition on sentence"—a type of UCI, committed here by the appellate judges themselves—and was concerned that appellate counsel would be "chilled" from fully presenting such matters to that court, if the CAAF did not take strong corrective action. The CAAF ordered rehearing by another panel of the same Service court.

#### **Rule 1.14, Client Under a Disability<sup>97</sup>**

*The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect.*<sup>98</sup>

An appellate defense counsel, no less than a trial attorney, has an ethical obligation to treat his client with attention and respect, even if that client is suffering from a serious mental disability. To serve that client's interests, appellate counsel must pay attention to the client, to determine whether he is competent to have his sentence affirmed on appeal. Rule for Courts-Martial 1203(c)(5) dictates that when the client lacks the mental capacity to understand the proceedings or cooperate intelligently in his appellate proceedings, "[a]n appellate authority may not affirm the proceedings," and this is true regardless of whether the client was competent to stand trial, so appellate

<sup>96</sup> *United States v. Arroyo*, 17 M.J. 224, 226 (C.M.A. 1984). *See infra* R. 3.1, Meritorious Claims and Contentions (discussing *Grosteffon* matters). In *Arroyo*, the Service court panel had criticized this rule at some length, while refusing to grant sentence relief requested by the accused. The CAAF interpreted this criticism as an "inelastic disposition on sentence" (a type of undue command influence) and ordered rehearing by another panel of the same court.

<sup>97</sup> AR 27-26, *supra* note 10, r. 1.14 (Client Under a Disability).

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

*Id.*

<sup>98</sup> *Id.* r. 1.14 cmt.

counsel must always pay attention.<sup>99</sup> The appellate court, like the trial judge, can direct an examination under RCM 706 to “determin[e] the accused’s current capacity to understand and cooperate in the appellate proceedings,” and appellate counsel’s careful (though distant) observations are vital in convincing an appellate court to do this. Evaluating a borderline client is more challenging for appellate attorneys, who will rarely meet their clients in person, and must rely on telephonic and written communications. If the client is no longer in custody, this will be all the harder, and it may be impossible if the client is homeless.

### Rule 1.16, Declining or Terminating Representation<sup>100</sup>

<sup>99</sup> A finding of incapacity (which the defense must prove by a preponderance of the evidence) requires the appellate authority to stay the proceeding until the appellant regains “appropriate capacity.” This can be a serious benefit to a client facing a punitive discharge that can cut off his access to military health care services. The court can also take “other appropriate action,” to include setting aside the conviction.

<sup>100</sup> AR 27-26, *supra* note 2, r. 1.16 (Declining or Terminating Representation).

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if;

(1) the representation will result in violation of these Rules of Professional Conduct or other law or regulation;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is dismissed by the client.

(b) Except as stated in paragraph (c), a lawyer may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if;

(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will seek to withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal or other competent authority, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable

*Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client allowing time for employment of other counsel, [and] surrendering papers and property to which the client is entitled.*<sup>101</sup>

It is rare for the accused to be absent when his sentence is announced. It is rarer for the appellant to be anywhere nearby when his appeal is decided. While the Service court’s decision does not in itself terminate representation, the relationship usually concludes shortly thereafter. Sometimes it will conclude sooner, as when counsel is taken off of a case due to a permanent change of station (PCS) move or leaving active service altogether. This should be avoided whenever possible so that the attorney-client relationship can mature, but sometimes it is unavoidable when counsel transfers early, the case lasts longer than expected, or the sentence includes death, in which case the appeals seem to have no end at all.<sup>102</sup> Where the likely need to change counsel is clear from the outset, such as in a capital case, it should be explained to the client up front. In all other cases it should be explained as soon as it becomes apparent counsel will have to leave. This should allow for a smooth transition of counsel.

At the trial level, withdrawal of counsel is covered by RCM 505(d). This allows free substitution of appointed counsel by competent authority when no attorney-client relationship has been formed. When the relationship has been formed, withdrawal requires release for good cause or release by the client (which must be a voluntary, informed decision<sup>103</sup>) or excusal by the court for “good cause shown

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notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

*Id.*

<sup>101</sup> *Id.* r. 1.16(d).

<sup>102</sup> In *United States v. Loving*, 41 M.J. 213, 326–30 (C.A.A.F. 1994) (Wiss, J., dissenting), Judge Wiss discusses at length the problems with lack of continuity of appellate defense counsel on capital cases. This problem is only growing as this opinion was written over fifteen years ago and *Loving*, along with the others who have received capital sentences, still has not been finally resolved on appeal. See *Loving v. United States*, 68 M.J. 1 (C.A.A.F. 2009), *cert. denied*, 131 S. Ct. 68 (2010). While a couple of capital cases have been reduced to life sentences without parole to resolve appellate issues, the vast majority wait in limbo at the U.S. Disciplinary Barracks in Fort Leavenworth, Kansas. The last servicemember executed in the U.S. military judicial system was Army Private John Bennett in 1961, who was hung for raping and attempting to kill an eleven-year-old Austrian girl. Bennett was sentenced in 1955. He was the last of just ten executions since the military’s implementation of the UCMJ in 1951.

<sup>103</sup> See *United States v. Hutchins*, 69 M.J. 282, 288–90 (C.A.A.F. 2011). In April 2011, the CAAF responded to a writ from the accused in *United States v. Wuterich*, requesting that the Marine Corps be ordered to return his retired defense counsel to active duty (the defense counsel had since joined a private firm that was conflicted out). The CAAF denied the writ without

on the record.” No similar RCM exists at the appellate level, but case law establishes that, when the appellant discharges his appellate counsel, he must show the court good cause to be entitled to substitute appointed counsel,<sup>104</sup> and appellate counsel must seek the court’s permission to withdraw from representing a client whether the client requests it or not.<sup>105</sup> Until appellate counsel has been permitted to withdraw, he must continue to assist the client.<sup>106</sup>

### Rule 3.1, Meritorious Claims and Contentions<sup>107</sup>

*I have said in open court that when I read an appellant’s brief that contains ten or twelve points, a presumption arises there is no merit in any of them.*<sup>108</sup>

Perhaps the most important step in writing a brief is deciding which issues, if any, to raise.<sup>109</sup> Some cases are seemingly void of issues and only a skilled appellate attorney can find the proverbial “needle in a haystack.”<sup>110</sup> Many others require a winnowing process to separate the wheat from the chaff.<sup>111</sup> The competent attorney will spot the obvious issues, but it takes a skilled advocate to separate issues with legitimate merit, but too small a chance of success to be worth fighting, from those that enjoy a realistic opportunity to get the client relief. Knowing they cannot read the minds of the judges, counsel may be reluctant to forego any claims they spot, but they must learn the danger of using a “shotgun blast” approach.<sup>112</sup> Hiding the one gem among the cubic zirconium convinces the judges that all the arguments by a particular advocate are equally worthless.<sup>113</sup>

<sup>107</sup> AR 27-26, *supra* note 10, r. 3.1 (Meritorious Claims and Contentions).

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the accused in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, discharge from the Army, or other adverse personnel action, may nevertheless so defend the proceeding as to require that every element of the case be established.

*Id.*

<sup>108</sup> Aldisert, *supra* note 14, at 458.

<sup>109</sup> In the vast majority of cases, there are no meritorious issues and counsel “p1” the case, submitting a pro forma, one page brief to the appellate court to act on any issues the appellate court believes appropriate pursuant to the court’s responsibility under Article 66, UCMJ.

<sup>110</sup> Lundberg, *supra* note 49, at 39.

<sup>111</sup> To assist in this process, the trial defense counsel must provide a copy of his case file upon written release from his former client. *United States v. Dorman*, 58 M.J. 295, 298 (C.A.A.F. 2003).

<sup>112</sup> Supreme Court Justice Robert H. Jackson stated,

One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases.

*Jones v. Barnes*, 463 U.S. 745, 752 (1983) (quoting Robert H. Jackson, *Advocacy Before the Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951)).

<sup>113</sup> Silberman, *supra* note 14, at 4 (describing briefs where counsel “had insufficient confidence and sophistication to choose and limit arguments” as “painful” to read). Appellate courts have ways of hinting their displeasure at counsel who have not learned to cull their arguments. *See United States v.*

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prejudice to give the trial court a chance to decide the issue and stated in great detail what they believed the trial court should review and record in case the appellate court needed to revisit the issue. This guidance to the trial court provides additional insight into the conflicts issue. *Wuterich v. Jones*, 70 M.J. 82 (C.A.A.F. 2011).

<sup>104</sup> *United States v. Bell*, 29 C.M.R. 122, 124 (C.M.A. 1960), *United States v. Jennings*, 42 M.J. 764, 766–67 (C.G. Ct. Crim. App. 1995). At the appellate level, the client is not entitled to representation by appointed counsel of his choice. *Bell*, 29 C.M.R. at 124; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1202 discussion (2008).

<sup>105</sup> *United States v. Parker*, 53 M.J. 631, 638 (A. Ct. Crim. App. 2000). *United States v. Jennings* is also instructive on his point. In that case, appellant refused to communicate with successive appellate counsel, preventing the establishment of an attorney-client relationship. The first appellate counsel, who had established a professional relationship “of sorts” with the appellant, moved to withdraw. The court ordered he continue representation, despite his client no longer talking to him, until appellant notified the court of his desire to dissolve the attorney-client relationship. The appellant was notified that he needed to say that he supported counsel’s withdrawal before the court would approve the request, but if he indeed endorsed the withdrawal, requests for future detailed counsel may well be denied. Even after the original counsel transferred to a new assignment and a new counsel assumed the case, submitting a brief and orally arguing on appellant’s behalf, they never formed an attorney-client relationship. The court found that the appellant’s refusal to communicate with his attorney constituted an abandonment of his right to counsel; however, the court chose to allow appellate counsel to continue in their role as assigned counsel “absent an explicit statement from the Appellant to the contrary.” *United States v. Jennings*, 49 M.J. 549, 553 (C.G. Ct. Crim. App. 1998).

<sup>106</sup> *United States v. Morgan*, 62 M.J. 631, 635 (N-M. Ct. Crim. App. 2006).

Rule 3.1 helps narrow the field, but only just barely, by requiring a lawyer not bring an issue before the court, “unless there is a basis for doing so that is not frivolous.”<sup>114</sup> The U.S. Supreme Court has stated that appellate counsel must pursue their client’s claims vigorously, but also have an obligation not to clog the court system with frivolous appeals, and not to “raise every ‘colorable’ claim suggested by a client.”<sup>115</sup> Since “the line between a frivolous appeal and one which simply has no merit is fine,” Rule 3.1 is a limited culling factor.<sup>116</sup>

The limitation is less on military appellate counsel because of case law. Starting with *United States v. Grostefon*, military courts have modified the rule by requiring military appellate counsel to “invite the Court of Military Review’s attention to any and all errors specified by the accused, regardless of counsel’s judgment concerning what action should be taken on behalf of the accused.”<sup>117</sup> The *Grostefon* rule, however, does not require counsel to *brief* frivolous issues on the appellant’s behalf.<sup>118</sup> Counsel is required only to set forth each issue in a legally recognizable format.<sup>119</sup> Once the issues are raised, “[t]he extent of the argument in support of the various issues is a matter of the attorney’s sound professional judgment,” shifting the onus back to the attorney to highlight and argue the winning issues.<sup>120</sup> The *Grostefon* requirement thus creates exceptions not only to the rule against raising frivolous issues, but the rule of zealous representation. If counsel believes raising a given issue would hurt the client, but the client still insists after consultation, “they may still ethically list the issue for consideration by the appellate court.”<sup>121</sup>

Even the unlimited nature of *Grostefon* that allows the appellant to literally submit hundreds and occasionally

thousands of pages of argument on their behalf has recently changed at the CAAF to only allow fifteen pages, now requiring selectivity even on behalf of the accused.<sup>122</sup>

### Rule 3.3, Candor Toward the Tribunal,<sup>123</sup> and Rule 8.4(a)–(d), Misconduct<sup>124</sup>

<sup>122</sup> C.A.A.F. R. 21A (effective 1 July 2010). While the Service courts have not implemented a fifteen-page requirement, good judgment should still prevail, ever mindful that issue selection is important.

<sup>123</sup> AR 27-26, *supra* note 10, r. 3.3 (Candor Toward the Tribunal).

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) knowingly disobey an obligation or order imposed by a superior or tribunal, unless done openly before the tribunal in a good faith assertion that no valid obligation or order should exist.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

*Id.*

<sup>124</sup> *Id.* r. 8.4(a)–(d) (Misconduct).

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

*Id.*

Cockrell, No. ACM S316, 2010 WL 4025851, at \*2 (A.F. Ct. Crim. App. Sept. 21, 2010) (referring to accused’s “laundry list” of ineffective assistance claims); *United States v. Grafmuller*, No. ACM 37524, at \*5 (A.F. Ct. Crim. App. Mar. 30, 2011) (referring to “sweeping allegations” by appellate counsel).

<sup>114</sup> AR 27-26, *supra* note 10, r. 3.1.

<sup>115</sup> *Barnes*, 463 U.S. at 754. The Court also noted that judges should not “second-guess reasonable professional judgements.” *Id.*

<sup>116</sup> *Hunt & Magnuson*, *supra* note 1, at 666.

<sup>117</sup> *United States v. Arroyo*, 17 M.J. 224, 225 (C.M.A. 1984) (citing *United States v. Grostefon*, 12 M.J. 431, 436 (C.M.A. 1982)). This deviation from civilian law is based on Articles 66 and 70 of the UCMJ, as opposed to the U.S. Constitution, in an effort to eliminate any appearance of unlawful command influence since appellate defense counsel are military officers. *Grostefon*, 12 M.J. at 436.

<sup>118</sup> *Arroyo*, 17 M.J. at 225.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 226.

<sup>121</sup> *Grostefon*, 12 M.J. at 435. *See also* *United States v. Bell*, 34 M.J. 937, 943–44 (A.F.C.M.R. 1992) (If client insists on raising an issue that, in counsel’s opinion, has “no arguable merit,” counsel must still raise the issue under *Grostefon*, but need not brief it.).

*It is your job to be partisan and persuasive, of course, but never at the expense of candor and accuracy.*<sup>125</sup>

In appellate practice, candor begins with the brief and continues into the courtroom for argument. The brief writer must present the case in the most favorable light to the client without being untruthful to the court. More than that, he is required to positively disclose directly adverse controlling legal authority.<sup>126</sup> This obligation continues even after the initial submission of briefs and is an ongoing duty to inform the court.<sup>127</sup>

At times, the duty to disclose seems like a penalty to the attorney who performs the most exhaustive research. However, rarely will a controlling case go undiscovered by both opposing counsel and the court in doing their own research, so even on the most pragmatic level it is better to disclose and explain than to simply ignore.<sup>128</sup> By disclosing opposing authority, the forthright counsel has the opportunity to distinguish it and reduce the sting of an opponent's presumptive presentation—or the court's independent reading—of the same case.<sup>129</sup> Failing to disclose and distinguish opposing authority may even give it extra weight, as the court may believe that if counsel could have distinguished it, they would have disclosed it.<sup>130</sup>

Failure to cite to opposing authority can ruin an attorney's reputation, and so seriously reduce his effectiveness in future cases. One federal court describing such behavior said, “[a]t best it was incompetent and at worst deceptive.”<sup>131</sup> An attorney who provided reliable, qualitative research reduces the court's burden and minimizes turnaround times, and discharges his duty to the law as well as to the tribunal. Due to its precedential value, a wrongly decided appellate case damages the entire justice system.<sup>132</sup>

The question quickly becomes how far the obligation to disclose reaches. Is an Army appellate defense counsel required to disclose an opinion that is directly on point, but from the Navy-Marine court? A plain reading of Rule 3.3(a)(3) suggests the answer is “no”—counsel is required to disclose only “legal authority in the controlling jurisdiction.” Indeed, the duty of zealous advocacy may require counsel *not* to disclose. After all, a lawyer's responsibility is to

safeguard one party's interests. “The lawyer is engaged in advocacy, not a seminar discussion.”<sup>133</sup>

Sometimes the extent of required disclosure is unclear. Unpublished opinions do not have precedential value and are not binding “legal authority.” Must counsel disclose them?<sup>134</sup> If counsel uses persuasive authority from another jurisdiction, must he also disclose adverse persuasive authority from that same jurisdiction? From others?<sup>135</sup> The ABA Committee on Professional Ethics and Grievances recommends counsel consider the following three questions when making such decisions:

- (1) whether the overlooked decisions are ones that the court clearly should take into account in deciding the case;
- (2) whether in failing to disclose the decisions the lawyer, in the eyes of the court, would lack candor and would be viewed as acting unfairly; and
- (3) whether the court would consider itself misled by the lawyer.<sup>136</sup>

The duty of disclosure does not pertain to facts outside the record. If the client submits affidavits to help establish a post-trial issue, and some of these are unhelpful to the defense, the appellate counsel is perfectly free to show the court only what he wants them to see. Submitting only the best affidavit does not demonstrate a lack of candor to the court, but competent, zealous advocacy on behalf of one's client. It is little different from a trial attorney selecting only favorable sentencing witnesses. Facts that were extracted from the client in a different case under a grant of immunity are immune from consideration and need not be mentioned at all.<sup>137</sup>

Counsel must be fair in what they assert within the brief and not let their obligation to zealously represent the client override their commitment to candor.<sup>138</sup> Appellate briefs are not the place for poetic license with the trial court record or for averments unsupported by that record, and especially not for assertions that level unsupported ethical charges against counsel in the earlier proceeding.<sup>139</sup> Counsel cannot

<sup>125</sup> Cummings, *supra* note 32, at 44.

<sup>126</sup> See Hunt & Magnuson, *supra* note 1, at 673–74.

<sup>127</sup> See ELLIGETT & SCHEB, *supra* note 14, § 2.7; see Richmond, *supra* note 57, at 315.

<sup>128</sup> See Hunt & Magnuson, *supra* note 1, at 673.

<sup>129</sup> See *id.*; Richmond, *supra* note 57, at 324–25 (citing Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539–40 (W.D. Pa. 2001)).

<sup>130</sup> See Richmond, *supra* note 57, at 325.

<sup>131</sup> ELLIGETT & SCHEB, *supra* note 14, [§ 2.7].

<sup>132</sup> See Richmond, *supra* note 57, at 323–24.

<sup>133</sup> See *id.* at 325.

<sup>134</sup> See Brundage v. Estate of Carambio, 951 A.2d 947, 956–57 (N.J. 2008) (holding that such opinions need not be disclosed under New Jersey rule); Richmond, *supra* note 57, at 315.

<sup>135</sup> See Richmond, *supra* note 57, at 319.

<sup>136</sup> Hunt & Morgensen, *supra* note 1, at 674 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 280 (1949)). Formal Opinion 280 has also been cited in Tyler v. State, 47 P.3d 1095, 1104–05 (Alaska App. 2001) and *In re Greenberg*, 104 A.2d 46, 49 (N.J. 1954).

<sup>137</sup> United States v. Schwimmer, 882 F.2d 22, 27 (2d Cir. 1989).

<sup>138</sup> See Cummings, *supra* note 32, at 44.

<sup>139</sup> See United States v. Morris, 54 M.J. 898, 903–04 (N-M. Ct. Crim. App. 2001) (denying relief based on “bald face allegations” of ineffectiveness,

“isolate[] words and phrases wholly out of context” in order to change their meaning.<sup>140</sup> Even omissions of information that could cause the court to draw an improper conclusion are improper, and such omissions will leave the court “disturbed.”<sup>141</sup> These rules for factual candor apply even when counsel are setting forth *Grosteefon* issues on behalf of their clients.<sup>142</sup>

The requirement for candor applies equally during oral arguments.<sup>143</sup> Counsel must be forthright in presenting argument to the panel and cannot bend the facts or other case holdings at this stage any more than when drafting their briefs. If counsel does not know the answer to a judge’s question, oral argument is no time for guessing). As Justice Scalia observes in his book, *Making Your Case: The Art of Persuading Judges*, even if the advocate should know the answer but does not, “acknowledged ignorance is better than proffered misinformation.”<sup>144</sup> A “negligent,” as opposed to a “knowing,” false statement does not violate the rule, but passing an assertion off as fact when it is really speculation is a violation.<sup>145</sup> So is a statement that is technically true, but misleads the listener to believe something false.<sup>146</sup>

Some courts have extended the obligation of candor to forbid omissions or silence if these will be misinterpreted by the courts.<sup>147</sup> Ghostwriting briefs for seemingly *pro se* appellants is deception through silence that a court may choose to punish.<sup>148</sup> “[D]ishonesty includes any conduct demonstrating a lack of ‘fairness and straightforwardness’ or a ‘lack of honesty, probity or integrity to principle.’”<sup>149</sup> Even statements that are irrelevant to the proceedings must be truthful; there is no materiality requirement in Rule 8.4(c).<sup>150</sup>

including unsupported claim of perjury by trial defense counsel).

<sup>140</sup> See *United States v. Harris*, 65 M.J. 594, 598 (N-M. Ct. Crim. App. 2007) (denying relief but not addressing issue of professional misconduct).

<sup>141</sup> *United States v. Savage*, No. NMCCA 200700241, 2008 WL 274918, at \*2 n.4 (N-M. Ct. Crim. App. 2008) (expressing this sentiment at appellate counsel who failed to mention trial stipulation of fact that cut against allegations on appeal).

<sup>142</sup> See *United States v. Deans*, No. NMCCA 200400791, 2007 WL 1702580, at \*3 & n.2 (N-M. Ct. Crim. App. 2007).

<sup>143</sup> Cf. *Richmond*, *supra* note 57, at 309 (noting that “[l]awyers must have a reasonable basis for believing all statements they make to courts, whether in writing, in court, or in chambers”).

<sup>144</sup> ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE, THE ART OF PERSUADING JUDGES* 193 (2008).

<sup>145</sup> See *Richmond*, *supra* note 57, at 308–09.

<sup>146</sup> See *id.* at 309–10.

<sup>147</sup> See *id.* at 311 & 312 (quoting *AIG Haw. Ins. Co. v. Bateman*, 923 P.2d 395, 402 (Haw. 1996)).

<sup>148</sup> See *Richmond*, *supra* note 57, at 313.

<sup>149</sup> *Id.* at 307 (quoting *People v. Katz*, 58 P.3d 1176, 1189–90 (Colo. 2002) (quoting *In re Shorter*, 570 A.2d 760, 767–68 (D.C. 1990) (internal quotation marks omitted)).

<sup>150</sup> See *id.* at 311.

### Rule 3.5, Impartiality and Decorum of the Tribunal,<sup>151</sup> and Rule 8.2, Judicial and Legal Officials<sup>152</sup>

*An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.*<sup>153</sup>

While appellate advocates are perhaps less likely to get caught up in the heat of the moment than their trial-court colleagues, they are not free to denigrate the trial advocates or the judge in the case under review, any more than they are free to insult the judges or opposing counsel that are handling the appeal.<sup>154</sup> As one appellate judge commented, “[y]ou can think it but you better not say it.”<sup>155</sup> Of course appellate counsel can argue that the trial court judge committed error or counsel was ineffective.<sup>156</sup> What is important is the tone and manner in which it is done.<sup>157</sup> The temptation is to say, not that the lower court was wrong, but that it was really, really wrong, so that the appellate court has no choice but to distance itself from such a horrendous decision.<sup>158</sup> Depending on how appellate counsel say “really, really wrong,” they may be in really, really big

<sup>151</sup> AR 27-26, *supra* note 10, r. 3.5 (Impartiality and Decorum of the Tribunal).

A lawyer shall not:

(a) seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law;

(b) communicate *ex parte* with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

*Id.*

<sup>152</sup> *Id.* r. 8.2 (Judicial and Legal Officials).

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, investigating officer, hearing officer, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

*Id.*

<sup>153</sup> *Id.* r. 3.5 cmt.

<sup>154</sup> See *Hunt & Magnuson*, *supra* note 1, at 679; *ELLIGETT & SCHEB*, *supra* note 14, [§ 2.9].

<sup>155</sup> See *id.* at 679 (quoting *Vandenbergh v. Poole*, 163 So. 2d 51, 52 (Fla. Dist. Ct. App. 1964)).

<sup>156</sup> See *Richmond*, *supra* note 57, at 340 (quoting *In re Garaas*, 652 N.W.2d 918, 927 (N.D. 2002)).

<sup>157</sup> Cf. *Hunt & Magnuson*, *supra* note 1, at 680 (noting that courts will tolerate relevant criticism).

<sup>158</sup> *Id.* at 327.

trouble.<sup>159</sup> Not only may the wrong language be “disruptive” and so violate Rule 3.5; it may also violate Rule 8.2: “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge.”<sup>160</sup>

This need for decorum applies to comments about appellate judges and counsel as well. An extreme example of how not to proceed comes from a Florida lawyer’s motion for a rehearing where he referred to opposing counsel’s argument as “ridiculous” and “a joke,” and went on: “the use of the term ‘total b[---] s[---]’ without the inclusion of at least 2 or 3 intervening expletives is very kind and generous under the circumstances.”<sup>161</sup> Apparently the Florida Bar Association was feeling kind and generous, because he was disciplined but not disbarred, unlike the attorney from Minnesota who referred to the (trial) court as a “kangaroo court” and the judge as a “horse’s ass.”<sup>162</sup>

While attorneys do not lose their First Amendment protections upon admission to the bar, they do need to be mindful about commenting on the functioning of the judicial

<sup>159</sup> *Id.* at 327–28. A good example is *Ramirez v. State Bar of Cal.*, 619 P.2d 399, 400–01 (Cal. 1980). Mr. Ramirez filed a reply brief in the U.S. Court of Appeals for the Ninth Circuit in a case involving the foreclosure of his clients’ security interest. He asserted that three state court judges had acted “illegally” and “unlawfully” when they acted against his clients. Mr. Ramirez also alleged they became “parties to the theft” and they entered into an “invidious alliance” with the creditor who foreclosed on his clients’ property. He later implied that the judges had falsified the record. The California Supreme Court rejected his First Amendment argument, finding they were made with a reckless disregard for the truth and as such were not constitutionally protected and zealous advocacy did not excuse “the breach of his duties as an attorney.” The court suspended Ramirez from the practice of law for a year, before ultimately staying the suspension and instead placing him on probation for one year.

<sup>160</sup> AR 27-26, *supra* note 10, r. 8.2. See also *Office of Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 427 (Ohio 2003). After losing a case in the Ohio Court of Appeals, Gardner, in a motion for reconsideration or certification to the Ohio Supreme Court, accused the appellate court of being dishonest and ignorant of the law. He wrote that the appellate panel’s decision was “so ‘result driven’ that ‘any fair-minded judge’ would have been ‘ashamed to attach his/her name’ to it.” Just to make sure he got his point across, he added the court “did not give ‘a damn about how wrong, disingenuous, and biased its opinion [was].’” *Id.* There was more in the same vein. Gardner’s blast proved partially successful, in that it did get him in front of the Ohio Supreme Court, just not for the reason requested. At his disciplinary hearing, the court found his statements were factual assertions and did not warrant First Amendment protection. The court found a reckless disregard for the truth in his allegations against the judges and suspended him for six months. At his hearing, Gardner admitted ignoring his law partner’s advice not to accuse the panel of bias and corruption. This is a good reminder that, after drafting a document in a matter in which you are emotionally invested, it is best to have someone review it and then follow that person’s advice.

<sup>161</sup> ELLIGETT & SCHEB, *supra* note 14, § 2.9 (quoting *5-H Corp. v. Padovano*, 708 So. 2d 244, 245 (Fla. 1998)).

<sup>162</sup> Compare *5-H Corp.*, 708 So. 2d at 245, with *In re Paulsruide*, 248 N.W.2d 747, 748 (Minn. 1976), quoted in *Hunt & Magnuson*, *supra* note 1, at 680. The Florida attorney in *5-H Corp.* did have a formal complaint filed against him by the Florida Bar; however, it was ultimately dismissed and he continues to practice law in Hollywood, Florida.

system, whether in public or in their pleadings, to avoid the erosion of public confidence.<sup>163</sup>

### Rules 5.1 and 5.2, Responsibilities of Supervisory and Subordinate Leaders<sup>164</sup>

*When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment.*<sup>165</sup>

Appellate counsel cannot fulfill their responsibilities under the rules unless their supervisors fulfill theirs, and supervisors can be held responsible for a subordinate lawyer’s professional responsibility shortfalls. Thus, as noted above, supervisory counsel can avoid potential conflicts in their sections through proper oversight.<sup>166</sup> If a subordinate attorney is to follow the maxims in Rule 1.3, Diligence, about avoiding undue delay, the supervisor must

<sup>163</sup> Richmond, *supra* note 57, at 327–28.

<sup>164</sup> AR 27-26, *supra* note 10, rules 5.1 and 5.2 (Responsibilities of Supervisory and Subordinate Lawyers).

Rule 5.1 (a) The General Counsel of the Army, The Judge Advocate General, the Chief Counsel, Corps of Engineers, the Command Counsel, Army Materiel Command, and other civilian and military supervisory lawyers shall make reasonable efforts to ensure that all lawyers conform to these Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to these Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of these Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) A supervisory Army lawyer is responsible for making appropriate efforts to ensure that the subordinate lawyer is properly trained and is competent to perform the duties to which the subordinate lawyer is assigned.

Rule 5.2 (a) A lawyer is bound by these Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate these Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

*Id.*

<sup>165</sup> *Id.* r. 5.2 cmt.

<sup>166</sup> See *id.* r. 1.7 cmt.

manage the size of the subordinate's caseload.<sup>167</sup> Under section (d) of Rule 5.1, senior counsel are also responsible for the training, without which their subordinates cannot follow rule number one: competence.<sup>168</sup> Counsel must be taught to know and follow the rules for whichever appellate court they are addressing, in person or by motion.<sup>169</sup> Reading those rules and the 1200 section of the RCM is a good start, but rigorous mentorship will be necessary to ensure a successful transition from trial to appellate counsel, given the high volume of work appellate counsel handle on a daily basis.<sup>170</sup>

## Conclusion

In order for America's judicial system, military and civilian, to function properly, a vigorous appellate system is necessary. That system depends on professionally responsible attorneys to help guide the justices to achieve the right end.<sup>171</sup> As the military's highest appellate court has

long recognized, it may be "flattering" to appellate judges to think of them as "infallible," but it is the "skillful advocate" who acts as a guide in the court's quest for justice.<sup>172</sup> To be skillful, that advocate must recognize the specialized nature of professional responsibility in appellate practice, and act accordingly. As the Chief Judge for the Northern District of Illinois stated: "Any notion that the duty to represent a client trumps obligations of professionalism is, of course, indefensible as a matter of law."<sup>173</sup>

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<sup>167</sup> *Id.* r. 1.3 cmt. *See, e.g.,* United States v. Brunson, 59 M.J. 41, 43 (N-M. Ct. Crim. App. 2003) (Court cites to Rule 1.3 and quotes from it, stating "[a] lawyer's workload must be controlled so that each matter can be handled competently.") To emphasize the supervisory nature of the issue, the Court "note[d] that a number of the motions filed recently by the Navy-Marine Corps Appellate Defense Division do not comply with the standards set forth." *Id.* at 43. The court went on to state, "[w]e do not 'condone disregard of [our] Rules by accepting late filings when the delay seems to be the result of neglect and carelessness.'" *Id.* As a final point of emphasis, the court concluded their opinion by declaring, "we shall consider appropriate sanctions in the event of 'flagrant or repeated disregard of our Rules.'" *Id.*

<sup>168</sup> AR 27-26, *supra* note 10, r. 5.1(d).

<sup>169</sup> *Id.* r. 5.1. *See* discussion *supra* note 9 (referencing the various military appellate court rules).

<sup>170</sup> According to Colonel Mark Tellitocci, Division Chief at DAD, during 2010 the Army's DAD filed 1143 briefs, not including Article 62 appeals, Petitions for New Trial, Extraordinary Writs, Writ Appeals, and other motions.

<sup>171</sup> Hunt & Magnuson, *supra* note 1, at 681.

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<sup>172</sup> United States v. Hullum, 15 M.J. 261, 268 (C.M.A. 1983).

<sup>173</sup> ELLIGETT & SCHEB, *supra* note 14, § 2.9 (citing Marvin Aspen, *Let Us Be Officers of the Court*, 83 A.B.A. J., July 1997, at 94).

## Rule of Law in Iraq and Afghanistan?<sup>†</sup>

Mark Martins\*

Good afternoon. Thank you for those gracious remarks, Dean Minow. And thanks to all of you for that warm welcome. It is a thrill and a privilege to be back home here in Cambridge, in such distinguished company, and following such accomplished prior recipients of this Medal.

If I may reciprocate for a moment, I would like to note that the scholarship of Dean Minow—and of my frequent sounding board during this most recent deployment to Afghanistan, Professor Jack Goldsmith—has not only featured the most illuminating sorts of conceptual and theoretical inquiry; their work has also been directed toward very practical problems. I am far from alone in benefiting from their writings during my years in public service.

I have to say, now that I am experiencing this, that less of the typical public speaking trepidation is present when you return to your own Law School to speak. With several of my teachers thankfully in attendance, I can always say that any faults you find in my reasoning are at least partly their responsibility, as they had their chance while I was here to correct those faults and apparently were unsuccessful in doing so. Professors Meltzer, Kaplow, Stone, Vagts, and Michelman know too well that the fact that I was an unusually difficult project only goes to extenuation and mitigation rather than to innocence on the merits and that they would unfortunately be guilty as charged on that count. I consider blameless David Barron, Ganesh Sitaraman, Harvey Rishikof, Ken Holland, and Jack Goldsmith because as gifted as they are as teachers and persuaders, their opportunities came much later, at a less formative time for me.

To say that I was a difficult case for this esteemed faculty is not to say that I didn't try to keep up with reading all of the homework. In fact, Professor Meltzer probably doesn't know that I defended him when students in our Federal Courts course once portrayed him as unfeeling for having assigned some 300 pages of intricate case material and analysis one night. "He probably digested all of those hundreds of small-print pages of holdings and dicta himself in an hour—he doesn't care that it takes all of us so much longer!" they said. "Not true," I offered. "He surely did digest all of that material in a fraction of the time it takes us, but he's not oblivious to our struggles; he's orchestrating them!" They had to agree. It is one of the things Harvard

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† Brigadier General Martins delivered these remarks as part of the Dean's Distinguished Lecture Series at Harvard Law School on 8 April 2011, upon receiving the Harvard Law School Medal of Freedom. This lecture is copyrighted by the President and Fellows of Harvard College and Mark Martins.

Law professors have in common with Army drill sergeants: tough love.

There are other things in common as well. To borrow from remarks by General Eisenhower when joining Columbia University in 1948, if this were a land with a different sort of military, one whose weapons and ranks serve tyrannical ends and whose officers form a controlling elite, a Soldier could hardly be welcomed here, in these halls of genuine academic freedom and independent scholarship. But in our nation, as General Eisenhower both explained and embodied, the military is drawn from and serves the people, and it is trained to protect our way of life. Duty in military ranks is an exercise of *citizenship*, so that the Soldier who participates in the life of a truly great academic institution—in Ike's case from 1948 to 1951, in mine for three wonderful years of law school just over two decades ago and now for an additional single day at the Dean's generous invitation—enters no foreign field but finds himself or herself instead engaged in a different aspect of a citizen's duty.

So while bowing deeply to accept the high honor of this Medal of Freedom, I also welcome the opportunity to speak at Harvard—America's oldest law school and the school that has produced so many leading thinkers and citizens: Supreme Court justices, U.S. Senators, esteemed faculty, distinguished advocates, judges, and partners at great law firms, leaders in so many nations across the globe. And of course the school where the current President of the United States received his law degree and served as President of the Law Review. I have mentioned before how when we both walked these halls, enjoyed the famous yard outside, and spent a lot of time at Gannett House, I considered Barack Obama to have strong attributes for military service. He was fit, energetic, intelligent, and fiercely competitive; he also had a hunger for public service and a knack for finding common ground. But I did not anticipate that his entry-level position in the military would be as Commander-in-Chief.

The topic on which I have been invited to share my views today is a tremendously important one. But there is a risk that in setting out to assess the rule of law in Iraq and Afghanistan, and the implications of that assessment for our national security interests, I will create the impression that the features of the formal legal systems of both countries are more clearly discernible, more stable, and therefore more conducive to rule-governed judicial decisions than they really are. Let us mitigate that risk by affirming the reality up front: neither country's legal system possesses the settled law and procedures or commands the respect and authority within society that are possessed and commanded by the legal systems of the United States and other western democracies.

To apply a phrase from the late Justice Harlan I prized almost as soon as I learned it for myself in some of that reading Dan Meltzer once assigned, the influence of law upon "primary, private individual conduct," particularly in Afghanistan, remains negligible in many places. Justice

Harlan's phrase, from his influential 1971 concurring opinion in *Mackey v. United States*, provided a criterion for determining those cases in which a new constitutional interpretation should be retroactively applied in habeas proceedings. I make no such specific use of the phrase here, but only observe that in these two countries, and again particularly in Afghanistan, it is a gross understatement to say that secular court processes are as yet very distant from the decisions individual private citizens make, the incentives they face, the fears they endure, and the survival they seek. Some nights in Kandahar and Khost and Helmand I reflect on the elaborateness of retroactivity doctrine to remind myself of just how distant things are there—where some 80 percent of all disputes are referred to village elders rather than courts—from the cherished system I first studied in earnest here in Harvard.

Nevertheless, despite the risk, there is much value in asking, "rule of law in Iraq and Afghanistan?" This is because the question urges inquiry into how law has constrained, enabled, and informed our own military operations since September 11th, 2001, even as it also causes us to mull whether and how an abstract concept we all approach with a multitude of assumptions arising from our own experience can possibly help oppose ruthless and diverse insurgent groups halfway across the globe. The case I will briefly sketch here today is this: your Armed Forces heed and have continued to heed the law, take it seriously, and in fact respect it for the legitimacy it bestows upon their often violent and lethal—necessarily violent and lethal—actions in the field. Furthermore, a conscious and concerted reliance upon law to defeat those inside and outside of government who scorn it happens to be good counterinsurgency. Efforts to promote the rule of law must be only part of a comprehensive counterinsurgency campaign and must be focused upon the building and protection of those key nodes and institutions—formal and informal—upon which the authorities' legitimacy depends. Great care must also be taken to preserve the initiative of the individual troops who continue to shoulder the most dangerous and significant burdens of this decentralized conflict. But if prosecuted effectively within these ground rules, such efforts may well prove decisive. After illustrating these points with several examples, I would like to take questions.

In two examples, I will describe significant instances in which law constrained, enabled, and informed U.S. military operations being commanded by General David Petraeus, instances in which I was not directly involved in the decision-making and have reconstructed things with help from General Petraeus and those who were present and advising him. For the remaining examples, I will draw upon personal direct experience.

I did not want to disappoint those of you who insist upon a dose of Powerpoint when being briefed by an Army general. As the slide suggests, the cases I will cite are also evenly divided between Iraq and Afghanistan, and they are

both inward- and outward-looking. By that I mean they don't artificially restrict focus on conformity of foreign state and nonstate actors with rule of law. My working definition of the rule of law is that it is a principle of governance which holds that all entities in society, public and private, including the state itself, and including coalition partners from whom the state has sought assistance, are accountable to laws. The rule of law in the society concerned increases in proportion to which the laws are made by a legislature or by some process representative of the people's interests, enforced by police and security forces that themselves follow the law, and interpreted, elaborated, and applied by judges who are evenhanded, honest, and independent. So the first three examples are inward-looking and focusing on us, with the impact upon the rule of law in Iraq or Afghanistan necessarily indirect, through example-setting, the conduct of joint patrols, and other mechanisms. The latter three are more outward-looking and focused upon the governments and societies we find ourselves operating with and in, and upon actions and effects that have a more direct impact upon the rule of law and upon the legitimacy of the governments we are supporting.

### **Responding to Attacks from a Shrine in Najaf (Iraq)**

So now, the first example: The setting was in and around the Iraqi city of An Najaf in late March and early April 2003. Then-Major General Dave Petraeus was at the time the commander of a division—a unit of about 20,000 troops and associated helicopters, weapons, communications systems, etc. As division commander, he—and certainly also the commanders and soldiers junior to him—faced time-sensitive and often difficult decisions as they complied with orders to destroy Iraqi military objectives and as they confronted an enemy that routinely fired on them from areas around the Shrine of Imam Ali. (This shrine is one of the holiest sites in Shia Islam.) They also fired on U.S. soldiers from the schools and houses in Najaf—a city of some 600,000 people.

In addition to being militarily sound, the decisions made needed to reflect common sense as well as awareness of the cultural and religious importance of the shrine and other buildings and areas. These decisions—made by individuals who were often tired and under fire—also needed to comply with the law of armed conflict, which permits military forces to kill or capture forces of the enemy but which also requires the minimizing of noncombatant casualties, the avoidance of unnecessary destruction of civilian facilities, and protection of religious and medical sites. United States operations in Najaf in 2003 complied with the law because that is how we had trained, because soldiers had internalized the rules and commanders were setting the right tone, and because operational lawyers—the judge advocates who deploy with our forces—were there in each headquarters down to brigade level to provide sound advice and supervise training on rules of engagement. A brigade, incidentally, is about 4,000 troops and is commanded by a colonel. At one point,

General Petraeus recalls putting a precision munition within some 400 meters of the Imam Ali Shrine, having received reliable intelligence that about 200 armed Saddam Fedayeen were operating in and around the shrine—there is an exception to the rule protecting religious sites that exposes them to attack if they are used for military purposes. In the end, Najaf fell with less destruction and less loss of life than had he decided differently. We and our Iraqi partners were relieved that the Shrine’s Gold Dome escaped the fighting without damage.

### **Opening the Syria Border Crossing (Iraq)**

A second example: In mid-May of 2003, General Petraeus and the newly elected Governor of Nineveh Province in northern Iraq had just located sufficient Iraqi bank funds to pay government workers in the province. General Petraeus’s training in economics came back to him, and he realized that without getting additional goods into the marketplace, the result of paying the workers would be inflation: more Iraqi dinars chasing a relatively fixed amount of goods. So the question to the new governor was how to get additional goods into Mosul, knowing that the flow of vehicles and persons at the Turkish border crossing to the north was already at capacity and that there was no hope in the near term of getting additional goods from Iran in the east. The governor’s answer was, “Reopen the Syrian border crossing.” So the Syrian border crossing was reopened.

The military decisions associated with reopening the border needed to reinforce the authority and legitimacy of the governor and other Iraqi officials. They needed to respect the economic forces at work. They needed to account for the distribution of units and leaders throughout the province. And they needed to address new security concerns raised by an open international border across which weapons and combatants could flow. The decisions also needed to avoid running afoul of a law—the Case Act—that delineates who in the United States government is authorized to make binding international agreements. They needed to comply with sanctions contained in various laws and UN resolutions—which were not yet lifted at that point—governing trade with Iraq. Legal advice was indispensable in this effort, and General Petraeus’s staff judge advocate, my good friend Colonel Rich Hatch, overnight drafted documents that remained below the threshold of an international agreement with Syria. These documents also reassured Washington that General Petraeus was taking emergency measures within his authority. And the documents addressed all of the other key legitimacy, economic, and security concerns. Within days, thousands of trucks were crossing the border, paying modest, flat taxes—\$10 for a little truck, \$20 for a big truck—that were then used to refurbish and operate the customs stations. The area was teeming with commerce, giving the people hope for normalcy. The inflation General Petraeus had been concerned about never materialized.

### **Acting upon Reports of Excessive Force or Crime (Iraq & Afghanistan)**

A third example—and this one is representative of incidents that have confronted commanders in Iraq and Afghanistan—on rare occasions we have received reports alleging use of excessive force against civilians or maltreatment of detainees, either at the point of capture during operations or while held in a facility under U.S. control.

The decision-making process in these rare situations—and I am pleased to be able to say that they have been rare, even as we have faced some who have hidden themselves among civilians and who have sought to mount attacks while in detention—the decision-making process in these rare situations has been governed foremost by law and by our investigative and military justice system. The law requires prompt reporting and investigation of all potential violations and, if the evidence points to it, the prosecution of violators. In these situations, our deployed judge advocates take a lead role. But commanders making decisions in these situations also must incorporate comprehensive non-legal measures to prevent future violations and to eliminate factors that might have contributed to the reported incident. These measures may include immediate instructions through the chain of command, training of guards and interrogators, improvement of facilities, invitations to the International Committee of the Red Cross and others to conduct assessments, discussions with and visits by mullahs and Imams and local council members, and so on. Take the case of a so-called escalation-of-force incident in which troops employ the rules of engagement to, with escalating force, warn an approaching vehicle to slow at a checkpoint and end up tragically claiming the life of a civilian. To help prevent such incidents, non-legal measures may include improvements to traffic control points such as physical barriers, clearly understandable warning signs, better lighting, and refinements to procedures.

### **Funding Local Security Efforts (Iraq & Afghanistan)**

My fourth example is the use of Commanders’ Emergency Response Program funds to support the so-called Sons of Iraq in 2007 and 2008. Many of you may have heard of this program, called “CERP” for short. This was initially a program funded with hidden stashes of Ba’ath Party cash—literally scores of aluminum cases contained stacks of hundred dollar bills—discovered by U.S. troops in early 2003. These stashes were secured, accounted for, and then put to use for the Iraqi people by coalition commanders. In late 2003, Congress supplemented these seized Iraqi funds with U.S. appropriated funds, specifying in law that the money must be used “for urgent humanitarian relief and reconstruction projects.” The successes of the CERP have been widely reported and documented. While larger-scale U.S. and international reconstruction stalled due to a lack of security or in-country capacity, and while the Iraqi

government struggled to execute initiatives of its own, commanders responsibly spent hundreds of millions of dollars in small-scale, immediate-impact projects. These have included thousands of schools, hundreds of medical clinics, thousands of kilometers of road repairs, tens of thousands of minor sewage and sanitation construction and repair jobs, irrigation systems, cement plants, internet cafes for local governments, supplies for courtrooms, air conditioners for homeless shelters, and a host of others.

In 2007, the decision confronting us was whether to use CERP to pay Sons of Iraq—local unemployed Iraqis in communities and neighborhoods in a growing number of provinces, who were willing to turn away from al Qaeda in Iraq and other extremist groups and to provide security for various nearby sites, such as electrical plants, bridges, wells and water treatment facilities, and local government offices. This was the legal piece of a much larger set of decisions aimed at peeling away individuals we came to call “reconcilables” from those who were unwilling to reconcile themselves to a new Iraq and its elected government—so-called “irreconcilables.” We calculated that for a fraction of the cost of fielding a new Mine-Resistant-Ambush-Protected (or MRAP) vehicle—the wonderful new vehicles with V-shaped hulls that have saved many of our troops’ lives—we could save even more U.S. and Iraqi lives by spending CERP to pay the Sons of Iraq. Once initially reconciled, we and the Iraqi government then developed DDR programs—Disarmament, Demobilization, and Reintegration programs—to begin to move these young Iraqi males into more economically productive trades.

The problem initially, however, was that Congress had said CERP was for “humanitarian” projects, and the prevailing interpretation of the law was that hiring armed Sons of Iraq did not fit the legal definition. To make a long story short, we did a lot of consultation with Senate and House members and staffers. In those consultations, we relied on textual as well as purposive arguments of legislative interpretation first learned right here. The result was that Congress became comfortable with the idea that using CERP to pay the Sons of Iraq was an acceptable humanitarian use of the funds for a limited period in 2007 and 2008. In that period, the use of CERP funds was absolutely essential to success in the larger counterinsurgency effort. As I will point out a bit later in discussing efforts of the Rule of Law Field Force in Afghanistan, this approach of employing appropriations provided by Congress for the Department of Defense as a bridge to other funding sources is something the Executive Branch is doing of necessity in Afghanistan in several other contexts.

### **Adopting Counterinsurgency Theory (Afghanistan)**

My fifth example is the express pursuit of a counterinsurgency strategy in Afghanistan since 2009, and what that means in theory. A good deal of theory on these

matters can be found in the U.S. military’s 2006 COIN manual and other recent professional literature.

United States uniformed men and women who are deployed to Afghanistan recognize that the rule of law principle I defined at the outset is essentially a principle of civilian governance. By “civilian,” we do not mean that the laws don’t apply to or require enforcement by the military. Surely they must for the rule of law to exist. As examples one, two, and three illustrated, the 98,000 U.S. troops in Afghanistan are formally bound by written codes of military justice, by commanders’ orders, and by rules of engagement consistent with law. The same is true for the some 40,000 international, and 170,000 Afghan troops deployed in partnership with our forces. All of these military forces join some 134,000 Afghan police in providing security within Afghanistan’s boundaries based upon specific United Nations Security Council, North Atlantic Treaty Organization, and Afghan domestic legal mandates.

By “civilian” governance, we mean to stress that the rule of law principle speaks to and provides a framework for evaluating the effectiveness of the sort of civilian-led government that ordinary Afghans clearly aspire to have. Scarred by decades of armed conflict and forcible occupations by the Soviets, by warring tribal chiefs, and by the Taliban, Afghanistan wants no part of military rule.

The American occupation of Afghanistan ended in 2001, and the country is seeing some still-reversible positive trends, but armed conflict continues in 14 of Afghanistan’s 34 provinces. That makes the government’s employment of both military and police forces a necessity. The armed conflict in Afghanistan is insurgency—a form of warfare in which non-ruling groups employ a mix of violent, persuasive, and other means in an effort to gain power, unseat the government, or otherwise change the political order.

When fighting an insurgency, a government that protects the population and upholds the rule of law can earn legitimacy—that is, authority in the eyes of the people. This is true even against insurgents who both flout and cynically invoke the law. A government’s respect for preexisting and impersonal legal rules can provide a key to gaining it widespread, enduring societal support. This is because distributions of resources, punishments, and other outcomes under law are, ideally, blind to whether one is Popalzai or Shinwari, Pashtun or Tajik, Shia or Sunni, or any other tribe, ethnicity, or sect.

Law is thus a powerful potential tool in COIN, though it was from the influence of my professors in this room that I instinctively avoid ever calling the law a mere “tool” in the service of some other end. Let’s say law is a powerful potential force in COIN.

## Fielding the Rule of Law in Practice (Afghanistan)

My sixth and final case example descends from the theoretical heights of the fifth example and encourages looking with a cold eye at what is being done in Afghanistan and how things are going.

As we move further into 2011, it's worth recalling that there were core grievances 20 years ago in the Afghanistan of the early 1990s that spawned and subsequently empowered the Taliban, leading to its opening as a safe haven for al-Qaida. One of these grievances was the inability of the post-communist Afghan governments to establish a foundation at the subnational level. With no competing authority, the predatory actions of corrupt warlords fueled hatred as local strongmen vying for power sought to compel obedience through the use of force in support of blatant self-interest. Under such conditions, even the harsh and repressive forms of dispute resolution and discipline, advertised by the Taliban as justice, seemed a tolerable alternative.

Fast forward to today. And while much about the situation is different from and more favorable than that of 20 years ago, it is significant that surveys of the Afghan population in key districts reflect a continued lack of governance at this subnational level. Note that Afghanistan is subdivided into 34 provinces and 369 districts. Afghanistan's Independent Directorate of Local Governance reports that there are 88 districts lacking saranwals, or prosecutors. And there are 117 lacking judges. The numbers are actually higher, as some prosecutors and judges on provincial and district payrolls are actually not at their province or district of duty, choosing instead to remain in Kabul or some other relatively safe locale.

This lack of governance, the surveys show, is accompanied by a lack of confidence in the government's ability to deliver justice, resolve civil disputes and address a perceived culture of impunity among the powerful. Establishing the rule of law in these districts is critical to the kind of sound governance that will enable an enduring transition of security responsibility to Afghan forces and deny that rugged country as a sanctuary for global threats.

By providing essential field capabilities—and by that I mean security, communications, transportation, contracting, engineering—the Rule of Law Field Force is helping Afghan officials establish rule-of-law green zones in recently cleared areas in Afghanistan. Doing so requires close coordination with locally deployed military units and partnered Afghan forces, as well as with talented civilian officials from the U.S. interagency, from Canada, the United Kingdom, the European Union, the United Nations and other committed international donors. All Rule of Law Field Force operations are undertaken with an Afghan government lead, and pursuant to civilian policy guidance from Ambassadors Karl Eikenberry, the U.S. chief of diplomatic mission, and Hans Klemm, the coordinating director for rule of law and

law enforcement. And as with all international rule-of-law support efforts in Afghanistan, those of the Rule of Law Field Force fall under the aegis of the United Nations and United Nations Security Council Resolution 1917.

Recent efforts to deliver better governance in western Kandahar City illustrate how an Afghan- and civilian-led rule-of-law campaign is being carried out, and how the Rule of Law Field Force is contributing. The campaign is focused upon holding areas that have been cleared and then building the institutions necessary for security that will last after soldiers are no longer present.

The large Sarposa detention facility in this area, run by Afghanistan's Ministry of Justice, has in recent years been chronically vulnerable and a symbol of the government's ineffectiveness. In 2008, some 400 Taliban prisoners escaped in a daring daylight attack. Assassinations of investigators, bribery of prosecutors, intimidation of justices, and attacks upon witnesses have corrupted the system and obscured both evidence and law. The Afghan national government has been reinforcing the objective of establishing the rule-of-law green zone adjacent to Sarposa prison, and then projecting criminal justice, as well as mediation and civil-dispute resolution, to outlying districts.

Afghanistan's ministers of Justice and Interior on 27 September of last year agreed to immediately build and man, with coalition-nation financing and international advisory assistance, a secure complex known as the Chel Zeena Criminal Investigative Center. The goal of Chel Zeena is to build Afghan capacity to conduct professional, evidence-based investigations, and independent, law-governed prosecutions of the individuals detained in the newly refurbished Sarposa pre-trial detention facility adjacent to it.

Civilian corrections mentors, meanwhile, will work to bring the conditions of detention into compliance with Afghanistan's 2005 law on prisons and detentions, while also reviving the vocational, technical and education bloc of the facility.

The Chel Zeena center, two buildings of which have been inhabited since mid-December, features modest but efficient offices, round-the-clock lighting and utilities, administrative facilities, evidence and hearing rooms, as well as protective housing for investigators, prosecutors, guards and clerical personnel.

With a reinforced hub, consisting of green zones in key governance and dispute resolution nodes in Kandahar City, the projection of support to the districts in Kandahar province becomes more feasible, as district centers rely heavily on the institutions in provincial capitals. The importance of reinforcing the key nodes making up the provincial hub cannot be overstated, as the assassination this past Friday of Kandahar Police Chief Khan Mohammad Mujahid at the police headquarters reminds us. The substantial gains across large swaths of land formerly

controlled by the Taliban, reported just yesterday by Rajiv Chandrasekran of the Washington Post, have made assassination, particularly with suicide car bombs or vests, the desperate tactic of weakened cells no longer able to hold terrain or confront government forces. In addition to Kandahar City, rule of law green zones are being established in other provincial centers, with linkage to protective zones for outlying districts. This hub-and-spoke linkage between green zones in key provinces and districts is helping to create a system of justice at the subnational level.

### Conclusion

A few concluding observations before taking questions. First, although potentially decisive, law was not the sole consideration in these examples, whether inward- or outward-looking. Instead, legal rules joined a host of tactical, operational, logistical, organizational, and other imperatives, all of which were and are significant enough to cause mission success or failure. Notably, in the first two examples, among the imperatives was initiative, without which the military units and soldiers involved would not have been even in position to succeed, and, in the examples that I cited, to save lives. In the 4th, 5th, and 6th examples, it is funding, a comprehensive approach to protecting the population and legitimating the government, and the field projection of governance, respectively, that are the dominant considerations.

Second, and my and General Petraeus's experiences here are by no means unique, the vast majority of soldiers and commanders took great pains to stay within the bounds of the law and in fact relied upon legal advice or legally sound training to sort through what sometimes appeared to be conflicting rules and other complex situations: Can I target the man who is shooting at me from behind the school? Am I authorized to notify the Syrians that we're opening the border? What rules of engagement do I give to my troops at the checkpoint, now that a suicide bomber has just attacked a nearby government building? Can I use CERP funds to pay Sons of Iraq or to rebuild Afghan prisons? This should not be surprising. Our troops respect the law because it is what distinguishes them from an armed mob. It is what legitimates those occasions when they are required to use violence to accomplish their mission. Professor David Kennedy, in "Of War and Law," which is on my Kindle—I should note that Kindle Store via Whispernet does not work in Helmand Province, Afghanistan—puts it well when he says that law does not "stand[ ] outside violence, silent or prohibitive. Law also permits injury, as it privileges, channels, structures, legitimates, and facilitates acts of war."

Third observation—in all of the examples, we had lawyers deployed with us who could help. I have not come close to exhausting all that operational lawyers must be, know, and do in modern U.S. military operations. They must be soldiers—physically fit to endure the rigors and

stresses of combat while keeping a clear head, as well as able to navigate the area of operations, communicate using radios and field systems, and, when necessary, fire their assigned weapons. They must also be prepared, when called upon, to foster cooperation between local national judges and police, to plan and supervise the security and renovation of courthouses, to support the training of judges and clerks on case docketing and tracking, to establish public defenders' offices, to set up anti-corruption commissions, to mentor local political leaders and their staffs, to explain governmental happenings on local radio and television, to develop mechanisms for vehicle registration. Because of their work ethic, creativity, intelligence, and common sense; because of their ability to think and write quickly, persuasively, and coherently; and because of their talent for helping leaders set the proper tone for disciplined and successful operations—I and other commanders tend to deploy as many field-capable lawyers as we can. The number of judge advocates in the 101st Airborne Division reached 29 under General Petraeus's command. At the Multi-National Force-Iraq, a force of about 160,000, we had 670 uniformed legal personnel, including 330 operational lawyers—several of whom were great British and Australian judge advocates—and 340 paralegal specialists and sergeants. In Afghanistan, we have nearly 500 judge advocates and paralegal specialists.

Not all deployed personnel who can help in these endeavors are uniformed or practicing lawyers. Michael Gottlieb, Harvard Law School Class of 2003 and Sears Prize winner that year, just completed 15 months of outstanding service in Afghanistan as Senior Civilian of Task Force 435 and superb Deputy to the inspiring and dynamic Vice Admiral Robert Harward. Professor Ken Holland of Ball State University, who has spent many months in Afghanistan in dozens of journeys there, is, I am grateful to say, the Senior Civilian in the Rule of Law Field Force. And I have my eye on this year's upcoming "draft" of great civilian talent such as Jacob Bronsther, 3rd year law student at New York University Law School, who could not be here this afternoon or else he would have missed celebrating Passover with his family—and I certainly don't wish to fall out of favor with his Mother, as I'm going to need her on my side when Jake and I soon discuss his potential deployment as a District Rule of Law Field Support Officer and Advisor to the Rule of Law Field Force.

Fourth observation: having competent and deployable legal support, much of it trained in halls such as these, is not enough. I grow concerned when I hear of an Italian prosecutor filing charges against a U.S. soldier who followed his rules of engagement and tragically shot and killed an Italian agent during the agent's rescue of an Italian journalist. Investigation established that the agent had failed to communicate his plan to coalition forces or comply with the soldier's instructions; wisely, the Italian court dismissed the case. I grow concerned by suggestions that soldiers during armed conflict should be held to the same standards of collecting evidence, establishing chains of custody, and

giving rights warnings to which policemen are held in American cities and towns.

To be sure, it is sound counterinsurgency to establish the forensic trace linking captives to their terrorist acts. This de-legitimizes them in the eyes of the people they hide among and kill. Sound counterinsurgency is a good thing; trying to stage CSI Baghdad or CSI Kandahar on a military objective is not, and quite frankly, the latter is dangerous. It is also dangerous—and unsound counterinsurgency—to move away from Law of Armed Conflict detention to criminal-based detention more rapidly than is feasible. On the other hand, I am encouraged by proposed laws that improve the environment for sound and timely decisions by military commanders and soldiers in the field. Professors David Barron and Jack Goldsmith and Dan Meltzer, during their time in government, deservedly were renowned throughout the Executive Branch for their incorporation of these considerations into legislative and policy reviews.

As a consequence of our troops' respect for the law, we all share a responsibility to evaluate whether legally significant proposals will promote or constrain the initiative which my examples suggest is essential to military success. And by "we," I mean not only military commanders and operational lawyers, but also members of the legal academy and the bar, as well as legislators and judges and diplomats and other executive branch officials—in short, I mean you and other citizens who provide or receive training, at some time or another, in law school settings such as this one.

Which brings me to a fifth and concluding observation. Rule of law in Iraq and Afghanistan remains mostly just a goal, but also an indispensable one. And in the context of Afghanistan, where my own experience is freshest and therefore this one Harvard Law Grad is more confident in my assessments, the challenges are very practical ones. There is much talk about whether the gains of the troop uplift ordered by the President at West Point in 2009 are sustainable. Simply put, this grad's view is that the emplacement and transitional support of relatively small

numbers of Afghan government officials at the provincial and district level is key to sustaining recent security gains and transferring security responsibility. We need to assist committed Afghans in fielding a network that surpasses what is a very real—if complex and multi-aimed—network opposing them. The resulting improvements in district governance can help displace the Taliban and prevent their return by offering less arbitrary dispute resolution and dispelling fear among the population. These efforts are modest in cost, and the improvements are achievable and sustainable. Anyone who has seen the district governors, police chiefs, and prosecutors in Khost City, Zheray, Arghandab, and Nawa help transform those places from active combat zones into places where Pashtuns are shouting and squabbling over civil claims rather than shooting and planting bombs, knows the force of this observation. The strengthening of traditional dispute resolution at the local level is one of the most efficient and effective ways to achieve the kind of security and stability that can enable transition of responsibility to the Afghan government and its forces, and protect our own core national security interests.

I close where I began, in humility and thanks for having received this opportunity to return to a place I hold dear, to thank the faculty that helped prepare me for service, and to recognize—by accepting this high honor—the extraordinary contributions and sacrifices being made by my comrades in Afghanistan and by those with whom I have served throughout my career since leaving Harvard Law. I also wish to thank Amy Hilton for her tireless efforts in setting up this event, Peter Melish for audiovisual support, and terrific Harvard alum and Deputy General Counsel of the Department of Defense Paul Koffsky, who helped set a record in clearing me to participate in these events today. My final note of thanks is easily the most important: I thank my family—mother Sadie, children Nathan and Hannah, and amazing, inspirational wife and partner, Kate. This day would have been inconceivable without their constant love and support. Kate, Honey, I'll be home from Afghanistan as soon as I pass the exit exam. And now I will be happy to take questions.

Trial Judiciary Note

A View from the Bench: Immunizing Witnesses

Colonel R. Peter Masterton\*

Introduction

Immunizing witnesses in courts-martial can provide benefits to both the prosecution and the defense. Immunizing a member of a criminal conspiracy is sometimes the only means of obtaining evidence that can be used against other conspirators. It may also provide important evidence for defense counsel representing another conspirator. However, once immunity is granted, it may be difficult or impossible to prosecute the immunized witness.<sup>1</sup>

This note will examine the purpose and history of immunity grants. It will then look at the types of immunity and the effects that each has on future prosecution. It will also discuss defense requests for grants of immunity and provide advice for both prosecutors and defense counsel seeking to immunize witnesses.

Purpose and History

The Fifth Amendment to the U.S. Constitution provides that “No person . . . shall be compelled in any criminal case to be a witness against himself . . . .”<sup>2</sup> Recognizing the need to obtain self-incriminating statements to break up criminal conspiracies, Congress enacted statutes authorizing grants of immunity to overcome the constitutional privilege.<sup>3</sup> The courts have long recognized that immunity could overcome the privilege: a properly immunized witness may be compelled to answer incriminating statements. Initially, case law suggested that the only way to overcome the privilege against self incrimination was a grant of “transactional immunity” which protects the witness from any future prosecution.<sup>4</sup> In 1972 the Supreme Court ruled that the privilege could be overcome by “testimonial” or

“use” immunity which only protects the witness from direct and derivative use of the immunized testimony.<sup>5</sup>

The privilege against self-incrimination has long been a part of military law.<sup>6</sup> The military has also long recognized the authority to overcome the privilege through grants of immunity.<sup>7</sup> The current military authority to grant immunity is codified in Rule for Courts-Martial 704.<sup>8</sup> Although this authority is not based on statute, the courts have recognized the validity of military grants of immunity.<sup>9</sup>

Formal Grants of Immunity

The *Manual for Courts-Martial* provides for two types of immunity: “transactional” immunity and “testimonial” immunity.<sup>10</sup> Transactional immunity protects the witness from future prosecution for the offenses that are the subject of the grant.<sup>11</sup> Testimonial immunity, also known as use immunity, does not provide this type of protection from future prosecution; it only protects the witness against the direct and derivative use of the immunized statements in a subsequent prosecution.<sup>12</sup> Because it does not provide as broad protection, testimonial immunity is the preferred type

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 704(a) discussion (2008) [hereinafter MCM].

<sup>2</sup> U.S. CONST. amend. V.

<sup>3</sup> The current federal immunity statute is 18 U.S.C. §§ 6002–6005 (2006).

<sup>4</sup> See *Counselman v. Hitchcock*, 142 U.S. 547, 585–86 (1892) (“No statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the constitution of the United States”).

<sup>5</sup> *Kastigar v. United States*, 406 U.S. 441, 452–53 (1972). The Court did not overrule *Counselman*, but held the broad language in that opinion to be dicta. *Id.* at 453–54.

<sup>6</sup> WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 196–97, 345–46 (2d ed. 1920), available at [http://www.loc.gov/rr/frd/Military\\_Law/historical\\_items.html](http://www.loc.gov/rr/frd/Military_Law/historical_items.html). The military privilege against self-incrimination is currently codified in Article 31, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 831 (2006).

<sup>7</sup> MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 216 (1917), available at [http://www.loc.gov/rr/frd/Military\\_Law/CM-manuals.html](http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html) (“The fact that an accomplice turns state’s evidence does not guarantee him immunity from trial, unless immunity has been promised him by the authority competent to order his trial . . .”).

<sup>8</sup> MCM, *supra* note 1, R.C.M. 704.

<sup>9</sup> *United States v. Kirsch*, 35 C.M.R. 56, 67 (C.M.A. 1964). *But see* Captain Herbert Green, *Grants of Immunity and Military Law*, 53 MIL. L. REV. 1, 25–27, 34 (1971), available at [http://www.loc.gov/rr/frd/Military\\_Law/Military\\_Law\\_Review/1971.htm](http://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/1971.htm) (critiquing *Kirsch* and proposing that Congress enact a plain statutory authorization for military grants of immunity).

<sup>10</sup> MCM, *supra* note 1, R.C.M. 704(a).

<sup>11</sup> *Id.* R.C.M. 704(a)(1).

<sup>12</sup> *Id.* R.C.M. 704(a)(2).

of immunity.<sup>13</sup> Testimonial immunity is sufficient to overcome the military privilege against self-incrimination.<sup>14</sup>

If the Government plans to prosecute a witness who has been granted testimonial immunity, it is best to complete the prosecution before the witness testifies.<sup>15</sup> Once the witness testifies, the Government bears the heavy burden of affirmatively showing in any subsequent prosecution of the immunized witness that it made no direct or derivative use of the immunized testimony.<sup>16</sup>

An accused's immunized statements may not be used to obtain additional witnesses, evidence or investigative leads for use in the accused's subsequent prosecution. For example, if an accused's immunized testimony implicating a co-accused induces the co-accused to testify against the accused, the prosecution is prohibited from using the co-accused's testimony in the accused's court-martial.<sup>17</sup> Similarly, if an accused's immunized testimony leads prosecutors to other witnesses, the prosecution is prohibited from using the testimony of these witnesses against the accused.<sup>18</sup> To successfully prosecute an immunized accused, the Government must affirmatively show that any new witnesses or evidence were derived through means independent of the accused's immunized statements.<sup>19</sup>

Immunized statements also may not be used in deciding to whether to prosecute immunized witnesses. For example, decisions to prosecute witnesses made after they provide immunized testimony are usually held to be improper.<sup>20</sup> To

successfully prosecute an immunized witness the Government must affirmatively show that the decision to prosecute was not based on immunized statements.<sup>21</sup>

Before prosecuting an immunized witness, the Government should catalogue or "freeze" its evidence at the moment immunity is granted.<sup>22</sup> The Government must also detail a different prosecution team to the trial of the immunized witness and create a "Chinese wall" between this team and the prosecutors who are exposed to the immunized testimony.<sup>23</sup> This will help the Government meet its burden of showing that its evidence and decision to prosecute were based on evidence independent of the immunized statements.

### Informal Immunity

Officers who make unauthorized promises of immunity to their soldiers may create *de facto* immunity. Only the general court-martial convening authority is authorized to grant immunity.<sup>24</sup> When lower-level commanders or staff officers make unauthorized promises of immunity, the courts may provide the accused *de facto* transactional immunity,

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accused and then denied such use. Government did not meet burden to show decision to prosecute was based on evidence wholly independent of immunized statements because decision to prosecute was made after accused's denial. Government bore burden of proving, by a preponderance of the evidence, that its decision to prosecute was "untainted" by immunized evidence); *United States v. Eastman*, 2 M.J. 417, 419 (A.C.M.R. 1975) (forbidden use of immunized testimony includes the "decision to initiate prosecution"; in this case the Government failed to meet this burden where immunized testimony was read by the Article 32 investigating officer, the drafter of the pretrial advice and the staff judge advocate (SJA) who provided the pretrial advice.); *Boyd*, 27 M.J. at 85–86 (where decision to withdraw administrative discharge and proceed with court-martial was made after accused was immunized and testified against co-accused, Government failed to meet burden of showing decision to prosecute was made wholly independently of immunized testimony).

<sup>13</sup> *Id.* R.C.M. 704(a) discussion.

<sup>14</sup> *Id.* MIL. R. EVID. 301(c)(1).

<sup>15</sup> *Id.* R.C.M. 704(a) discussion ("[I]f it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.").

<sup>16</sup> *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972) (prosecution bears heavy burden to affirmatively demonstrate its evidence is derived from legitimate source wholly independent of immunized testimony).

<sup>17</sup> *United States v. Mapes*, 59 M.J. 60, 68 (2003) (where co-accused implicated accused only after accused gave immunized testimony against co-accused, Government failed to meet burden of showing its evidence was derived from source wholly independent of immunized testimony); *United States v. Rivera*, 1 M.J. 107, 110–11 (C.M.A. 1975) (Government made improper use of accused's immunized testimony because it assisted Government in obtaining co-accused's testimony against accused).

<sup>18</sup> *United States v. Boyd*, 27 M.J. 82, 83–86 (C.M.A. 1988) (when accused was immunized and testified against co-accused and co-accused and another witness subsequently implicated accused, Government failed to meet burden of showing new evidence was developed wholly independently of immunized testimony). See Captain Jeffrey J. Fleming, DAD Note, *Revenge by a Co-Accused—A Derivative Use of Immunized Testimony*, ARMY LAW., May 1989, at 20 (reporting on *Boyd* and its implications).

<sup>19</sup> *United States v. Allen*, 59 M.J. 478, 482–83 (2004) (accused made immunized statements under state law; Government met burden of showing the accused's subsequent confession to military investigator was not derived from the immunized statements).

<sup>20</sup> *United States v. Olivero*, 39 M.J. 246, 248–51 (C.M.A. 1994) (Accused was granted immunity and initially admitted using marijuana with co-

<sup>21</sup> *United States v. England*, 33 M.J. 37, 39 (C.M.A. 1991) (although decision to prosecute was made after accused's immunized testimony was given, the Government met its burden of showing that it did not affect the decision to prosecute because the testimony did not relate to the accused and provided prosecutors with no new information). Prior case law held that a convening authority who immunized a witness was disqualified from taking post-trial action on the case; this is no longer the case. *United States v. Newman*, 14 M.J. 474, 481–82 (C.M.A. 1983).

<sup>22</sup> *United States v. Gardner*, 22 M.J. 28, 31 n.4 (C.M.A. 1986) (government can meet burden of showing accused's trial was not tainted by immunized testimony in part by preserving investigatory file assembled prior to the testimony). See Captain A. Jason Neff, *Getting to Court: Trial Practice in a Deployed Environment*, ARMY LAW., Jan. 2009, at 50, 54.

<sup>23</sup> *United States v. Mapes*, 59 M.J. 60, 69 (2003) (Chinese wall inadequate where SJA, convening authority, and principal CID investigator all knew about immunized testimony); *United States v. Gardner*, 22 M.J. 28, 31 (C.M.A. 1986) (military judge properly disqualified assistant trial counsel who was exposed to immunized testimony where trial counsel had not been exposed to testimony in any way). See Neff, *supra* note 22 at 54 (discussing challenge of maintaining "Chinese wall" in deployed environment, where privacy is limited).

<sup>24</sup> MCM, *supra* note 1, R.C.M. 704(c).

barring the Government from future prosecution.<sup>25</sup> At the very least, statements made in response to such promises may not be used against the recipient of the promise.<sup>26</sup> Prosecutors should ensure that the commanders and staff officers they advise do not inadvertently immunize service members suspected of criminal offenses.

The pretrial agreement process may provide a result similar to a grant of immunity. A promise to testify truthfully in the trial of a co-accused is a permissible pretrial agreement term.<sup>27</sup> However, such promises must be made voluntarily, since an accused may not be forced to enter into a pretrial agreement.<sup>28</sup> The protections for the accused are not the same as those provided through immunity. The Government can withdraw from a pretrial agreement before the accused begins performance.<sup>29</sup> In addition, pretrial agreements made with lower-level convening authorities may not preclude later prosecution by higher-level convening authorities.<sup>30</sup> Defense counsel who are negotiating pretrial agreements should always consider including terms promising testimony against co-accused.

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<sup>25</sup> United States v. Kimble, 33 M.J. 284, 289–91 (C.M.A. 1991) (promise by accused's reporting official and special court-martial convening authority that there would be no court-martial if accused successfully completed civilian diversionary program amounted to *de facto* transactional immunity); Cooke v. Orser, 12 M.J. 335, 337–38, 345–46 (C.M.A. 1982) (trial court held that promise of immunity by SJA, though unauthorized by general court-martial convening authority, required suppression of statements and derived evidence; appellate court found a due process violation and dismissed charges with prejudice); United States v. Churnovic, 22 M.J. 401, 408 (C.M.A. 1986) (promise by petty officer, under instructions from executive officer, that accused "wouldn't get in trouble" if he revealed the location of hidden hashish, was "enforceable for much the same reasons that apply to promises of transactional immunity"). *But see* United States v. Caliendo, 32 C.M.R. 405, 410 (C.M.A. 1960) (promise by accused's civilian supervisor and noncommissioned officer in charge that no action would be taken if stolen property was returned did not amount to *de facto* immunity or require suppression of subsequent acts and statements; court reasoned that it could have done so, but that trial court had made appropriate factual conclusions to the contrary, in particular that subsequent admissions were not made in reliance on this promise).

<sup>26</sup> Cunningham v. Gilevich, 36 M.J. 94, 100–02 (C.M.A. 1992) (statement by accused's commander encouraging them to testify did not amount to *de facto* immunity, but did amount to unlawful influence making accused's subsequent statements inadmissible under Article 31); United States v. Thompson, 29 C.M.R. 68, 70–71 (C.M.A. 1960) (alleged promise by squadron commander not to prosecute accused if he revealed all he knew about thefts did not amount to *de facto* immunity, but would bar admission of statements made in response to promise).

<sup>27</sup> MCM, *supra* note 1, R.C.M. 705(c)(2)(B).

<sup>28</sup> *Id.* R.C.M. 705(c)(1)(A).

<sup>29</sup> *Id.* R.C.M. 705(d)(4)(B); Shepardson v. Roberts, 14 M.J. 354, 357–58 (1983).

<sup>30</sup> United States v. McKeel, 63 M.J. 81, 83–85 (2006) (pretrial agreement with special court-martial convening authority not to refer charges to court-martial if accused accepted non-judicial punishment and waived administrative separation board did not preclude later referral of court-martial charges by general court-martial convening authority; remedy for improper promises extended only to accused's detrimental reliance on the improper promise, and trial court had suppressed statements made during nonjudicial punishment).

Defense counsel should also ensure that their clients understand the limited protections such terms provide.

## Defense Requests for Immunity

Often, servicemembers accused of crimes will want others allegedly involved in their misconduct to provide exculpatory evidence on their behalf. Although the defense may ask that a witness be immunized, the decision to grant immunity is within the sole discretion of the general court-martial convening authority.<sup>31</sup> However, if the Government has engaged in discriminatory use of immunity to obtain a tactical advantage or, through overreaching, has forced a witness to invoke the privilege against self-incrimination, the defense may be able to obtain a remedy. In such cases, a military judge may abate the proceedings if the defense can show that the witness will invoke the privilege against self-incrimination and that the witness' testimony is material, clearly exculpatory and not cumulative or obtainable from some other source.<sup>32</sup>

Defense counsel representing clients suspected of engaging in criminal activity with other service members should consider requesting immunity, in appropriate situations. Although such requests are rarely granted, they may provide critical evidence for the defense. Defense counsel should also be alert to the discriminatory use of immunity by the Government.

## Procedures

A grant of immunity must be made in writing and signed by the general court-martial convening authority who issues it. The grant must identify the matters to which it extends.<sup>33</sup> Defense counsel representing an immunized witness should carefully examine the written grant of immunity and ensure the client understands the limits of the grant, and the point beyond which the client should invoke the privilege against self-incrimination.

The Government is required to notify the accused when a prosecution witness has been granted immunity or leniency.<sup>34</sup> When an immunized witness testifies at trial, defense counsel should be prepared to cross examine the witness regarding the grant of immunity and consider

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<sup>31</sup> MCM, *supra* note 1, R.C.M. 704(e).

<sup>32</sup> *Id.*; *see also* Major Steven W. Myhre, *Defense Witness Immunity and the Due Process Standard: A Proposed Amendment to the Manual for Courts-Martial*, 136 MIL. L. REV. 69, 72–74 (1992) (discussing, among other things, normal process for defense witness immunity).

<sup>33</sup> MCM, *supra* note 1, R.C.M. 704(d).

<sup>34</sup> *Id.* MIL. R. EVID. 301(c)(2). The notice must be made before arraignment or within a reasonable time before the witness testifies.

requesting an instruction on the limited credibility of such testimony.<sup>35</sup>

Military grants of immunity will bar use of the immunized statements by other jurisdictions.<sup>36</sup> Similarly, grants of immunity in other jurisdictions will bar use of the immunized testimony in military courts-martial.<sup>37</sup> Defense counsel should be vigilant to ensure the Government makes no direct or derivative use of immunized testimony their clients provide in state or federal court.

Military grants of immunity are usually made to service members subject to the Uniform Code of Military Justice.<sup>38</sup> When the subject of a military grant of immunity relates to federal offenses which could result in prosecution of a service member in U.S. District court, coordination with the Department of Justice is required.<sup>39</sup> Military prosecutors must ensure this coordination is completed before a grant of immunity is issued. Military grants of immunity can be made to civilians only when specifically authorized by the Attorney General of the United States.<sup>40</sup>

Grants of immunity should not specify the contents of the testimony the witness is expected to give.<sup>41</sup> Grants of immunity that require witnesses to testify in accordance with a written statement, or otherwise specify what the content of the testimony must be, may encourage them to be untruthful, making them incompetent as witnesses.<sup>42</sup> Prosecutors and

defense counsel must be vigilant to ensure grants of immunity are not too specific in this regard.

Grants of immunity will not shield witnesses from subsequent prosecutions for perjury or making a false statement.<sup>43</sup> A person who refuses to testify despite a valid grant of immunity may be prosecuted for the refusal to testify.<sup>44</sup> Prosecutors who determine that an immunized witness has lied, either to investigators or in court, or has refused to testify should consider bringing appropriate charges against the witness. Such prosecutions should be completely separate from any prosecution for the underlying misconduct.<sup>45</sup>

## Conclusion

Grants of immunity can be useful tools for both the Government and the defense. However, they can raise many legal problems. Before immunity is granted, the Government should carefully plan out any future prosecution of the witness to be immunized. The Government should catalogue the evidence it has at the time of the grant of immunity and should create a new prosecution team for the case against the witness that is separated from the prosecutors exposed to the immunized testimony. Defense counsel should understand the implications of grants of immunity issued to their clients. Defense counsel should also consider alternatives to formal grants of immunity, such as a pretrial agreement term offering testimony against a co-accused.

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<sup>35</sup> U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-19 (1 Jan. 2010). Defense counsel should also consider requesting an accomplice instruction. *Id.* para. 7-10.

<sup>36</sup> *See* *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79-80 (1964) (holding that state grant of immunity from prosecution is binding on the federal government; after grant of immunity witness and government should be left in substantially the same position as if the witness had invoked his right to silence).

<sup>37</sup> *United States v. Allen*, 59 M.J. 478, 482-84 (2004) (holding that state grant of immunity is binding on courts-martial, but that court-martial was not tainted by evidence obtained under state grant under particular facts of the case).

<sup>38</sup> MCM, *supra* note 1, R.C.M. 704(c)(1).

<sup>39</sup> *Id.*; U.S. DEP'T OF DEF., INSTR. 5525.07, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENTS OF JUSTICE (DOJ) AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES encl. 2, para. E, Supplemental DOD Guidance (18 June 2007) (command authority to issue grants of immunity extends only to trial by court-martial, so coordination must be made with civilian authorities when offenses might lead to prosecution in civilian court).

<sup>40</sup> MCM, *supra* note 1, R.C.M. 704(c)(2).

<sup>41</sup> *Id.* R.C.M. 704(d) discussion.

<sup>42</sup> *United States v. Stoltz*, 34 C.M.R. 241, 244-45 (C.M.A. 1964) (grant of immunity that required witness to testify in conformity with pretrial statement rendered witness incompetent to testify); *United States v. Conway*, 42 C.M.R. 291, 293-94 (C.M.A. 1970) (co-accused was incompetent as witness when he understood his informal agreement with SJA required him to testify in strict accordance with his statement to trial counsel).

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<sup>43</sup> *Glickstein v. United States*, 222 U.S. 139, 142 (1911).

<sup>44</sup> MCM, *supra* note 1, R.C.M. 704(d) discussion.

<sup>45</sup> *United States v. Eastman*, 2 M.J. 417, 419 (A.C.M.R. 1975).

## New Developments

### Administrative & Civil Law

#### The Army Safety Program

The following Army regulation has been recently updated. Attorneys should regularly consult the U.S. Army Publishing Directorate's website (<http://www.apd.army.mil>) for updates to Army publications, including regulations and pamphlets. All updated regulations feature a "Summary of Change" section that outlines pertinent revisions.

- AR 385-10, The Army Safety Program  
RAR: 4 October 2011  
*Changes:* Among other things, this update requires that a Soldier's failure to wear occupant protective devices (e.g., seat belts) or other required protective equipment, or to comply with operator licensing or training requirements, be considered when making a line-of-duty

determination for death or injuries resulting from nonuse of such equipment or noncompliance with requirements.<sup>1</sup> This change is significant because the regulation previously left it to the discretion of the official making the line-of-duty determination whether to consider such information in making the determination.

—Major Derek D. Brown

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<sup>1</sup> U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 11-4a(7) (RAR, 14 Jun. 2010).

## Book Reviews

### How We Decide<sup>1</sup>

Reviewed by Major Keith A. Petty\*

*If the game seems simple or obvious, then you've made a mistake. The game is never simple. You've always got to wonder: what am I missing?*<sup>2</sup>

#### I. Introduction

In late 2002, top U.S. military and political leaders were heavily engaged in deciding whether and how to launch an armed attack against Iraq.<sup>3</sup> Following the invasion in 2003 and during the conflict, thousands of Soldiers made split-second decisions whether to engage the enemy with lethal force. Judge advocates supporting these efforts had to decide how to advise on issues ranging from targeting decisions to detention operations. Each of these actors—leaders, Soldiers, judge advocates—must make effective decisions in order to succeed. But how does the military professional, as the maxim goes, “get it right the first time, every time?” How can we avoid making bad decisions?

In his latest work, *How We Decide*, Jonah Lehrer attempts to shed light on two key issues: How the human mind makes decisions, and how we can make those decisions better.<sup>4</sup> His conclusions are surprising and illuminating. The conventional wisdom that logic ought always to prevail over emotion must be discarded, he argues convincingly.<sup>5</sup> Rather, different situations require the decision-making abilities of different parts of the brain and, sometimes, a cooperative combination of reason and feeling. Lehrer's arguments are strengthened by his use of the latest research from neuroscience and cognitive psychology. That this book is on the reading list at the U.S. Army Command and General Staff College reflects its applicability to the decision-making process of military leaders.<sup>6</sup> Any experienced trial attorney who reads it will readily see how it applies to the tactical decisions he must make, both out of court and on his feet.

#### II. The Complexities of the Human Mind

Lehrer explains the complex workings of the mind by relying on his storytelling gifts. For example, he demonstrates the power of the emotional brain through the story of Lieutenant Commander (LCDR) Michael Riley, a British Navy radar operator during the Gulf War.<sup>7</sup> Concerned that a blip on the radar approaching the USS *Missouri* did not “feel like” a friendly aircraft, he ordered that it be shot down because “he just knew” it was an incoming Iraqi missile.<sup>8</sup> His intuition saved the lives of hundreds on board the *Missouri*.<sup>9</sup> Or take the story of Wag Dodge, a parachuting firefighter in Montana in 1949, who was trapped with his brigade of smokejumpers by a wall of fire two hundred feet tall and three hundred feet deep.<sup>10</sup> Realizing they could not outrun the approaching flame, Dodge relied on his prefrontal cortex, the logic center of the brain, to come up with a creative solution—he lit a small fire where he was standing.<sup>11</sup> The burnt ground where he made the fire served as a protective buffer to the raging inferno.<sup>12</sup> Finally, Michael Binger, a particle physicist at Stanford and a professional poker player, demonstrates how a combination of logic (math) and instinct (judging your opponent's bluff) allow him to make the decisions that win poker tournaments.<sup>13</sup>

While these anecdotes add clarity to otherwise complex ideas, the structure of the book risks confusing the reader. Initially, Lehrer argues that emotions are undervalued and that dopamine neurons that control feelings can be extremely useful. Just look at the instincts of Tom Brady when he threw a last second pass that ultimately won the 2002 Super Bowl.<sup>14</sup> He relied on finely tuned dopamine cells, the same brain activity that allowed LCDR Riley to know the radar blip was an incoming missile.<sup>15</sup> Then Lehrer does an about face and cautions against using emotions too heavily. This

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<sup>1</sup> JONAH LEHRER, *HOW WE DECIDE* (2009).

<sup>2</sup> *Id.* at 241 (quoting Michael Binger, professional poker player and physicist).

<sup>3</sup> Peter Beaumont & Ed Vulliamy, *US Lays Out Plans to Invade Iraq with 200,000 Troops*, THE GUARDIAN, November 10, 2002, available at <http://www.guardian.co.uk/world/2002/nov/10/iraq3>.

<sup>4</sup> LEHRER, *supra* note 1, at xvii.

<sup>5</sup> *Id.* at xv.

<sup>6</sup> U.S. ARMY COMBINED ARMS CTR., COMMAND AND GENERAL STAFF COLLEGE, LEADERSHIP READING LIST, available at <http://www.cgsc.edu/dcl/readingList.asp> (last visited Nov. 10, 2011).

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<sup>7</sup> LEHRER, *supra* note 1, at 30.

<sup>8</sup> *Id.* at 32.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 95.

<sup>11</sup> *Id.* at 96.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 219–29.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 34.

can lead to risky behavior—gambling, excessive credit card use—because our feelings have blinded us to the prospect of loss.<sup>16</sup> Later still, he trumpets the value of reason, and, paraphrasing Aristotle, states that “the key to cultivating virtue [is] learning how to manage one’s passions.”<sup>17</sup> And then he suggests that when we allow reason to take complete control we choke on thought.<sup>18</sup>

The patient reader is rewarded in the final chapter when Lehrer succinctly describes the situations best suited for each type of brain function and strategies to avoid mental traps. Simple problems, he suggests, require the simplicity of the logical mind.<sup>19</sup> If it can be reduced to a numerical value, then it is a simple problem for the prefrontal cortex. Novel problems that we have no experience with also require the creativity only derived from the logical part of the brain.<sup>20</sup> It is only in cases where we have experience—throwing a pass, swinging a golf club, firing a weapon—that we should allow our emotional instincts to thrive.<sup>21</sup> For complex problems, we must be cautious of overconfidence.<sup>22</sup> This can only be avoided if we embrace all of the evidence before making a choice, especially if it contradicts our preconceived notions. This is when, time permitting, the decision-making process should be extended. Ultimately, Lehrer urges the reader to think about how we think in order to recognize the type of problem we are facing and the kind of decision-making process it requires.<sup>23</sup>

### III. A Growing Field

Lehrer readily admits that “[t]he science of decision-making remains a young science.”<sup>24</sup> Nonetheless, efforts to determine why humans behave the way they do has been the focus of research for decades.<sup>25</sup> A rich body of literature already exists in the field of compliance theory, which seeks to answer why individuals, organizations, and governments

behave the way they do.<sup>26</sup> Lehrer misses the opportunity to illustrate how the dopamine neurons that control our emotions might explain Herbert Kelman’s influential theory of “identification.” This theory describes how individuals adopt the behavior of a superior in order to attain a desired relationship, and has been widely cited in behavioral scholarship.<sup>27</sup>

Also, by focusing his efforts on the inner workings of the mind, Lehrer gives little consideration to outside influences that affect individual behavior. Social psychologists have noted a tendency among professionals, including lawyers, to overlook external variables when examining individual decision-making.<sup>28</sup> In fact, the decision-making environment has a tremendous impact on human behavior, causing some scholars to suggest that greater emphasis needs to be placed on the institutional factors that affect the decision-making process.<sup>29</sup> And even though Lehrer touches upon the importance of internalizing experiences for future decision making,<sup>30</sup> he never capitalizes on research demonstrating that individuals tend to internalize the value sets of their organizations.<sup>31</sup>

Although Lehrer’s arguments are strong, they could be more persuasive if he cited, and rebutted, counterarguments. He refers to rational choice theory in microeconomics,<sup>32</sup> which maintains that human beings tend to act like rational agents out to get the most utility for the lowest possible price. Lehrer contends that this theory fails to account for bias and expectations, and that too much rational analysis leads to poor decisions.<sup>33</sup> He does not, however, take the time to explain—from a rational choice perspective—why there might be exceptions to the general theory. To his detriment, he also does not cite leading scholars in the field.<sup>34</sup> In spite of these shortcomings, the lessons derived

<sup>16</sup> *Id.* at 81.

<sup>17</sup> *Id.* at 107. The paraphrase is from Aristotle, *Nicomachean Ethics* (Martin Ostwald trans., New York: Macmillan 1962).

<sup>18</sup> LEHRER, *supra* note 1, at 138.

<sup>19</sup> *Id.* at 244. See also David J. Snowden & Mary E. Boone, *A Leader’s Framework for Decision Making*, HARV. BUS. REV., Nov. 2007, at 70 (arguing that simple problems require “straight-forward management and monitoring”).

<sup>20</sup> LEHRER, *supra* note 1, at 246.

<sup>21</sup> *Id.* at 248.

<sup>22</sup> *Id.* at 247.

<sup>23</sup> *Id.* at 250.

<sup>24</sup> *Id.* at 243. For a similar contribution in this field, see generally DAN ARIELY, *PREDICTABLY IRRATIONAL* (2009).

<sup>25</sup> John S. Hammond, Ralph L. Keeney & Howard Raiffa, *The Hidden Traps in Decision Making*, HARV. BUS. REV., Jan. 2006, at 118.

<sup>26</sup> See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1 (2010).

<sup>27</sup> Herbert C. Kelman, *Compliance, Identification, and Internalization: Three Processes of Attitude Change*, 2 J. CONFLICT RESOL. 51, 52–53 (1958). See also, Koh, *supra* note 26, at 260 n.3.

<sup>28</sup> Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007).

<sup>29</sup> W. Bradley Wendel, *Deference to Clients and Obedience to the Law: The Ethics of the Torture Lawyers (A Response to Professor Hatfield)*, 104 NW. U. L. REV. COLLOQUY 58, 63 (2009) (citation omitted).

<sup>30</sup> LEHRER, *supra* note 1, at 252.

<sup>31</sup> Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245 (2009).

<sup>32</sup> LEHRER, *supra* note 1, at 148, 201.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (applying rational choice theory to international law).

from Lehrer's work are directly applicable to military professionals.

#### IV. Practical Applications

There are obvious benefits to Lehrer's normative prescriptions for commanders and judge advocates alike. Leaders can reinforce combat readiness by training Soldiers effectively. With sufficient experience, actions during combat—like LCDR Riley's ability to detect an Iraqi missile—will be instinctual and correct. Judge advocates similarly recognize that once the law of war and rules of engagement are committed to memory, a Soldier's decision to engage after positively identifying the enemy becomes automatic; a thought process that occurs in the dopamine neurons that the Soldier might not even be aware of.<sup>35</sup> This allows the kind of quick, decisive action that wins battles. But, as Lehrer states, "Dopamine neurons need to be continually trained and retrained, or else their predictive accuracy declines."<sup>36</sup> A combat Soldier, or courtroom advocate, whose experience gets "rusty" will need retraining or new experience before being sent into the "thick of battle."<sup>37</sup>

Complex military decisions cannot be left to feeling alone. The Army currently uses the military decision making process (MDMP),<sup>38</sup> which has a strong correlation to the Lehrer's key principles. The MDMP is a seven-step planning model that "establishes procedures for analyzing a mission, developing, analyzing, and comparing courses of action against criteria of success and each other, selecting the optimum courses of action, and producing a plan or order."<sup>39</sup> The intent of the MDMP is to organize the decision-making of commanders and staffs.<sup>40</sup>

Lehrer explains how the mind engages in a similarly structured three-step process when problem-solving.<sup>41</sup> First, the logical part of the brain establishes a "clean slate" by removing irrelevant thoughts. Second, the brain generates associations, searching for relevant strategies in different areas of the mind. Finally, when the correct answer is

found, it is passed to the frontal lobes and the mind instantly recognizes that the problem is solved.

Military planners must similarly focus on relevant information in order to generate creative solutions, as Wag Dodge did when he lit the protective fire that saved his life.<sup>42</sup> After dismissing irrelevant courses of action, planners then must consider all of the options, allowing Lehrer's inner "argument" to take effect.<sup>43</sup> This helps military decision-makers avoid the trap of preconceived notions (e.g., overconfidence in their own troop strength or overreliance on incomplete intelligence) and engage in a truthful analysis of the situation at hand.<sup>44</sup> Finally, and perhaps most importantly, it allows the commander to exert authority over operations. This is similar to the executive function of the prefrontal cortex, which reins in possibly impulsive behaviors of the emotional brain centers.<sup>45</sup>

Judge advocates are indispensable to the military decision-making process by providing support to the command. The ability to apply the law to a proposed course of action is directly analogous to Lehrer's description of the logical prefrontal cortex keeping the emotional mind under control.<sup>46</sup> For example, if the command wishes to purchase something (emotional activity), the judge advocate must be prepared to ask how much it costs and whether the purchase complies with relevant laws and regulations (logical reasoning).

Judge advocates also serve as the command's moral compass. Some will inevitably take issue with Lehrer's comparison of the immoral mind to a lawyer. He writes, "[A] psychopath is left with nothing but a rational lawyer inside his head, willing to justify anything."<sup>47</sup> It is understood in our profession, with morality codified in ethics regulations, that we are to help commanders find a way to "yes," but not at all costs and certainly not at the expense of the law. In the military decision-making process, perhaps the most important moral question a judge advocate can ask is this: "I know we *can* take this course of action, but *should* we?" The ability to consider the feelings of others—whether it is higher headquarters, the civilian population that might be affected by an operation, or the public reaction to certain actions—is required of military lawyers and a critical component of what Lehrer calls the "moral mind."<sup>48</sup>

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<sup>35</sup> *Id.* at 34.

<sup>36</sup> LEHRER, *supra* note 1, at 49.

<sup>37</sup> This also suggests that a new trial counsel looking for a quick "gut check" might get a better answer from a senior trial counsel who has been in court continuously for the last two years than from a senior member of the office who has more experience and knowledge, but has not been in court lately. It also suggests that courtroom skills, as opposed to legal analysis, are best learned on the job from current practitioners, not in an academic setting.

<sup>38</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 5-0 (101-5), ARMY PLANNING AND ORDERS PRODUCTION ch. 3 (20 Jan. 2005).

<sup>39</sup> *Id.* para. 3-1. The seven steps of the MDMP are: (1) receipt of missions; (2) mission analysis; (3) course of action development; (4) course of action analysis (war game); (5) course of action comparison; (6) course of action approval; and (7) orders production. *Id.* fig.3-1.

<sup>40</sup> *Id.* para. 3-2.

<sup>41</sup> LEHRER, *supra* note 1, at 119.

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<sup>42</sup> *Id.* at 117.

<sup>43</sup> *Id.* at 199.

<sup>44</sup> Hammond et al., *supra* note 25, at 123.

<sup>45</sup> LEHRER, *supra* note 1, at 116.

<sup>46</sup> *Id.* at 127.

<sup>47</sup> *Id.* at 175.

<sup>48</sup> *Id.* at 182.

Lehrer provides yet another valuable lesson for those in the perfection-driven military ranks: “[T]he best decision-makers don’t despair.”<sup>49</sup> Instead, “they become students of error, determined to learn from what went wrong. They think about what they could have done differently so that the next time their neurons will know what to do.”<sup>50</sup> This advice may seem counter-intuitive to the profession of arms, particularly when there is so much at stake with operational decisions.<sup>51</sup> Still, unless we focus on our mistakes and “experience the unpleasant symptoms of being wrong,” the brain will never correct itself and make better instinctual decisions.<sup>52</sup> When we allow future leaders to learn from their mistakes, we add new meaning to the cliché, “getting the mind right.”

deficiencies. Some will undoubtedly find his advice to “think about thinking” too abstract,<sup>53</sup> but his conclusions bring the research into focus and provide guidance for problem-solvers. Two such groups, military professionals and lawyers, should take notice of this work, and so especially should those military professionals who are also lawyers. Whether it is commanders issuing orders, Soldiers engaged in training exercises, or judge advocates providing legal advice or preparing a case for trial, each can draw valuable lessons from Lehrer’s key message: “Whenever you make a decision, be aware of the kind of decision you are making and the kind of thought process it requires.”<sup>54</sup> That way, they can make the best possible decisions in the future.

## V. Conclusion

*How We Decide* is a fascinating exploration of the complex functions of the mind. Lehrer’s demonstrated expertise in neuroscience and strong writing make this a highly persuasive study, overcoming its minor analytical

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<sup>49</sup> *Id.* at 250.

<sup>50</sup> *Id.*

<sup>51</sup> In the business context, scholars warn against leaders being intolerant of mistakes. In complex problem-solving, failure “is an essential aspect of experimental understanding.” Snowden & Boone, *supra* note 19, at 74.

<sup>52</sup> LEHRER, *supra* note 1, at 54.

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<sup>53</sup> *Id.* at 249.

<sup>54</sup> *Id.* at 250.

## CLE News

### 1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

### 2. TJAGLCS CLE Course Schedule (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C20	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 12
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	221st Senior Officer Legal Orientation Course	19 – 23 Mar 12
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F3	18th RC General Officer Legal Orientation Course	30 May – 1 Jun 12
5F-F5	2012 Congressional Staff Legal Orientation (COLO)	23 – 24 Feb 12
5F-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12
5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12

5F-F70	43d Methods of Instruction	5 – 6 Jul 12
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<b>NCO ACADEMY COURSES</b>		
512-27D30	2d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	3d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	4th Advanced Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D30	5th Advanced Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	2d Senior Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D40	3d Senior Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12

<b>WARRANT OFFICER COURSES</b>		
7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12
7A-270A2	13th JA Warrant Officer Advanced Course	26 Mar – 20 Apr 12

<b>ENLISTED COURSES</b>		
512-27D/20/30	23d Law for Paralegal NCO Course	19 – 23 Mar 12
512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27D-BCT	BCT NCOIC Course	7 – 11 May 12
512-27DC5	37th Court Reporter Course	6 Feb – 23 Mar 12
512-27DC5	38th Court Reporter Course	30 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	6 Aug – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12
512-27DC7	16th Redictation Course	9 – 13 Jan 12
	17th Redictation Course	9 – 13 Apr 12

<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 12
5F-F202	10th Ethics Counselors Course	9 – 13 Apr 12

<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F12	83d Fiscal Law Course	12 – 16 Mar 12
5F-F14	30th Comptrollers Accreditation Fiscal Law Course	5 – 9 Mar 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12

<b>CRIMINAL LAW</b>		
5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	41st Criminal Law Advocacy Course	6 – 10 Feb 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12

<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F47	57th Operational Law of War Course	27 Feb – 9 Mar 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F47E	2012 USAREUR Operational Law CLE	17 – 21 Sep 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

### 3. Naval Justice School and FY 2011–2012 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (020) Lawyer Course (030)	23 Jan – 30 Mar 12 30 Jul 12 – 5 Oct 12
900B	Reserve Legal Assistance (010) Reserve Legal Assistance (020)	18 – 22 Jun 12 24 – 28 Sep

850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	23 Apr – 4 May 12 (Norfolk) 9 – 20 Jul 12 (San Diego)
786R	Advanced SJA/Ethics (010)	23 – 27 Jul 12
850V	Law of Military Operations (010)	4 – 15 Jun 12
NA	Litigating Complex Cases (010)	4 – 8 Jun 12
961J	Defending Sexual Assault Cases (010)	13 – 17 Aug 12
525N	Prosecuting Sexual Assault Cases (01)	13 – 17 Aug 12
4048	Legal Assistance Course (010)	2 – 6 Apr 12
03TP	Basic Trial Advocacy (010) Basic Trial Advocacy (020)	7 – 11 May 12 17 – 21 Sep 12
NA	Intermediate Trial Advocacy (010)	6 – 10 Feb 12
748A	Law of Naval Operations (010) Law of Naval Operations (020)	12 – 16 Mar 12 (San Diego) 17 – 21 Sep (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	23 Jul – 3 Aug 12
0258 (Newport)	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	6 – 10 Feb 12 12 – 16 Mar 12 7 – 11 May 12 28 May – 1 Jun 12 13 – 17 Aug 12 24 – 28 Sep 12
2622 (Fleet)	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (100) Senior Officer (110)	27 Feb – 1 Mar 12 (Pensacola) 9 – 12 Apr 12 (Pensacola) 21 – 24 May 12 (Pensacola) 9 – 12 Jul 12 (Pensacola) 30 Jul – 2 Aug 12 (Pensacola) 30 Jul – 2 Aug 12 (Camp Lejeune) 6 – 10 Aug 12 (Quantico) 10 – 13 Sep 12 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	2 – 6 Apr 12
03RF	Legalman Accession Course (030)	11 Jun – 24 Aug 12
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	25 Jan – 16 May 12 22 May – 6 Aug 12 31 Aug – 20 Dec 12
932V	Coast Guard Legal Technician Course (010)	6 – 17 Aug 12
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 12

08XO	Paralegal Ethics Course (020) Paralegal Ethics Course (030)	5 – 9 Mar 12 11 – 15 Jun 12
08LM	Reserve Legalman Phases Combined (010)	TBD
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	9 – 20 Apr 12 23 Jul – 3 Aug 12
627S	Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100)	15 – 17 Feb 12 (Norfolk) 28 Feb – 1 Mar 12 (San Diego) 27 – 29 Mar 12 (San Diego) 30 May – 1 Jun 12 (Norfolk) 30 May – 1 Jun 12 (San Diego) 17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk)
NA	Iraq Pre-Deployment Training (020)	26 – 28 Jun 12
	Legal Specialist Course (020) Legal Specialist Course (030)	25 Jan – 5 Apr 12 3 May – 20 Jul 12
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	9 Jan – 6 Apr 12 10 Jul – 5 Oct 12
NA	Information Operations Law Training (010)	19 – 23 Mar 12 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	19 – 23 Mar 12
NA	TC/DC Orientation (010) TC/DC Orientation (020)	30 Apr – 4 May 12 10 – 14 Sep 12

<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	23 Jan – 10 Feb 12 27 Feb – 16 Mar 12 2 – 20 Apr 12 7 – 25 May 12 11 – 29 Jun 12 9 – 27 Jul 12 12 – 31 Aug 12
0379	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	30 Jan – 10 Feb 12 5 – 16 Mar 12 9 – 20 Apr 12 14 – 25 May 12 16 – 27 Jul 12 20 – 31 Aug 12
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050)	26 Mar – 30 Mar 12 4 – 8 Jun 12 10 – 14 Sep 12

<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	30 Jan – 17 Feb 12 5 – 23 Mar 12 7 – 25 May 12 11 – 29 Jun 12 23 Jul – 10 Aug 12 20 Aug – 7 Sep 12
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 16 Feb 12 26 Mar – 6 Apr 12 14 – 25 May 12 18 – 29 Jun 12 27 Aug – 7 Sep 12
3759	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	2 – 6 Apr 12 (San Diego) 30 Apr – 4 May 12 (San Diego) 4 – 8 Jun 12 (San Diego) 17 – 21 Sep (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Paralegal Apprentice Course, Class 11-02	10 Jan – 2 Mar 2012
Homeland Defense/Homeland Security Course, Class 12-A	23 – 27 Jan 2012
CONUS Trial Advocacy Course, Class 12-A (Off-Site)	30 Jan – 3 Feb 2012
Legal & Administrative Investigations Course, Class 12-A	6 – 10 Feb 2012
European Trial Advocacy Course, Class 12-A (Off-Site, Kapaun AS, Germany)	13 – 17 Feb 2012
Judge Advocate Staff Officer Course, Class 12-B	13 Feb – 13 Apr 2012
Paralegal Craftsman Course, Class 12-02	13 Feb – 29 Mar 2012
Paralegal Apprentice Course, Class 12-03	5 Mar – 24 Apr 2012
Environmental Law Update Course-DL, Class 12-A	27 – 29 Mar 2012
Defense Orientation Course, Class 12-B	2 – 6 Apr 2012
Advanced Labor & Employment Law Course, Class 12-A (Off-Site DC location)	11 – 13 Apr 2012

Air Force Reserve and Air National Guard Annual Survey of the Law, Class 12-A (Off-Site Atlanta, GA)	13 – 14 Apr 2012
Military Justice Administration Course, Class 12-A	16 – 20 Apr 2012
Paralegal Craftsman Course, Class 12-03	16 Apr – 1 Jun 2012
Will Preparation Paralegal Course, Class 12-A	23 – 25 Apr 2012
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Cyber Law Course, Class 12-A	24 – 26 Apr 2012
Negotiation and Appropriate Dispute Resolution Course, Class 12-A	30 Apr – 4 May 2012
Advanced Trial Advocacy Course, Class 12-A	7 – 11 May 2012
Operations Law Course, Class 12-A	14 – 25 May 2012
CONUS Trial Advocacy Course, Class 12-B (Off-Site)	14 – 18 May 2012
CONUS Trial Advocacy Course, Class 12-C (Off-Site)	21 – 25 May 2012
Reserve Forces Paralegal Course, Class 12-A	4 – 8 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012
Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012
Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012
Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012
Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

## 5. Civilian-Sponsored CLE Courses

**For additional information on civilian courses in your area, please contact one of the institutions listed below:**

AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225

ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611

AGACL: (312) 988-6200  
Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552

ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

FB: Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University Law School  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

MC Law: Mississippi College School of Law  
151 East Griffith Street  
Jackson, MS 39201  
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(803) 705-5000

NDAA: National District Attorneys Association  
44 Canal Center Plaza, Suite 110  
Alexandria, VA 22314  
(703) 549-9222

NDAED: National District Attorneys Education Division  
1600 Hampton Street  
Columbia, SC 29208  
(803) 705-5095

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 (in MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

TLS: Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

UMLC: University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

UT: The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

VCLE: University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

## **6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)**

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have

completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail [baucum.fulk@us.army.mil](mailto:baucum.fulk@us.army.mil).

## **7. Mandatory Continuing Legal Education**

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at [www.clereg.org](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

### 1. Training Year (TY) 2012 RC On-Site Legal Training Conferences

Date	Region, LSO & Focus	Location	Supported Units	POCs
24 – 26 Feb	Southeast Region 213th LSO  Focus: Trial Advocacy and Military Justice	Atlanta, GA	12th LSO 16th LSO 174th LSO	CPT Brian Pearce brian.pearce@usdoj.gov (404) 735-0388
18 – 20 May	Midwest Region 9th LSO  Focus: Expeditionary Contracting & Fiscal Law	Cincinnati, OH	8th LSO 91st LSO	CPT Steven Goodin steven.goodin@us.army.mil (513) 673-4277
15 – 17 Jun	Western Region 78th LSO  Focus: Rule of Law	Los Angeles, CA	6th LSO 75th LSO 87th LSO 117th LSO	CPT Charles Taylor charles.j.taylor@us.army.mil (213) 247-2829
20 – 22 Jul	Mid-Atlantic Region 139th LSO  Focus: Rule of Law	Nashville, TN	134th LSO 151st LSO 10th LSO	CPT James Brooks james.t.brooks@us.army.mil (615) 231-4226
17 – 19 Aug	Northeast Region 153d LSO  Focus: Client Services	Philadelphia, PA (Tentative)	3d LSO 4th LSO 7th LSO	MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391

### 2. Brigade Judge Advocate Mission Primer (BJAMP)

Dates: 12 – 15 Mar 12; 4 – 7 Jun 12

Location: Pentagon

ATTRS No.: NA

POC: PDP@conus.army.mil

Telephone: (571) 256-2913/2914/2915/2923

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

#### **4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

#### **5. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet

satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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