

# Truth Is Stranger than Fiction:<sup>1</sup> A Year in Professional Responsibility

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## Introduction

The case facts that confronted the Court of Appeals for the Armed Forces (CAAF) and the service courts in the area of professional responsibility this past year ranged from the mundane to the bizarre. The corrective guidance in the court's opinions was not only directed at the all-too-familiar appellate target, the defense counsel, but also included the trial counsel and the military judge. With these trial participants providing their missteps and misdeeds as a backdrop, the appellate courts took the opportunity to address various areas of professional responsibility, including judicial bias, judicial conduct, candor to the tribunal, prosecutorial misconduct, conflict of interest, and of course, the ever-present ineffective assistance of counsel.

This article reviews some of the more educational and entertaining cases of the past year. It does so in hopes of adding flesh to some of the bare-bones rules of professional responsibility, while at the same time illustrating some of the interpersonal dynamics that can occur both inside and outside of the courtroom. Additionally, this article draws some practical guidance from these cases to help counsel and military judges avoid the pitfalls to which their contemporaries fell victim.

## The Rules of Professional Responsibility

The ethical rules governing the conduct of Army lawyers, both military and civilian, and of non-government lawyers appearing before Army tribunals are contained in the *Army's Rules of Professional Conduct for Lawyers*.<sup>2</sup> The Rules establish a framework of ethical conduct for these lawyers to follow while performing their official duties.<sup>3</sup> Army lawyers are simultaneously bound by the ethical rules of their state licens-

ing authority.<sup>4</sup> Additionally, judges, counsel, and court-martial clerical support personnel must comply with the American Bar Association (ABA) Standards for Criminal Justice, unless these rules conflict with the military's ethical rules. Finally, judges are additionally bound by the 1972 ABA Code of Judicial Conduct (now the ABA Model Code of Judicial Conduct) when its rules are not in conflict with the military's rules.<sup>5</sup> The goal of these rules and standards is not only to protect clients, but also to protect third parties with whom the lawyers deal, and to enhance the public's confidence in the judicial system.

The CAAF had to apply a broad range of standards contained in the references mentioned above in its first two cases of its 2002 term. In both *United States v. Quintanilla*<sup>6</sup> and *United States v. Butcher*,<sup>7</sup> the court confronted the issue of judicial conduct creating an appearance of bias.

## Judicial Conduct and Impartiality

In *Quintanilla*, the CAAF ruled that the military judge had abused his discretion when he failed to recuse himself sua sponte after his actions created the appearance of bias. The appellant in this case was charged with several offenses arising out of his sexual conduct with three civilian teenage boys and two male soldiers. One of these victims was JB, a nineteen year-old civilian who, after the sexual encounters, moved out of the appellant's house and into the home of his employer, Mr. Bernstein.<sup>8</sup>

At trial, the government called JB as its second witness. After several members of the government failed to persuade JB to enter the courtroom and testify, the military judge, on his own initiative, exited the courtroom and proceeded to where the

1. Anonymous, quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS 403 n.3 (Little, Brown & Co., 16th ed. 1992) ("Truth is stranger than fiction, but not so popular.").
2. U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].
3. For a detailed analysis of the Army's current rules and the history behind their development and adoption, see Major Bernard P. Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 MIL. L. REV. 1 (1989).
4. AR 27-26, supra note 2, R. 8.5(f).
5. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-8 (20 Aug. 1999) [hereinafter AR 27-10].
6. 56 M.J. 37 (2001).
7. 56 M.J. 87 (2001).
8. *Quintanilla*, 56 M.J. at 46.

witnesses were waiting. He did this on two separate occasions.<sup>9</sup> In each instance, the military judge dealt with Mr. Bernstein and JB. His interceding in the effort to get JB to the witness stand was motivated by his frustration over the lengthy delay in getting the case to trial,<sup>10</sup> as well as delays during the trial itself.<sup>11</sup> Unfortunately, due to the military judge's failure to ensure a complete disclosure of the facts in the record of trial, it is unclear what exactly occurred during each of the encounters; however, the CAAF was able to fill in some of the missing facts through the use of documents and statements gathered after the trial.<sup>12</sup>

The record does show that at some point, Mr. Bernstein expressed his concern to government counsel and to the military judge about the timing of JB's testimony and how JB would be treated by the defense on cross-examination. He also made it known that neither he nor JB was under subpoena, and that they would walk out of the courthouse if their concerns

were not addressed.<sup>13</sup> During an emotional exchange between the military judge and Mr. Bernstein, the military judge threatened him with a finding of contempt if he continued to interfere with JB's testimony.<sup>14</sup> Additionally, the military judge initiated physical contact by placing his hands on Mr. Bernstein's chest.<sup>15</sup> Finally, during one of the two encounters, the military judge walked in on Mr. Bernstein while he was in the process of contacting the Commander, III Corps, to complain about his treatment at the hands of government counsel and the military judge. At this point, the military judge informed Mr. Bernstein that he did not "give a f\*\*\* . . . about what [the commander of III Corps] did or said," or words to that effect.<sup>16</sup>

During one of the court recesses, the military judge informed the trial counsel that Mr. Bernstein had made an ethical complaint against him (the military judge), and that this issue would therefore have to be addressed on the record by calling Mr. Bernstein as a witness. The trial counsel expressed his concern

9. *Id.* at 48.

10. *Id.* at 47. "Appellant was arraigned on May 7, 1996, and pretrial motions and related proceedings were considered on August 10 and 19. A variety of circumstances delayed commencement of trial on the merits, including a lengthy, defense-requested continuance to accommodate the schedules of both civilian and military defense counsel." *Id.*

11. *Id.* The military judge admonished the trial counsel for not having "his witnesses organized so that the court-martial would 'not have to wait 10 minutes between witnesses.'" *Id.* Additionally, when the defense counsel requested a delay for the purposes of interviewing the first government witness, CS, the military judge "expressed concern about further delay, noting that 'witnesses in cases like this do tend to be a little reluctant, a little frail; and we had them waiting all morning.'" *Id.* at 53. Later in the trial, when recounting the confrontation with Mr. Bernstein for the record, the military judge noted that "[i]t was [his] goal at that point to move the trial along." *Id.* Finally, the military judge had the following conversation on the record with Mr. Carlson, the civilian defense counsel (CDC):

MJ: Mr. Carlson, I want you to think for just a moment about this entire trial.

CDC: Yes, sir.

MJ: What is the only time that I've gotten on the lawyers in this case? Truly. I mean, nitpicky stuff, but what's the only thing I've really gotten on the lawyers about? Efficiency.

CDC: Yes, sir.

MJ: Okay. I told you guys why you needed a reason at 9:00 when we put the members together. I told you when a witness takes the stand and before the first question is asked people want another reason to talk for an hour. The fact that I want to move this trial along got me the great pleasure of having Mr. Bernstein slander my reputation in the military. I beat on Captain Schwind [trial counsel] to pick up the pace and move on, and I've done that with you, but less frequently, Okay.

CDC: Yes, sir, and I will.

*Id.* at 55.

12. *See id.* at 69-76.

13. *Id.* at 50-53.

14. *Id.* at 51.

15. *Id.* at 50. This physical contact has been characterized numerous different ways depending on who was doing the characterizing and in what forum they were doing the characterizing. The military judge described it variously as "patted [Mr. Bernstein] on the shoulder," *id.* at 50; "tapped [Mr. Bernstein]—thumped [Mr. Bernstein] on the chest with an open hand, man—mano a mano," *id.* at 54; "simply pat [Mr. Bernstein] twice," "appropriate" touching "in order to calm the situation," *id.* at 72; and "positive, friendly, and encouraging" contact, *id.* Mr. Bernstein described it in court as an "offensive touching," *id.* at 50, and "like a father" would touch, *id.* at 54, and out of court as "hit [Mr. Bernstein] on the shoulder," *id.* at 57; "smacked [Mr. Bernstein] on the left hand side of [Mr. Bernstein's] chest four times," *id.* at 63; and "smacked the left side of [Mr. Bernstein's] chest four or five times with an open hand," *id.* at 74. The trial counsel stated that the military judge "patted Bernstein on the shoulder and told him to clam down." *Id.* at 73. In his statement to the military police, JB recalled that the "judge hit him on the chest about three or four times." *Id.* at 74.

16. *Id.* at 54.

about the potential adverse effect that this in-court confrontation would have on the quality of Mr. Bernstein's subsequent testimony on the merits. To avoid this problem, the trial counsel asked the military judge if Mr. Bernstein could testify on the merits before confronting him with the issue of the ethical complaint. The military judge agreed to this request; however, neither defense counsel were present for this conversation, and the military judge made no disclosure about it to the defense.<sup>17</sup>

Later in the trial, the defense sought to make the confrontation between the military judge and Mr. Bernstein the subject of a stipulation-of-fact. The trial counsel resisted signing this document based on his conclusion that portions of it were not relevant. The trial counsel also pointed out that if the military judge ruled that the confrontations were relevant to the merits of the case, it would make the military judge a material witness.<sup>18</sup> When faced with the possibility of being called as a witness in the case, the military judge issued an erroneous warning to trial counsel by telling him that "[i]f you call me, you get to try this case all over again, and you get to figure out whether or not you want to wrestle with double jeopardy."<sup>19</sup> As the parties wrestled with this issue, the military judge suggested to the defense that the term "military judge" in the stipulation-of-fact be changed to either "court official," "senior field grade judge advocate," or "senior field grade member of the Judge Advocate General's Corps." The defense declined to adopt any of these suggested changes.<sup>20</sup>

One of the unresolved factual issues in the case is whether the civilian defense counsel (CDC) was present during the confrontations. The military judge asserted that he brought the CDC with him when he left the courtroom.<sup>21</sup> In a post-trial affidavit, the CDC denied being present during any of the military judge's dealings with JB and Mr. Bernstein.<sup>22</sup>

In deciding *Quintanilla*, the CAAF first addressed the issue of whether the defense waived the appearance of bias when it failed to raise the issue at trial.<sup>23</sup> The court noted that for a party to waive this issue, the waiver must be "preceded by a full disclosure on the record of the basis for disqualification."<sup>24</sup> Here, the CAAF found that because the military judge "failed to fulfill his fundamental responsibility" of ensuring that the record of trial was complete and coherent, this condition was not met.<sup>25</sup> Therefore, it would be inappropriate to conclude that the defense knowingly waived this issue.<sup>26</sup> Thus, the court then turned its attention to the issue of the appearance of bias.<sup>27</sup>

The CAAF found that several actions by the military judge had created the appearance of bias. One such act was his overinvolvement in securing the testimony of JB before ascertaining the facts or being asked for assistance by the government. Another was his failure to ensure that the record of trial set forth a complete account of the proceedings and events, both in and out of court. Many of his in-court conversations were with unidentified spectators in the courtroom that involved cryptic and incomplete references to unidentified matters and events. His account of the out-of-court activities was either incomplete, as in the case of a Rule for Courts-Martial (RCM) 802 session and his interactions with Mr. Bernstein, or completely missing, as in the case of his ex parte discussion with the trial counsel.<sup>28</sup>

In examining the nature of this ex parte discussion with the trial counsel, the CAAF noted that it involved a strategic decision on the order of questioning a witness, and it was therefore more than a mere administrative discussion. The court concluded that the military judge's failure to disclose to the defense the existence and nature of this discussion added to the appearance of bias.<sup>29</sup>

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17. *Id.* at 75.

18. *Id.* at 64-65.

19. *Id.* at 65.

20. *Id.*

21. *Id.* at 70.

22. *Id.* at 70, 73.

23. *See id.* at 77.

24. *Id.* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(e) (2000) [hereinafter MCM] (allowing parties to waive an appearance of bias on the part of the military judge as defined under RCM 902(a)).

25. *Id.*

26. *Id.*

27. *See id.* at 78 (construing MCM, *supra* note 24, R.C.M. 902(a)).

28. *Id.* at 79.

29. *Id.*

Finally, the CAAF focused on the impact of the stipulation-of-fact. The court concurred with the trial counsel's in-court determination that its admission impermissibly put the military judge in the position of being a witness in the case, a witness whose credibility would be weighed against the credibility of another witness, Mr. Bernstein.<sup>30</sup>

Based on these findings, the court had little trouble concluding that the military judge should have disqualified himself due to an appearance of bias created by his actions. On the issue of whether reversal was an appropriate remedy,<sup>31</sup> the CAAF felt that it could not make this decision yet due to the incomplete record of events. As such, the court requested a post-trial hearing<sup>32</sup> to gather additional facts to fill in the missing pieces of the puzzle.<sup>33</sup>

In *United States v. Butcher*,<sup>34</sup> the CAAF reviewed whether the military judge should have recused himself after the defense objected to his ex parte social interactions with the trial counsel during the trial. One of these social interactions involved the military judge and his wife attending a party at the trial counsel's house during the weekend recess in the trial. All attorneys in the local judicial circuit had been invited to this party. Although other defense attorneys attended the party, appellant's defense counsel did not.<sup>35</sup> The party lasted approximately two hours, and there were no discussions about the appellant's case, other than a comment by the military judge that the trial had lasted longer than he had anticipated.<sup>36</sup>

Based on a suggestion that arose during the party, the judge secured the trial counsel as his doubles partner in a tennis match against another couple the following day. The match lasted less than two hours. The tennis participants discussed tennis and other social subjects, but did not discuss the appellant's case.<sup>37</sup>

In *Butcher*, the CAAF reaffirmed that when reviewing a judge's decision on recusal, the appropriate standard of review is abuse of discretion.<sup>38</sup> In reviewing the judge's actions, the CAAF stated that it would "assume, without deciding, that the military judge should have recused himself."<sup>39</sup> The court then applied the three *Liljeberg* factors<sup>40</sup> to decide whether the conviction warranted a reversal. In deciding against reversal, the CAAF found that (1) "the risk of injustice to the parties" was greatly diminished because the judge's actions took place after the presentation of evidence and discussion of instructions on the merits, and that the military judge's subsequent actions in the case "were few in number and not adverse to the appellant;"<sup>41</sup> (2) "the risk that denial of relief will produce injustice in other cases" was unlikely, because judges are "highly sensitive" to the problems caused by out-of-court contact with the parties during litigation; therefore, there was no need to send them a message by reversing this case;<sup>42</sup> and (3) "the risk of undermining the public's confidence in the judicial process" was not a danger because the judge's conduct did not involve an intimate or personal relationship, extensive interaction, and came late in the trial.<sup>43</sup>

30. *Id.* at 80.

31. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988). The Supreme Court, noting that presence of the appearance of bias alone does not mandate reversal, set out a three-part test for determining if reversal is an appropriate remedy. *See id.* at 864; *infra* note 40.

32. *See, e.g., United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

33. *Quintanilla*, 56 M.J. at 81. The CAAF sought to have the record fully developed as to (1) what actually happened in the confrontations between the military judge and Mr. Bernstein, (2) what transpired in the ex parte conversation, (3) the nature and significance of Mr. Bernstein's alleged threat to testify for the defense, (4) what details defense counsel knew at trial about these occurrences, and (5) whether these occurrences affected the trial and charges involving RW. *Id.*

34. 56 M.J. 87 (2001).

35. *Id.* at 89. The circuit defense counsel had a policy that prohibited his defense counsel from engaging in social activities with opposing counsel during an ongoing trial. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 90. Appellant asked the CAAF to use the de novo standard of review. The court noted that only the Seventh Circuit uses such a standard and that the appellant failed to demonstrate why the majority position should be replaced with the minority position. *Id.* at 90-91.

39. *Id.* at 92.

40. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). In deciding whether to reverse a conviction on the basis of a lack of judicial impartiality, the Supreme Court concluded that "it is appropriate to consider [1] the risk of injustice to the parties in the particular case, [2] the risk that denial of relief will produce injustice in other cases, and [3] the risk of undermining the public's confidence in the judicial process." *Id.*

41. *Butcher*, 56 M.J. at 92.

42. *Id.* at 93.

43. *Id.*

The CAAF again faced the issue of judicial impartiality in *United States v. Jones*.<sup>44</sup> The appellant in *Jones* claimed, for the first time on appeal, that one of the service court judges should have recused himself because, before becoming an appellate court judge, he had been the Director of the Appellate Government Division of the Navy-Marine Corps Appellate Review Activity while appellant's case was on appeal at the service court. During this time, the appellate defense counsel filed numerous motions for enlargements of time. The first seven of these were unopposed by the government. In response to the appellant's last two motions for enlargements of time, the government filed motions in opposition.<sup>45</sup>

The CAAF reviewed the appellate judge's actions for abuse of discretion, and applied the plain error standard because the appellant had not raised the issue until this appeal. Additionally, based on the facts of this case, the CAAF decided to apply the actual prior involvement theory rather than the vertical imputation theory.<sup>46</sup> The former theory, as its name suggests, requires that the attorney in question have had actual involvement in the case. The court cautioned that this was not necessarily the standard it would apply to all such cases.<sup>47</sup>

After scrutinizing the facts of the case under both an appearance of bias standard and an actual bias standard,<sup>48</sup> the CAAF affirmed the lower court's ruling. The CAAF was persuaded by the un rebutted facts that the appellate judge had no direct involvement with appellant's case, and that while he was the Director he gave no guidance on the filing of the opposition motions. After concluding that the filing of such opposition motions was "perfunctory" and "mechanical," and merely contained "rote" assertions, the court ruled that the appellate

judge's impartiality could not reasonably be questioned, and therefore he was not required to recuse himself.<sup>49</sup>

Interestingly, this was the second time the CAAF had to rule on an appeal based on the prior position of this appellate judge.<sup>50</sup> Although the court declined to reverse the conviction in that case also, it could not conceal its annoyance at having to address this easily avoidable issue twice. The CAAF noted, for all appellate judges, that this whole issue "can be readily avoided in the future if judges appointed to the lower courts after prior appellate division service would recuse themselves from all cases that were pending during their tenure in the division."<sup>51</sup>

The CAAF was not the only appellate court that dealt with the issue of judicial impartiality over the past year. In *United States v. Reed*,<sup>52</sup> the Army Court of Criminal Appeals (ACCA) addressed the issue of when a military judge would be disqualified from sitting on a case due to a personal financial interest.<sup>53</sup>

In *Reed*, the military judge convicted the appellant pursuant to his pleas of charges stemming from an insurance fraud scheme. The appellant had conspired with a German body shop owner to vandalize the appellant's car. The appellant then filed a false insurance claim with his carrier, United States Automobile Association (USAA). After collecting the insurance money from his false claim, the appellant and the German national decided to expand the scope of their conspiracy by vandalizing other soldier's cars in the appellant's housing area. The appellant would then recommend his co-conspirator's body shop to the victims. In exchange for these business refer-

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44. 55 M.J. 317 (2001).

45. *Id.* at 318.

46. *Id.* at 319.

The Federal Courts of Appeals have applied two different approaches to evaluating whether a judge who previously served as a U.S. Attorney may preside over a case investigated by the U.S. Attorney's office during his or her tenure as the head of that office. The Ninth Circuit has applied a "vertical imputation" theory under which the knowledge and actions of subordinates are attributed to the U.S. Attorney, holding that "[a] United States District Judge cannot adjudicate a case that he or she as United States Attorney began." *United States v. Arnpriester*, 37 F.3d 466, 467 (1994). By contrast, the Tenth Circuit has interpreted the phrase "participated as counsel" in [28 U.S.C. § 455(b)(3)] as connoting activity by the individual and has held that a judge is not required to recuse himself absent a specific showing of actual prior involvement with the case. *United States v. Gipson*, 835 F.2d 1323 (1988), *cert. denied*, 486 U.S. 1044 (1988).

*Jones*, 55 M.J. at 319.

47. *Id.* at 321.

48. *Id.* at 319 (stating that 28 U.S.C. § 455 governs the recusal of appellate court judges).

49. *Id.* at 320.

50. *See United States v. Lynn*, 54 M.J. 202 (2000).

51. *Jones*, 55 M.J. at 321.

52. 55 M.J. 719 (Army Ct. Crim. App. 2001).

53. *Id.* at 720.

erals, the German national agreed to complete the repairs on the appellant's vehicle.<sup>54</sup>

During the sentencing phase of the court-martial, the trial counsel put on aggravation evidence through the testimony of a USAA claims handler. This claims handler testified that false claims increased company expenses and impaired USAA's competitive advantage. He further testified that because USAA was a member-owned company, fraudulent claims could potentially lower member dividends and raise premiums.<sup>55</sup>

At the conclusion of this testimony, the military judge disclosed to the parties that he had been a member of USAA for about eighteen years. He then gave both sides a chance to conduct voir dire on him based on this disclosure. The military judge stated on the record that he did not feel he was a victim of the appellant's crimes. Additionally, he felt his status as a USAA policyholder had not affected his previous findings nor would it affect his ability to determine a fair and appropriate sentence. When provided the opportunity at trial, both sides declined to challenge the military judge. In his closing argument on sentencing, the trial counsel argued that the military judge should consider the impact that appellant's crimes had on USAA policyholder's by stating that "every member's dividend was reduced in some small degree by this offense."<sup>56</sup>

In deciding the issues raised in this case, the ACCA addressed and quickly dismissed appellant's complaint that the military judge had failed to disclose his policyholder status in a timely manner. The court noted that they found "nothing improper or erroneous by this military judge's failure to disclose his policyholder status until a potential ground for his disqualification unfolded with the government's presentation of (the claim adjuster's) testimony."<sup>57</sup>

The ACCA next turned its attention to the issue of the military judge's impartiality. In addressing this issue, the court first looked at whether actual bias existed as defined under RCM 902(b)(5)(B).<sup>58</sup> After considering the "essentially nonexistent"

impact the military judge's decision would have on a company with USAA's tremendous financial assets and numerous members, the ACCA concluded that "the [military judge's] interests could not reasonably be affected by the outcome of the trial."<sup>59</sup>

Although the court declined to find that the appellant had waived the issue of the appearance of bias under RCM 902(a), it did point out that the defense, after conducting voir dire on the military judge about his policyholder status, had declined to challenge him. The ACCA deemed this choice to reflect the defense counsel's "satisfaction that the military judge's impartiality was not compromised by his policyholder status."<sup>60</sup> Instead, the court dealt with the appearance of bias issue briefly by concluding that under the facts of this case, "there was no reasonable basis for questioning the military judge's impartiality."<sup>61</sup>

Interestingly, the ACCA judges astutely raised the issue of their own USAA policyholder status sua sponte.<sup>62</sup> Applying the same analysis as they did to the trial judge, the ACCA judges concluded that they had no financial interests that would be substantially affected by the outcome of the case. As an additional assurance, the judges reaffirmed their pledge to be impartial when deciding the appellant's case.<sup>63</sup>

The lessons military judges can draw from these four cases range from the obvious to the subtle. While the *Reed* and *Jones* cases provide specific, fact-driven guidance, the *Quintanilla* and *Butcher* cases contain broader lessons for military judges. To suggest that the important lessons for military judges to take away from *Quintanilla* are that they should not curse at or "initiate physical contact" with trial witnesses would be unenlightening and insulting. Rather, *Quintanilla* and *Butcher* serve to remind military judges that their conduct during a trial, both in-court and out-of-court, is constantly scrutinized by trial participants and the public. What the military judge might view as steps necessary to ensure the smooth execution of a trial or as an innocent social interaction, others might interpret as a show of partiality to one side in the litigation. Additionally, military

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54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 721.

58. *See id.* at 722. Rule for Courts-Martial 902(b)(5)(B) states that a military judge shall disqualify himself when "the military judge know[s] he has] an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding." MCM, *supra* note 24, R.C.M. 902(b)(5)(B).

59. *Jones*, 55 M.J. at 723.

60. *Id.* at 722.

61. *Id.* at 723.

62. *Id.* at 721 n.3.

63. *Id.*

judges should keep in the forefront of their minds what their role is in the trial process, and knowing this, resist the temptation to overly assist a floundering advocate during trial, no matter how tempting it might be.<sup>64</sup> Canon 3 of the ABA Model Code reminds judges that it is their responsibility to be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others,” and to avoid “words or conduct [that would] manifest bias or prejudice.”<sup>65</sup>

### Prosecutorial Conduct

In *United States v. Adens*,<sup>66</sup> the ACCA examined the issue of prosecutorial misconduct through the sub-issue of nondisclosure of evidence to opposing counsel. Here, the appellant was charged with wrongful use of cocaine. The government’s case rested on the testimony of a registered source and the results of a scientific hair analysis done on the appellant that demonstrated chronic cocaine use.<sup>67</sup>

Part of the defense trial strategy involved exploiting an inconsistency in the evidence dealing with the hair sample kits. The government witnesses all testified that only one hair collection box was used to take a sample from the appellant; however, the lab report stated that the lab had received two collection boxes. The defense planned to introduce into evidence a sample hair collection kit that contained only one box, thereby supporting its theory that the sample that tested positive was from an individual other than the appellant.<sup>68</sup>

Unknown to the defense, the government had hair collection kits that came from the same batch as the kit used on the appellant and that contained two collection boxes.<sup>69</sup> The government planned to lie-in-wait while the defense presented its theory at

trial, and then use its kits in rebuttal to “torpedo” the defense case.<sup>70</sup>

The defense had previously filed an ongoing discovery request for all real evidence that the government intended to offer on the merits, and for any evidence that may be of benefit to the defense at trial.<sup>71</sup> Although the government had been in possession of these kits before trial, the trial counsel failed to notify the defense of their existence, therefore effectively denying the defense the opportunity to inspect this evidence.

When the military judge questioned the trial counsel about when he had become aware of the existence of these kits, the trial counsel initially responded that it was not until after the defense counsel’s opening statement.<sup>72</sup> When later challenged on this assertion, the trial counsel admitted that he had misspoken earlier and that he had actually known about the kits before trial. This belated revelation prompted the military judge to chastise the trial counsel on the record and to refer the matter to the trial counsel’s staff judge advocate to investigate whether the trial counsel’s “less than candid” comments to the court amounted to a violation of *Army Regulation (AR) 27-26, Rules of Professional Conduct for Lawyers*, Rule 3.3 (candor toward the tribunal).<sup>73</sup>

After analyzing the accused’s right to discovery under both constitutional and statutory authority, the ACCA ruled that these kits were discoverable and that the trial counsel had violated the rules of discovery by not notifying the defense of their existence.<sup>74</sup> In reversing the findings and sentence, the court concluded that the trial counsel’s actions had violated a substantial right of the accused, that the accused had been materially prejudiced, and that the military judge had failed to give a curative instruction to the panel.<sup>75</sup>

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64. See MCM, *supra* note 24, R.C.M. 801(a)(3) discussion. “The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties’ presentations or the appearance of partiality.” *Id.*

65. ABA MODEL CODE, CANON 3 (2000 ed.).

66. 56 M.J. 724 (Army Ct. Crim. App. 2002).

67. *Id.* at 725.

68. *Id.*

69. *Id.* at 728.

70. See *id.* at 728-29.

71. *Id.* at 726-27.

72. *Id.* at 729.

73. *Id.* at 730.

74. *Id.* at 733-34. For an in-depth analysis of the discovery issues raised in this case, see Major Christina E. Ekman, *New Developments in the Law of Discovery: When Is Late Too Late, and Does Article 46, UCMJ, Have Teeth?*, ARMY LAW., May 2002, at 18.

75. *Adens*, 56 M.J. at 734-35.

The ACCA did not rest their opinion on the issue of discovery alone. The court used this case as an opportunity to remind trial counsel of their unique ethical obligations as prosecutors. After citing to relevant case law and regulatory guidance that condemn the type of conduct that the trial counsel engaged in, the court closed by providing all trial counsel with the following sage guidance: “Considering the purposes behind the broad military discovery rule and the intent of the rules of professional responsibility, the successful trial counsel will engage in full and open discovery at all times and will scrupulously avoid gamesmanship and trial by ambush, which have no place in Army courts-martial.”<sup>76</sup>

It is difficult to draw a lesson from *Adens* for trial counsel that is more salient and succinct than that given by the court in the statement above. Taking a step back to look at the broader role of the prosecutor in the military justice system, all trial counsel will do well to remember that they are “not simply an advocate but [are] responsible to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence,”<sup>77</sup> and that, as prosecutors, they have a special duty as “ministers of justice” not to impede the truth.<sup>78</sup>

### Conflict of Interest

In *United States v. Beckley*,<sup>79</sup> the CAAF found that the Office of the Staff Judge Advocate’s “heavy-handed” dealings with the civilian defense counsel (CDC) over what it perceived as a conflict of interest were not the cause of the CDC’s request to withdraw from representing the accused. Rather, the CDC withdrew because of an actual conflict of interest in his representation of the appellant.<sup>80</sup>

In *Beckley*, the appellant had been ordered by his chain-of-command to have no contact with his estranged wife. He disobeyed this order, prompting his wife to call the military police for intervention. During one of the appellant’s attempts to visit his wife at their quarters, a suspicious fire broke out. As a

result, both parties became suspects in a Criminal Investigation Command investigation for arson of their quarters.<sup>81</sup>

The appellant’s wife had previously retained the CDC’s law firm to represent her in a divorce action against the appellant. During her consultation with a lawyer from the CDC’s firm, she discussed her marital situation, child custody and support issues, and matters pertaining to the fire. The appellant later consulted and retained the CDC to represent him in his criminal case. When the CDC discovered this conflict of interest, his firm returned part of the wife’s money to her and informed her that they could no longer represent her; however, the appellant’s wife refused to waive any conflict of interest caused by the firm’s previous representation of her.<sup>82</sup>

When this conflict came to the government’s attention, the chief of military justice informed the CDC that if he refused to withdraw voluntarily from the appellant’s case, the government would file a grievance with The Judge Advocate General of the Army and with the CDC’s State Bar.<sup>83</sup>

In analyzing the ethical issues raised in this case, the CAAF cited Rule 1.7 of *AR 27-26*, which states: “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless . . . each client consents after consultation.”<sup>84</sup> Although the CAAF did not go into a detailed analysis of how the firm’s prior representation would be “directly adverse” to the appellant, the trial judge did. He explained to the appellant, on the record, that the CDC

may not be able to cross-examine appellant’s wife if she was called to testify, to conduct voir dire on anything dealing with his wife’s testimony, to present evidence that would discredit appellant’s wife or impeach her testimony, and to argue in opening and closing statements “any matters that have been presented concerning” appellant’s wife.<sup>85</sup>

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76. *Id.* at 735.

77. *AR 27-26*, *supra* note 2, R. 3.8 cmt. (addressing the special responsibilities of trial counsel).

78. Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 *GEO. J. LEGAL ETHICS* 309 (2001).

79. 55 M.J. 15 (2001).

80. *Id.* at 25.

81. *Id.* at 16.

82. *Id.* at 17.

83. *Id.* at 18.

84. *Id.* at 23 (quoting *AR 27-26*, *supra* note 2, R. 1.7).

85. *Id.*

Despite these warnings, the appellant still wished to have the CDC represent him at trial. The CDC eventually asked that the military judge allow him to withdraw from the case, and after a lengthy colloquy on the record with the CDC as to his motivation for seeking to withdraw, the military judge granted this request.<sup>86</sup>

The appellant based his appeal on the fact that he was denied his choice of counsel under the Sixth Amendment, and that his CDC had withdrawn due to threats from the local OSJA, and not because of any actual ethical concerns. The CAAF disagreed with the appellant's claim. Based on the nature of the attorney-client relationship between the appellant's wife and the CDC's law firm, her entanglement in the criminal charges facing the appellant, and her refusal to waive any conflict, the court concluded that "[the CDC] had an actual conflict of interest for which he was required to withdraw."<sup>87</sup>

The Comment to Rule 1.7 (Conflict of Interest: General Rule), AR 27-26, reminds practitioners that "[l]oyalty is an essential element in the lawyer's relationship to a client" and that this loyalty is "impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."<sup>88</sup> All counsel owe their clients the core duty of being their zealous advocate. As such, counsel must be constantly vigilant to avoid conflicts that can restrict or undermine this duty.

### Ineffective Assistance of Counsel

In *United States v. Morris*,<sup>89</sup> the appellant claimed that his defense counsel was ineffective because his defense counsel was in an "inactive status" with his state bar at the time of trial.

86. *Id.* at 18-23.

87. *Id.* at 25.

88. AR 27-26, *supra* note 2, R. 1.7 cmt.

89. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).

90. *Id.* at 903. Article 27(b), UCMJ, states:

Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

UCMJ art. 27(b) (2000).

91. *Morris*, 54 M.J. at 903 (citing *United States v. Steele*, 53 M.J. 274, 278 (2002) (holding that a CDC practicing before a court-martial was not per se ineffective due to his inactive state bar status)).

92. *Id.*

93. *Id.*

94. *Id.* at 903 n.7.

The appellant further claimed that his defense counsel "perjured himself" when he asserted on the record that he was qualified under Article 27(b), UCMJ.<sup>90</sup>

The Navy-Marine Court of Criminal Appeals (NMCCA) reaffirmed the position previously taken by the CAAF that an "inactive bar status of a judge advocate does not in and of itself constitute a deprivation of the right to counsel."<sup>91</sup> In *Morris*, the NMCCA noted that there was no evidence that the defense counsel was not in good standing with his state bar, but that, in fact, the letter the appellant submitted from the defense counsel's state bar indicated that the defense counsel had faithfully complied with the state's bi-annual registration requirements.<sup>92</sup>

In tersely dismissing the appellant's claim that his defense counsel had perjured himself and perpetrated a fraud on the court, the NMCCA stated that it found "*absolutely no support* for [this] allegation."<sup>93</sup> In doing so, the court could not hide its distain for the appellate defense counsel's flippant and baseless attack on the trial defense counsel's ethical conduct. In addressing this ethical allegation, the NMCCA issued forth its own warning to all counsel:

We caution against making allegations that trial participants committed criminal and ethical violations absent solid proof that such violations occurred. Such charges are very serious and should not be alleged in a hyperbolic fashion as the appellate defense counsel has done in this case. Indeed, to do so comes dangerously close to an ethical violation. *See* Rules of Professional Conduct, Candor Toward the Tribunal.<sup>94</sup>

The appellant in *United States v. Oliver*<sup>95</sup> was found guilty of several charges stemming from his alteration of a hotel receipt and subsequent submission of a false claim against the government. As part of their criminal investigation, agents from the Naval Criminal Investigative Service (NCIS) interviewed the appellant. After waiving his rights, the appellant made several incriminating admissions. When the agents asked the appellant if he would reduce the substance of the interview to writing, he refused and requested a lawyer.<sup>96</sup>

During the appellant's trial, one of the NCIS special agents testified not only about the content of the interview, but also about the appellant's refusal to sign a written statement and his request for a lawyer. The defense counsel did not object to this testimony, nor did the military judge *sua sponte* interject or give a curative instruction.<sup>97</sup>

The NMCCA found that the agent's latter testimony was obvious error. In doing so, the court found that the defense counsel was "deficient" when he failed to object to "clearly inadmissible" evidence. Additionally, the NMCCA could "discern no possible strategic or tactical reason not to object."<sup>98</sup> Based on the other overwhelming evidence of the appellant's guilt, however, the court concluded that the appellant was not prejudiced, and therefore it declined to grant any relief on this ground.<sup>99</sup>

*Oliver* serves to remind defense counsel not only of the importance of ensuring that they are well-versed on the rules of evidence, but also of remaining attentive and vigilant throughout the trial. During trial, as trial counsel are attempting to admit evidence, defense counsel should ask themselves two questions: are there legal grounds for keeping the evidence out,

and if there are, are there strategic reasons to let the evidence in anyway? The NMCCA answered these questions for the defense counsel in *Oliver* with "yes" and "no," respectively.

The CAAF examined the issue of ineffective assistance of counsel in the post-trial phase of a court-martial in *United States v. Gilley*.<sup>100</sup> In *Gilley*, the appellant was convicted of six specifications of indecent assault and one specification of assault and battery of his three stepchildren.<sup>101</sup> In his appeal, the appellant claimed that his defense counsel was ineffective because his defense counsel submitted inflammatory letters from the appellant's family members to the convening authority as part of the appellant's post-trial clemency matters,<sup>102</sup> without consulting the appellant.<sup>103</sup>

The most vitriolic of the letters came from the appellant's father. The appellant's father referred to the appellant's ex-wife and stepchildren as the "no good whore and her bastard kids," and the wife individually as "a lying tramp whore who wouldn't know a decent person if they kicked her in the ass and give [sic] her a new set of brains, which she doesn't have."<sup>104</sup> He derided the court-martial proceedings as a "kangaroo court."<sup>105</sup> Additionally, he accused the Air Force of contriving the court-martial as a way to save money by not having to pay his son retirement pay.<sup>106</sup> He referred to the military, Air Force lawyers, the jury, the judge, and the Air Force's "high ranks" collectively as a "bunch of low-lifed [sic] bastards," "dumb asses," and "a chicken-shit bunch."<sup>107</sup> Finally, he thought they all should face a "firing squad," and he hoped that they would "burn in hell."<sup>108</sup>

In his affidavit, the appellant claimed that his defense counsel never discussed the content of his father's letter with him,

95. 56 M.J. 695 (N-M. Ct. Crim. App. 2001).

96. *Id.* at 698.

97. *Id.* at 700.

98. *Id.* at 703.

99. *Id.* at 704-05.

100. 56 M.J. 113 (2001).

101. *Id.* at 114. The appellant was sentenced to a dishonorable discharge, confinement for ten years, total forfeiture of pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence. *Id.*

102. *See generally* MCM, *supra* note 24, R.C.M. 1105-1106.

103. *Gilley*, 56 M.J. at 124.

104. *Id.* at 119 (brackets in original).

105. *Id.*

106. *Id.* The appellant's father refers to his son's "18 years of service" in the letter. *Id.*

107. *Id.* (brackets in original).

108. *Id.*

other than to inform him that the letter contained some curse words and that his defense counsel was trying to get the appellant's father to rewrite it. Additionally, the appellant stated that he never directed his counsel to include the letter in his clemency package.<sup>109</sup>

The CAAF described the father's letter variously as "acerbic," "a scathing diatribe," and a "scathing denouncement of the system and its participants."<sup>110</sup> Although the court reaffirmed that tactical and strategic post-trial decisions are within the control of the defense counsel, it could find no possible "positive spin" that the defense could have placed on the father's letter. The court also found that the inclusion of the appellant's mother and brother's negative letters compounded the prejudicial impact of the father's.<sup>111</sup>

After applying the test for effectiveness of counsel announced in *United States v. Polk*<sup>112</sup> to the defense counsel's actions and facts of this case, the CAAF found that all three of the *Polk* prongs had been met.<sup>113</sup> In reaching its decision that the appellant had been denied effective assistance of counsel, the court concluded that the defense counsel had failed to evaluate the letters to determine if they were appropriate to submit to the convening authority. Also, they could find no reasonable explanation for the inclusion of these letters, and the decision to use them fell "measurably below the performance . . . [ordinarily expected] of fallible lawyers."<sup>114</sup> Finally, the CAAF determined that by sending these letters to the convening authority, the defense counsel "may have dashed appellant's 'last best chance' for sentencing relief," and that absent these

letters, the appellant might have been granted some clemency.<sup>115</sup>

*Gilley* illustrates for defense counsel the importance of fulfilling the ethical duties of competence and communication that they owe to their clients. An essential part of competently handling a case entails thoroughness, preparation, and the employment of "methods and procedures" appropriate to achieve the goals of the representation.<sup>116</sup> With post-trial submissions, this means defense counsel should carefully review all documents they plan to submit to ensure the submissions will individually and collectively have a positive effect on their clients' chances for clemency.

The duty of communication is fulfilled when lawyers keep their clients informed about the status of their case so that the client can make informed decisions about the objectives of the representation and the methods best suited to achieve them.<sup>117</sup> This duty is often difficult enough to achieve pre-trial for busy defense counsel. It becomes even more difficult when the trial is over and the defense counsel's attention is naturally focused on the next trial on the docket. This diminished focus on post-trial matters is often compounded when the client is in confinement and difficult to contact. The appellate courts, however, have made it clear that the ethical standard owed to post-trial clients is not lower than that owed to pre-trial clients.<sup>118</sup>

Defense counsel should make a habit of calling their post-trial clients shortly after their arrival to confinement to check on them, answer any questions, and discuss plans for seeking

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109. *Id.* at 120.

110. *Id.* at 124.

111. *Id.*

112. 32 M.J. 150 (C.M.A. 1991).

113. *Gilley*, 56 M.J. at 124 (construing *Polk*, 32 M.J. at 153). The court adopted the following three-pronged test to determine if the presumption of counsel competency had been overcome:

- (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
- (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance . . . [ordinarily expected] of fallible lawyers"? and
- (3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors" there would have been a different result?

*Id.* (quoting *Polk*, 32 M.J. at 153) (brackets in original).

114. *Id.* (quoting *Polk*, 32 M.J. at 153) (brackets in original).

115. *Id.* at 125.

116. AR 27-26, *supra* note 2, R. 1.1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Id.*

117. *Id.* R. 1.4. This Rule states: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable 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.*

118. *See United States v. Carter*, 40 M.J. 102 (C.M.A. 1994); *United States v. Fluellen*, 40 M.J. 96 (C.M.A. 1994).

## Conclusion

clemency. Once defense counsel have completed their proposed post-trial submissions, they should send them, complete with all enclosures, to their clients for review and approval. Any disagreements over their content can hopefully be worked out over the phone; however, like testifying at trial, it is the client who has the ultimate say in what matters he wants and does not want submitted to the convening authority on his behalf.<sup>119</sup>

While reading through the strange and entertaining facts contained in this year's professional responsibility cases, counsel and judges should not lose sight of the important lessons to be gleaned from them. Baseball great Yogi Berra once said, "You can observe a lot by watching."<sup>120</sup> Counsel and military judges should apply this maxim when reading professional responsibility cases and articles.<sup>121</sup> Learning from the missteps of others can help current counsel and judges avoid the pitfalls that ensnared their predecessors and can help to ensure that the rights of the client, as well as the integrity of the military justice system, are maintained.

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119. See *United States v. Hicks*, 47 M.J. 90 (1997); *United States v. Lewis*, 42 M.J. 1 (1995).

120. BARTLETT, *supra* note 1, at 754 n.12.

121. Major Charles H. Rose III, *Professional Responsibility: Peering Over the Shoulder of Trial Attorneys*, ARMY LAW., May 2001, at 11.