THE MILITARY'S APPROACH TO APPELLATE LAW

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> *The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.*[1]

I. THE APPELLATE COMPONENT OF THE MILITARY JUSTICE SYSTEM

Long gone are the days when "military justice" meant a rush to judgment with charges read after sunrise, a conviction by lunch, and a firing squad—blindfold optional—completing its work by sunset.[2] Today's military justice system, the Uniform

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1. *Manual for Courts-Martial, United States*, pt. 1, § 3 (Jt. Service Comm. on Mil. Just. 2008) [hereinafter *Manual for Courts-Martial*].

2. *Cf.* William Winthrop, *Military Law and Precedents* 703–05 (W.H. Morrison 1886) (discussing authority of commanders in the field to carry out sentences imposed on guerilla fighters by military commissions for offenses like arson, rape, and violations of the laws and customs of war). At the very least, the Act of 1862 required Presidential approval for

Code of Military Justice, found in the *Manual for Courts-Martial*,[3] is replete with protections for servicemembers, not the least of which is a robust appellate system.[4] It is this final safeguard in the military's justice system that I will explore to give the reader an understanding of the military's approach to appellate law and how this portion of the legal structure guarantees that America's servicemembers are protected by the very laws they have volunteered to defend.

The military has essentially a two-tiered appellate system. There are four service courts, the Army Court of Criminal Appeals, the Navy-Marine Court of Criminal Appeals, the Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals, each composed of military judges from the Judge Advocate General (JAG) Corps. From this level, cases are appealable to the Court of Appeals for the Armed Forces, a court composed of five civilians, appointed by the President, who serve fifteen-year terms.[5] As is typical of appellate courts generally, military appellate courts are limited by the records they receive on appeal, even in cases in which the appellate

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the execution of all death sentences, preventing immediate summary executions in the field. *Id.* at 703. Even the revision, the Act of 1863, only narrowly loosened this requirement and allowed for execution of sentence with the approval of the senior field commander in the case of those convicted for spying, desertion, mutiny, and murder. *Id.*

3. For the convenience of civilian readers, later citations in this article to specific provisions of the Uniform Code of Military Justice are rendered as citations to the United States Code, an authoritative version of which is available at http//:uscode.house.gov.

4. *See generally Manual for Courts-Martial*, *supra* n. 1 (addressing procedures for various types of appellate review, including that of the Judge Advocate General, the Court of Appeals for the Armed Forces, and the Supreme Court); *see also* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. Rev. 185, 210 (2002) (pointing out that "the military system offers the accused extraordinary access to the appeals process").

5. *The United States Court of Appeals for the Armed Forces* 1 (Clerk, Armed Forces App. 2011). All CAAF decisions bind lower military appellate and trial courts. *See e.g.* Armed Forces App. R. Prac. & P. 10(d) (providing that "[t]he Clerk shall, on the date a judgment is entered, distribute to all parties and the Judge Advocate General of the service in which the case arose a copy of the judgment and opinion, if any, or of the order if no opinion was written"). The intermediate-level service courts produce multiple forms of decisions, with only the published decisions binding on their trial courts. *See e.g.* Navy-Marine Crim. App. R. 18.2 (providing that unpublished decisions, although not binding, may be cited as persuasive authority). The history of the military appellate courts can be found on the CAAF website at http://www.armfor.uscourts.gov/newcaaf/about.htm (accessed Jan. 18, 2012; copy on file with Journal of Appellate Practice and Process).

court believes the record to be inaccurate.[6] The appellate courts do have de novo review, allowing another reassessment of the findings, albeit limited to the facts in the record, with the ability to overturn the result of trial if the reviewing court deems appropriate.[7]

The intermediate service courts automatically review any case where the sentence of the accused includes confinement for more than a year, a bad-conduct or dishonorable discharge, dismissal of an officer, or death.[8] In fiscal year 2009, the most recent year available for statistics from the Army's intermediate service court, there were 1069 courts-martial, and of those, 605 resulted in sentences serious enough that they mandated automatic review by the service court.[9] During that same time

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6. *See e.g. U.S. v. Peterson*, 2010 WL 3637581 (Navy-Marine Crim. App. Sept. 21, 2010). The verbatim transcript came to the court with what the judges suspected "represent[ed] a stenographer's error" based on the "incongruous" exchange between the defense counsel and the witness that includes a "contextually strange" question:

DC: Were you on drugs that night?

W: Yes.

DC: But [you] have done drugs?

W: Yes.

Id. at 3 (Maksym, J., concurring in the result). Judge Maksym's separate opinion goes on to note that there was no attempt to clarify the witness's testimony on redirect or any further inquiry from the judge, noting only that because it was an "authenticated record . . . the court may not speculate beyond the four corners of same." In rare cases, however, the appellate court 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 that the appellate court needs resolved in order to decide a case. In the military, these are referred to as *DuBay* hearings, from *U.S. v. DuBay*, 1967 WL 4276 (C.M.A. July 21, 1967), which established procedure to perform such an investigation. *See* Armed Forces App. R. Prac. & P. 27 (outlining procedures relating to initiation and conduct of *DuBay* hearing).

7. *See* 10 U.S.C. §§ 866, 867, 869 (providing for review by Court of Criminal Appeals, Court of Appeals for the Armed Forces, and Judge Advocate General, all of which have authority to modify or set aside the sentence or findings entered at trial).

8. 10 U.S.C. § 866. For cases in which there is a guilty finding that does not automatically trigger an appellate review due to a relative lack of severity in the sentence, 10 U.S.C. § 864 requires a neutral judge advocate's written review of the charge(s) and sentence.

9. Email from Homan Barzmehri, Mgt. & Program Analyst, Off. of the Clerk, Army Ct. of Crim. App., to Author, *% of cases granted appellate review* (Oct. 21, 2011, 09:59 EST) (on file with author). This is about a twenty percent drop over five years, indicating a significant reduction in the sentences given across the board. Because the military does not have any mandatory minimums or sentencing guidelines, *see generally Manual for Courts-Martial, supra* n. 1 (providing throughout only maximum punishments instead of punishments that range from minimums to maximums), military judges or panels—i.e.,

period, CAAF issued forty-six opinions in cases arising from the various intermediate courts after reviewing petitions in approximately 950 cases.[10]

Like CAAF, each service court operates under its own set of rules.[11] Counsel appearing before these courts must remember that their procedural rules are typically enforced much more closely than are the procedural rules at trial level.[12]

II. DUTIES OF MILITARY APPELLATE LAWYERS

A. Competence

Each service also has its own appellate personnel consisting

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military juries—were able to impose these shorter sentences over that five-year period without having to refer to any pre-set restrictions.

Like the intermediate appellate courts of the other Services, the ACCA reviews cases for legal error, factual sufficiency, and sentence appropriateness, 10 U.S.C. § 866(c), while the CAAF has mandatory jurisdiction of death-penalty cases and has discretion to review the results from the lower service courts in other types of cases, 10 U.S.C. § 866(b)(2) (removing death-penalty cases from purview of courts of criminal appeals); Armed Forces App. R. Prac. & P. 4 (noting mandatory review in death-penalty cases and enumerating means by which the court's discretionary jurisdiction may be invoked).

Since 1983, the Supreme Court has had discretion to review cases under the Uniform Code of Military Justice after the CAAF has reviewed the case. *See* Pub. L. 98-209, § 10(c)(1) (1983) (now codified in 28 U.S.C. §1259). Supreme Court review of a military case is rare, however, the Court having "granted plenary review in just nine cases" from CAAF or its predecessor, the Court of Military Appeals, since 1983. *See* Dwight Sullivan, National Institute of Military Justice Blog—CAAFlog, *Reply Brief Filed in Smith v. United States*, http://www.caaflog.com/2010/11/05/reply-brief-filed-in-smith-v-united-states (Nov. 5, 2010).

10. *Report of the United States Court of Appeals for the Armed Forces, September 1, 2008 to August 31, 2009*, at 5, in *Annual Report of the Code Committee on Military Justice*, http://www.armfor.uscourts.gov/newcaaf/annual/FY09AnnualReport.pdf.

11. *See generally* Armed Forces App. R. Prac. & P, http://www.armfor.uscourts.gov/newcaaf/library/Rules/Rules2011May.pdf; Army Crim. App. R. Prac. & P., https://www.jagcnet.army.mil/8525749F00722CA8/0/B05B03925AE20A2585257604006B53BC/$file/ACCA%20Rules%2020090731.pdf; A.F. Crim. App. R. Prac. & P., http://afcca.law.af.mil/content/afcca_data/cp/afcca_rules_of_practice_and_procedures.pdf (Oct. 11, 2010); Navy-Marine Crim. App. R. Prac. & P., http://www.jag.navy.mil/courts/documents/NMCCA_Rules_2011a.pdf; Coast Guard Crim. App. R. Prac. & P., http://www.uscg.mil/Legal/cca/court_rules.pdf (July 18, 2008).

12. Under the new contempt power effective January 2011, the judiciary also has the option in a military appeal of ordering any individual who violates the court's rules or orders to serve up to a month in jail in combination with, or instead of, a financial sanction. 10 U.S.C. § 848(b).

of both government and defense appellate divisions.[13] The attorneys that staff these departments are all licensed practitioners, required to follow the ethical rules of the jurisdictions in which they are admitted to practice as well as the military rules of professional responsibility for their particular service, not least of which is the requirement of competence.[14] Typically, most of these positions are held by junior legal officers who have held at least one other assignment before taking on appellate counsel responsibilities. Their prior military experience is often beneficial in helping them understand the uniquely military aspects of an otherwise typical appellate case, such as flying surface-of-the-earth missions in Italy or interrogating terrorists in Iraq.[15]

Another issue that is unique to the military system—and that military appellate counsel regularly face—is speedy post-trial processing.[16] A competent appellate defense counsel needs not only to recognize dilatory post-trial processing, but to preserve and document it to allow the client to receive credit for the problem. For example, in *United States v. Jones*[17] the appellant, quite possibly on the advice of his counsel, documented the prejudice he suffered because of excessive post-trial delay. This ultimately resulted in the disapproval of his bad-

13. While each Service has its own separately located defense appellate division, all of the attorneys within that section are co-located and these departments are all in the greater Washington D.C. area, typically near their respective appellate courts.

14. *See* Army R. Prof. Conduct 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") (1 May 1992); A.F. R. Prof. Conduct 1.1 (17 Aug 2005) (same); Navy R. Prof. Conduct 1.1 (9 Nov 2004) (same); Coast Guard Leg. R. Prof. Conduct 1.1 (June 1, 2005) (same).

15. *See U.S. v. Schweitzer*, 68 M.J. 133 (Armed Forces App. 2009); *U.S. v. Behenna*, 70 M.J. 521 (Army Crim. App. 2011).

16. When processing a case after trial, the government has 120 days to action and then an additional thirty days to forward the record to the service court before creating a rebuttable presumption that the government has taken too long to process the case. *U.S. v. Moreno*, 63 M.J. 129, 142 (Armed Forces App. 2006). If prejudiced by delayed processing, the servicemember may be entitled to relief. *Id.* at 135–36, 141–43 (discussing due process requirements and systemic delay in military tribunals, noting that the 1688-day period of review and appeal in this case was "facially unreasonable," and announcing that the court would soon begin to "apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals").

17. 61 M.J. 80 (Armed Forces App. 2005).

conduct discharge.[18] Not only do counsel need to recognize the post-trial delay opportunity, but they also must provide the court with proof demonstrating prejudice and actual harm.[19]

One way to prove actual harm is to have a knowledgeable official from a potential civilian employer submit an affidavit stating that but for appellant's missing DD-214 discharge certificate, appellant would likely have received employment.[20] Even if appellant ultimately finds another job, as Jones did, if it is for less pay or reduced benefits, a viable appellate issue still exists as evidenced by Jones's success.[21] One of the finer takeaways from *Jones* is to carefully screen what proof is submitted to the court. Jones submitted affidavits from three different officials at the trucking company, each of whom offered varying degrees of certainty about his job prospects if he did have a DD-214.[22] While the court ultimately found prejudice, in commenting on the affidavit that was most definitive about his job prospects, the court stated, "[i]f that were the only document that Appellant had submitted, it would seem unquestionable that he has established that the unreasonable post-trial delay prejudiced him."[23] The court then proceeded to examine the other statements, observing that while the one, by itself, made for a clear issue warranting relief, the inclusion of the others made it a much more difficult question.[24]

A competent appellate advocate will consider the juxtaposition of *Jones* with another excessive post-trial delay case, *United States v. Bush*,[25] that not only illustrates the difficulty of post-trial delay claims, but also how closely success is linked to substantiation. Bush was without a DD-214 for a

18. *Id.* at 82 (describing declarations from appellant's prospective employer), 86 (setting aside bad-conduct discharge).

19. *Id.* at 85 (concluding that "the unrebutted declarations establish that the unreasonable post-trial delay prejudiced Appellant").

20. *Id.*

21. *Id.* at 82 (noting that appellant had resorted to part-time positions and work available through temporary agencies).

22. *Id.*

23. *Id.* at 84.

24. *See id.* at 84–85 (discussing contents of declarations, noting difference between being offered a job and being considered for a job, and concluding that a delay interfering with consideration for a job may be sufficient to demonstrate prejudice).

25. 68 M.J. 96 (Armed Forces App. 2009).

significantly longer period of time than Jones and was similarly turned down for a job as a result.[26] Bush, however, failed to submit any supporting documentation from potential employers and failed to explain why he was unable to do so.[27] Because the court was asked to rely exclusively on Bush's own affidavit, which had no independent verification, the court rejected his claim of employment prejudice.[28] While it is impossible to tell from the court's opinion whether counsel informed Bush that he should provide an employer's statement and whether Bush was unwilling or unable to obtain one, early attorney emphasis on this point might have made all the difference.

If submitting an unsupported affidavit from a client is bad, proffering an unsigned affidavit based on a telephone conversation between attorney and client is even worse. This situation is exacerbated in the military, because the appellate attorney is almost never in the same location as the client, and is forced to proceed without any personal contact. If a client is released from confinement before the conclusion of the appellate process, the client will often return to his or her home, inevitably—or so it seems to appellate counsel—in some other state. In *United States v. Gunderman*,[29] for example, appellate defense counsel submitted an unsigned affidavit on behalf of the client alleging that counsel below "never told me that I could also submit a request to the convening authority that he not approve my adjudged forfeitures and defer my automatic forfeitures . . . [or] waive any automatic forfeitures."[30] The court, however, "decline[d] to use an unsigned document as

26. *See id.* at 99. It took over seven years to review Bush's 143-page guilty plea because it was "lost in the mail for over six years." *Id.*

27. *See id.*

28. *See id.* at 100 ("The appellant's failure to independently corroborate his assertion of specific employment prejudice or alternatively to provide facts explaining his inability to provide such independent corroboration weighs heavily in our decision.").

29. 67 M.J. 683 (Army. Ct. Crim. App. 2009).

30. *Id.* at 685. The unsigned document averred that appellant would have requested deferment and waiver of forfeitures because his wife was depending on his military pay for housing while he was in confinement. *Id.* at 688 (holding that the court would not rely on the unsigned affidavit, and noting that without a signed version of the affidavit in the record, "appellant has not demonstrated he wished to submit a request for deferment and waiver of forfeitures," and that the clemency request that he did submit during the post-trial phase contained no reference to forfeitures).

extrinsic evidence upon which to base a decision."[31] The court went on to "reaffirm a longstanding legal principle: the oath or swearing process itself has legal import."[32]

In *Gunderman*, appellate defense counsel learned in a telephone conversation with her client that there was an appealable issue with the advice the client had received from trial defense counsel, but was unable to obtain a signed document at the time.[33] Later, when it was necessary to submit an affidavit to the court, counsel was still unable to locate her client.[34] Any time an appellate attorney learns something from the client that will require the client's signature, it is imperative for the competent appellate counsel to obtain the necessary signature before the client's release from confinement, especially if there is any chance that the client may be released before the appellate process is complete and then disappear. The best policy is to immediately begin work on obtaining the necessary signature from the client because dealing with a distant confinement facility, often in a different time zone, is usually a time-consuming process that involves considerable effort.[35]

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31. *Id.* at 686.

32. *Id.* at 688 (citing *U.S. v. Trainor*, 376 F.3d 1325, 1332 (11th Cir. 2004)).

33. *Gunderman*, 67 M.J. at 685.

34. *Id.* at 686.

35. The same is true of further appeals. While the client is available, appellate counsel should discuss whether the client wants to appeal to CAAF should the initial appeal to the service court prove unsuccessful. As an example, counsel should attempt at this early stage to acquire information relevant to the preparation of the documents necessary for an additional appeal—such as phone numbers for the client's family members or other contacts in the civilian world. While there often may be no harm in trying a further appeal (particularly given that the potential appellant does not pay counsel and maintains some military benefits, such as healthcare and commissary access, while an appeal is pending), the client may when actually faced with an additional appeal just want the process to end in order to move on with life, especially if he or she needs a DD-214 to obtain employment. Additionally, counsel's collecting all potentially relevant information at the start will be useful in complying with the newly inflexible CAAF filing deadline if the client does decide to proceed with an additional appeal. *See U.S. v. Rodriguez*, 67 M.J. 110 (Armed Forces App. 2009) (implementing a strict sixty-day deadline for C.A.A.F. petitions). The *Rodriguez* court held that the statutory sixty-day period for filing petitions for review was jurisdictional and could not be waived, and that it did not have discretion to provide relief, overruling decades of practice that had allowed extensions of the filing deadline for good cause shown. Upon ruling in *Rodriguez*, the CAAF dismissed as untimely even then-pending petitions that it had already accepted. Reversal of this relatively new policy of inflexibility seems unlikely given CAAF's even more recent denial of an appellant's

Another aspect made more complex for the military appellate attorney is the diaspora of those involved in the original trial. Military witnesses can be particularly difficult to find due to recurring deployments and changing of duty assignments; further, once they leave the military, departing servicemembers routinely leave the area, moving back to their original homes or new places adopted in their travels.[36] The importance of including detailed affidavits containing facts that can only come from others is highlighted in *United States v. Martin*,[37] another case in which appellant "failed to overcome a presumption of competence," on the part of trial defense counsel, due at least to some extent to a lack of specificity.[38] On appeal, Martin provided his appellate defense counsel with an affidavit containing a list of about twenty sentencing witnesses that his trial defense counsel never called. The court observed, however, that the appellant "has not provided any specificity as to what those witnesses would have said if they had been called to testify at trial."[39] The lack of specificity about the testimony of the listed individuals as well as their relationship to the appellant, juxtaposed with trial counsel's articulated strategy for limiting the number of witnesses and obvious competence in general, led the court to decline appellant's request for relief.[40]

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second *coram nobis* petition arguing that the sixty-day deadline is not jurisdictional and thus should be applied in a less rigid manner. *See Rittenhouse v. U.S.*, 70 M.J. 266 (Armed Forces App. 2011) (denying petition). But on the other hand, two members of the *Rittenhouse* court dissented from that denial, so it is possible that the CAAF may revisit this strict-compliance issue within the next few years. Counsel should follow developments in this area.

36. Former servicemembers are also much more likely to be homeless. About twenty-five percent of America's homeless population suffers from some form of severe mental illness, Kristen Paquette, *Individuals Experiencing Homelessness*, http://homeless.samhsa.gov/Resource/View.aspx?id=48800 (Substance Abuse & Mental Health Servs. Admin. 2010), but about half of those who make up the nation's population of homeless veterans suffer from mental illness, *Fact Sheet: VA Programs for Homeless Veterans*, http://nchv.org/docs/VA%20Homeless%20Veteran%20Fact%20Sheet.pdf (Dept. of Vet. Affairs Sept. 2011). Additionally, forty percent of the men in America's male homeless population are veterans. *Who is Homeless?* http://www.nationalhomeless.org/factsheets/who.html (Natl. Coalition for the Homeless 2009) (rev. Dec. 15, 2011).

37. 2010 WL 3927493 (Army Crim. App. 2010).

38. *Id.* at *7.

39. *Id.* (citing *U.S. v. Perez*, 64 M.J. 239, 244 (Armed Forces App. 2006)) (internal quotation marks omitted).

40. *Id.* at *2, *7–*8 (pointing out that civilian defense counsel informed the judge below that the defense team was "comfortable with the decision" not to present character

In many cases, providing detailed summaries of potential-witness affidavits like those the *Perez* court expected will not be possible. Nonetheless, appellate attorneys have an obligation to at least inform the client of the standard that witness affidavits will probably be required to meet and assist in achieving it to whatever extent possible.[41]

B. Scope of Representation

Scope of representation[42] concerns for military appellate defense counsel are much greater when the client elects to retain

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witnesses and that the absence of their testimony "was not the result of laziness or oversight," mentioning appellant's knowing agreement to this strategy, indicating that the volatility of one potential witness caused defense counsel to decide against calling him, noting that defense counsel made calculated decisions about limiting evidence related to uncharged misconduct that might otherwise have been used in aggravation, presented extensive evidence of defendant's good performance as a soldier, and negotiated a pre-trial agreement that limited defendant's potential confinement to a term well below the maximum). It appears that the court would have favorably viewed affidavits from potential character witnesses asserting a willingness to testify, a proffer of what they would have testified about, and their basis for such knowledge, *see id.* at 7, but the court found nonetheless that the record showed defense counsel to be competent even absent a decision to present such affidavits.

41. In many cases either the character or fact witness will be unavailable, due to contact information that is not updated, witnesses who may not be eager to go on record with a court, or a host of other reasons, or if available, will have something quite different to say than what appellant posits.

42. *See e.g.* Army R. Prof. Conduct 1.2(a), (c)–(e):

> (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. . . .
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> (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.
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> (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.
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> (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.

civilian counsel while keeping military appointed counsel, resulting in a possible dual-representation dilemma. This situation is common in the military where the Defense Appellate Division (DAD) appoints a military attorney while the appellant also retains civilian counsel.[43]

That arrangement can raise a host of questions: 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? If particular military and civilian lawyers have not had extended time working together on prior cases, these questions are not only appropriate to discuss, but the answers should be documented from the outset of the case to avoid a situation in which an attorney is expected to sign a brief that he or she had little input in drafting and only a cursory opportunity to review. This is particularly true when, with the due date rapidly approaching, one lawyer has not seen a single draft of what will be submitted and the court has made clear that it will not allow any more enlargements of time.[44] Counsel must be prepared, at least, to make a timely submission of a basic appeal that raises the issues if co-counsel fails to comply with the court's filing deadline or if co-counsel submits a pleading deficient on its face.[45] Counsel should particularly avoid putting themselves in the position of signing any document that raises professional-responsibility concerns.[46]

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43. Just as in courts-martial, the military provides servicemembers pursuing appeals with attorneys free of charge. R. Cts.-Martial 1202 (providing that "the Judge Advocate General concerned shall detail one or more commissioned officers as appellate Government counsel and one or more commissioned officers as appellate defense counsel). Servicemembers have the option of retaining civilian counsel at their own expense who can either replace DAD-appointed counsel or assist DAD-appointed counsel with the appeal. *See* R. Cts.-Martial 1202–*Discussion*, in *Manual for Courts-Martial*, *supra* n. 1, at II-168.

44. Typically, each enlargement is thirty days in the ACCA, with the first extension periods consolidated to allow for ninety days instead of thirty. *See* Army Crim. App. R. 24.1(c)(E)(2).

45. This is especially important in light of the strict enforcement of the statutory sixty-day deadline announced in *Rodriguez*. *See* n. 35, *supra*.

46. *See e.g. In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (finding that a partner who signed a brief making an accusation of bias about the court should be sanctioned despite his apology and the fact that the brief was written by his co-counsel); *U.S. v. May*, 47 M.J. 478 (Armed Forces App. 1998) (finding that military appellate defense counsel could be sanctioned for civilian appellate defense counsel's failure to meet a filing deadline); *see*

C. Diligence and Communication

Yet another problem for military appellate defense counsel is that of the missing client, which can raise issues related to the appellate lawyer's duties of diligence[47] and communication.[48] What if there has been no communication about whether the client even wants to appeal, let alone what issues are to be appealed? This is a conundrum that military appellate counsel are exposed to far more often than their civilian counterparts, owing to the military's liberal automatic-appeal standard.[49] A

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also Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 Rev. Litig. 301, 329–38 (2004) (discussing *Wilkins*).

Counsel should note that the *May* court found that military appellate defense counsel had an obligation as both officers of the court and appellate defense counsel to fulfill their duties to their client and to the court, and indicated that they had four options: (1) a *pro se* pleading filed by appellant—with the assistance of military appellate counsel unless appellant rejected such assistance—together with a pleading filed by military appellate counsel explaining why a *pro se* pleading was being filed; (2) a *pro se* pleading filed by appellant without assistance of military counsel together with a pleading filed by military appellate counsel explaining why a *pro se* pleading was being filed; (3) a pleading filed by military appellate counsel in compliance with the court order, with the consent of 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 the representation. *Id.* at 482. The court also made it clear that "[w]here individual civilian counsel's failure to act is working to the detriment of an appellant, military appellate counsel may not stand by idly, because they remain responsible for protecting the interests of their client." *Id.* at 481.

47. *See* Army R. Prof. Conduct 1.3:

> 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.

Id.

48. *See* Army R. Prof. Conduct 1.4(a)–(b):

> (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.

49. Article 66(b) of the Uniform Code of Military Justice 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
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> > (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

prime example is the client who has already been released from confinement and is now on excess leave[50]—somewhere—just not where he or she is listed on the release paperwork.[51] When this situation arises, appellate counsel have an obligation to attempt to notify the client of the status of the case in order to comply with their obligation of diligence under Rule 1.3. But how far does that obligation extend?

Although the rules do not provide great clarity, it seems that they require appellate counsel to do whatever is possible—from their desks.[52] This means calling the client, leaving messages at the last known phone number, and sending letters to the addresses listed on the Post-Trial and Appellate Rights (PTAR) paperwork 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

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> (2) except in the case of a sentence 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.

10 U.S.C. § 866.

50. Excess leave in this circumstance is typically involuntary and authorized at the direction of the general court-martial convening authority when a servicemember is sentenced to a punitive discharge while awaiting completion of appellate review, but any confinement has already been completed. When in this status, the servicemember does not get paid and is released from any previously assigned responsibilities but still retains a military ID card and is also entitled to military healthcare, access to the commissary, and other similar benefits. *See* U.S. Army Reg. 600-8-10 (*Leaves and Passes*) at 30 (Dept. of the Army 15 Feb. 2006).

51. It should not be overly difficult to locate and communicate with a client who is in confinement, despite the sometimes less-than-accommodating practices of the confinement facilities regarding scheduling and escorts. However, as the court pointed out in *U.S. v. Suarez*, 1998 WL 552648 at *1 n. 3 (Navy-Marine Crim. App. 1998), while "adequate communications . . . are fundamental to effective representation" and should be relatively straightforward when the client is confined, it still does not always happen. Because communication only gets more difficult once the client is released, and in order to comply with *Rodriguez*, *see* n. 35 and accompanying text, *supra*, it is best to initiate the communication as soon as possible.

52. In *U.S. v. Lang*, 1995 WL 934977 at *1, *2 (Navy-Marine Crim. App. 1995), when the appellant attempted to show 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. The court concluded that it was appellant's responsibility to keep his defense counsel informed of his location and, if he failed to do that, then he was unable to benefit from his dereliction. Presumably courts would expect nothing more from appellate counsel: Notice sent via registered mail from the U.S. Postal Service to the last address provided by the appellant is sufficient.

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, one civilian appellate court chastised the attorney who filed a notice of appeal on behalf of his missing client as the deadline for the appeal approached.[53] The court said the attorney should have instead sent a letter to his client's last known address notifying him of the impending deadline, for doing so would have discharged his ethical obligations.[54] While of no precedential value in a military court, that chastening guidance seems like a good model to follow to the limited extent that it provides guidelines for searching out one's clients.[55] Unfortunately, it does not offer any guidance as to whether to file an appeal, given the military's mandatory appeals as detailed in Article 66 of the Uniform Code of Military Justice, or how to deal with discretionary appeals to CAAF.[56]

If an attorney is unable to reach a client after receiving unfavorable treatment at the intermediate service court, the last communication on this issue determines the attorney's next action.[57] If the client was left with the impression that the attorney would file all possible appeals, then an appeal to CAAF

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53. *W.J.E. v. Dept. of Children & Fam. Servs.*, 731 So. 2d 850 (Fla. 3d Dist. Ct. App. 1999). The CAAF opined in *U.S. v. Miller*, 45 M.J. 149 (Armed Forces App. 1996), that it is error for substitute trial defense counsel to accept service of the Staff Judge Advocate's post-trial recommendation and respond to it without first communicating or entering into an attorney-client relationship with the appellant, given that appellant's counsel from trial left active duty ten days after submitting a clemency package to the original convening authority. *Id.* at 150. The CAAF performed a prejudice analysis, however, and determined that since substitute counsel was acting in appellant's best interest and did not engage in ultra vires acts even though he did not technically enter in an attorney-client relationship and consequently never became appellant's counsel in a legal and ethical sense, there was no prejudice. *Id.* at 151.

54. *W.J.E.*, 731 So. 2d at 850.

55. However, it bears noting that *W.J.E.* was a termination-of-parental-rights case in which the judge, required to "protect the daughter's best interests," stated that the court could "tarry no more" because of its duty to protect the child's future. *Id.* Thus, the rule of *W.J.E.* may not apply universally outside the family-law arena.

56. *See* 10 U.S.C. §§ 866, 867.

57. The comments to Rule 1.3 state that

> [u]nless the relationship is terminated as provided in Rule 1.16, and to the extent permitted by law, a lawyer should carry through to 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.

Army R. Prof. Conduct 1.3 cmt.

is appropriate. Alternatively, if counsel left the client with the understanding that each appeal to each different court was a separate action and only after learning of the result from the intermediate service court would they decide how to proceed, then the attorney should refrain from filing additional pleadings without further instructions from the client. It is incumbent on the attorney to make that distinction clear in early communications with the client so the client knows what stage the case is at and how it will proceed.[58]

A related issue is whether to inform the court if the appellant is incommunicado. In very rare cases, the Personnel Confinement Facility (PCF) will issue a warrant to regain contact with a servicemember who is on excess leave but has failed to update his or her status after release.[59] While an attorney should not volunteer information that the client has violated the directive to provide updated contact information, the court may inquire into the attorney-client relationship.[60] In one case where the appellate counsel asked for over ten enlargements of time to respond, the court "merely ask[ed] whether counsel coordinated with the client before the request was made."[61] When counsel objected, the court held that the information was not privileged, as the court's inquiries did not intrude into the zone of privacy surrounding attorney-client conversations.[62]

58. *Id.*

59. Interview with John M. Cutler, Dep. Dir., Fort Sill PCF (Jan. 19, 2011). A servicemember on excess leave agrees on the Appellate Leave Action form to provide an updated address if his or her residence changes after the excess leave begins. *See* Dept. of Def. Form 2717 at ¶ 8 (Nov. 1999).

60. *See U.S. v. Greska*, 65 M.J. 835, 842 (A.F. Crim. App. 2007).

61. *Id.* at 840.

62. *See id.* at 839–41, 842. The court described this information as "incident to the representation," and as such not privileged, and pointed out that the court-martial procedures frequently require inquiries more intrusive than this by military judges. *Id.* at 840-41 (noting that what the court "requested from the appellant . . . was nothing more than 'the fact of consultation'" about the requested delays). Presumably, the court had in mind the intrusive nature of such routine inquiries as "Have you consulted with your defense counsel about your decision to plead guilty, and had the full benefit of his advice?"

D. Conflict of Interest

When applying conflict of interest rules[63] in the military appellate practice, several nuances arise. First, on a practical level, there are a limited number of appellate defense counsel, all of whom work within the same section at the same location for each Service. If an appellant fires one or more counsel, it may become increasingly difficult to provide conflict-free appellate counsel.[64] Even for the Army, which has the greatest number of counsel assigned to DAD, there are still issues with released counsel, as well as the typical co-accused situations that raise conflict-of-interest problems.[65] DAD is divided into two branches to easily address the co-defendants situation.[66] In the rare case that has more than two co-defendants, counsel can be assigned to work directly under the division chief or deputy to prevent a branch chief from supervising two counsel with opposing interests, as well as preventing the Deputy or Chief of

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63. *See e.g.* Army R. Prof. Conduct 1.7:

> (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.

64. *See e.g. U.S. v. Parker*, 53 M.J. 631 (Army Crim. App. 2000) (noting that "the appellant has acted unreasonably in dismissing four successive appellate defense counsel," and concluding that he was not "entitled to substitute counsel" as a result); *Manual for Courts-Martial*, *supra* n. 1, at II-168 (noting in discussion of Rule 1202 that an accused does not have a right to counsel of choice).

65. The Army has approximately twenty appellate defense counsel. *See* Judge Advocate General, *The Directory (2011–2012): JAG Pub 1-1, JAGC Personnel and Activity Directory* 19 (TJAG 2011).

66. *Id.* at 19–20 (listing lawyers assigned to DAD Branch 1 and DAD Branch 2).

DAD from signing conflicting briefs.[67] Additionally, the Army DAD has a good working relationship with its counterparts within the sister Services that allow for handing cases off to avoid a potential conflict situation with an abnormally large number of co-accused servicemembers.[68] Finally, to avoid a conflict of interest, assignment of appellate defense counsel can come from military judge advocates not assigned to DAD.[69]

Second, the standard former-client limitations apply.[70] Thus, the accused's trial defense counsel cannot transfer to GAD and work on a former client's appeal. Less obvious, but also typically prohibited within the military, a former trial defense counsel should not later represent the same individual on appeal.[71]

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67. *See also* text accompanying nn. 113–14, *infra*. In many cases, the Chiefs of GAD (Government Appellate Division) and DAD and their deputies—in addition to the branch chiefs and counsel who actually prepared the briefs—will sign the briefs originating in their departments.

68. Interview with Col. Mark Tellitocci, Chief, Def. App. Div., U.S. Army (Oct. 6, 2010).

69. *See e.g. Parker*, 53 M.J. 631.

70. *See* Army R. Prof. Conduct 1.9:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter;
>
> > (1) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the interests of the client unless the former client consents after consultation; or
> >
> > (2) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.
>
> (b) An Army lawyer shall not knowingly represent a second client in the same or a substantially related matter in which a firm with which the lawyer formerly associated had previously represented a client;
>
> > (1) whose interests are materially adverse to that second client; and
> >
> > (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
>
> (c) An Army lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter;
>
> > (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.
> >
> > (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Id.

71. *U.S. v. Slocumb*, 24 M.J. 940, 941 (Coast Guard Mil. Rev. 1987) (citing *U.S. v. Howard*, 24 M.J. 897 (Coast Guard Mil. Rev. 1987) and noting that "it is asking too much

Third, on a more theoretical level, the issue of unlawful command influence can also make an appearance in military appellate practice. In *United States v. Arroyo*,[72] the court, challenged on the issue of unlawful command influence,[73] held that

> since 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 counsel wishes to 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.[74]

Unlawful command influence, this time of the appellate judges instead of appellate defense counsel, also appeared in

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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"). The *Slocumb* 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 the judges "to make [their] . . . 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.*

For yet another variation of an attorney playing one role at the trial level and another at the appellate level, but with a different result, see *Martindale v. Campbell*, 25 M.J. 755, 756 (Navy-Marine Mil. Rev. 1987), in which a trial judge was later assigned as the "director of the appellate defense division." The appellant claimed that there was an apparent conflict of interest because the individual who previously found him guilty was now evaluating and rating his appellate defense counsel, who was tasked to look for error in that trial. *Id.* at 758. Because the director screened himself from any involvement with the case, however, the court found "no risk that counsel's representation may be materially limited by his own interests in this case." *Id.*; *see also U.S. v. Jones*, 55 M.J. 317 (Armed Forces App. 2001) (holding that an appellate judge's prior position as Director of the Appellate Government Division of the Navy-Marine Corps Appellate Review Activity did not require recusal).

72. 17 M.J. 224 (Ct. Mil. App. 1984).

73. The *Arroyo* court also considered issues raised by *U.S. v. Grostefon*, 12 M.J. 431, 436–37 (Ct. Mil. App. 1982) (holding that "when the accused specifies error in his request for appellate representation or in some other form, the appellate defense counsel will, at a minimum, invite the attention of the Court of Military Review to those issues and, in its decision, the Court of Military Review will, at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them," and that "an appellate counsel cannot properly be criticized or admonished for identifying an issue to our Court or to the Court of Military Review—no matter how frivolous the issue—when that issue has been requested by the accused"). *Grostefon* and its requirements are discussed in more detail in Section II(G), *infra.*

74. *Arroyo*, 17 M.J. at 226.

United States v. Mitchell.[75] Appellant asserted that he was unable to "receive a fair and impartial review by an independent appellate court" because "appellate judges risk professional adversity" if they issue opinions that diverge from what The Judge Advocate General (TJAG), who signs their evaluation reviews, believes promote good order within the ranks.[76] The court observed that all judges, civilian and military, are accountable at some level for their actions and the real issue is whether the manner in which they are held accountable subverts judicial independence.[77] The court held that TJAG's preparation of military judges' evaluations does not violate the appellant's right to an independent judiciary "*if* there are adequate assurances within the military justice system that those reports will not be based upon nor influenced by judicial opinions and rulings."[78] The court ultimately found those assurances existed in two primary forms: The Uniform Code of Military Justice forbids using performance evaluations to punish a military judge, trial or appellate, for making particular findings or imposing a particular sentence, and Congress has directed TJAG to ensure the independence of the judiciary.[79] Consequently, the *Mitchell* court held that appellant was not denied an independent judicial review.[80]

E. Client under a Disability

As Rule for Courts-Martial 909 states, the presumption is that a servicemember is competent to stand trial unless the defense establishes by a preponderance of the evidence that this is not the case.[81] If the appellant's competence at the original

75. 37 M.J. 903 (Navy-Marine Mil. Rev. 1993).

76. *Id.* at 904.

77. *Id.* at 908.

78. *Id.* at 912–13.

79. *Id.* at 913. Indeed, TJAG's penalizing the judiciary through performance evaluations would be contrary to a sworn duty. *Id.*

80. *Id.* at 917.

81. *See* R. Cts.-Martial 909(e)(2) in *Manual for Courts-Martial, supra* n. 1, at II-98 (directing that the proceeding should continue "unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to

trial—a question of fact—is still at issue from the defense perspective, appellate defense counsel must show that the trial judge's ruling on competence was clearly erroneous.[82] If the issue is not whether the accused was suffering from a mental disease or defect at trial, but his or her current state of mind, then the appellate court will apply the same standard used at trial: Is the individual currently suffering from a disease or defect that would leave him or her "unable to understand the nature of the proceedings or to conduct or cooperate intelligently in defense of the case"?[83]

The appellate court also has the authority to direct an examination in accordance with R.C.M. 706 to "determin[e] the accused's current capacity to understand and cooperate in the appellate proceedings."[84] If the accused lacks the requisite mental capacity, as shown by a preponderance of the evidence, the appellate authority must stay the proceeding until the

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understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case").

While the military screens applicants for mental issues, certainly some servicemembers are admitted that should not be and others develop mental issues while in service, often resulting from post-traumatic stress disorder (PTSD) or traumatic brain injuries (TBI). If the client is in fact suffering from a mental disability, the military appellate lawyer's conduct will be guided by the applicable rule relating to disabled clients. *See e.g.* Army R. Prof. Conduct 1.14:

> *(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.

82. *See e.g. U.S. v. Proctor*, 37 M.J. 330, 336–37 (Mil. App. 1993).

83. *U.S. v. Barreto*, 55 M.J. 568 (A.F. Crim. App. 2001) (citing R. Cts.-Martial 909(a) and its discussion); *see also* R. Cts.-Martial 1203(c)(5) in *Manual for Courts-Martial*, *supra* n. 1, at II-170 (dictating that when the lack of understanding is demonstrated by a preponderance of the evidence, "[a]n appellate authority may not affirm the proceedings").

84. R. Cts.-Martial 1203(c)(5), in *Manual for Cts.-Martial*, *supra* n. 1, at II-170; *see also U.S. v. Simon*, 2008 WL 5119589 at *1 (Navy-Marine Crim. App. 2008) (noting that the CAAF had directed the *Simon* court to "determine—under the circumstances presented to the court at the time of such further proceedings—whether there is a question as to Appellant's competence to participate in the appellate proceedings" before hearing the appeal). The military has a robust healthcare system that includes mental-health facilities that the attorney can use as a resource for diagnosing and treating clients, as well as a source for experts to testify.

appellant regains "appropriate capacity."[85] The R.C.M. also allow for "other appropriate action," which can include setting aside the conviction.[86]

Evaluating borderline clients becomes even more challenging for military appellate attorneys, because it is rare that they will ever meet their clients in person and must evaluate whether competency is an issue based on telephone and written communications.[87] An additional layer of complexity is added for the DAD attorney who questions the competence of a client who is no longer in custody, as talking to a counselor who has regular interaction with the client or arranging for the completion of a mental evaluation is much more difficult once the client is released from custody. If the client is homeless, a prevalent problem among veterans with mental-health issues,[88] the ability to engage in basic communication is almost certainly hampered, if not entirely compromised.

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85. R. Cts.-Martial 1203(c)(5), in *Manual for Courts-Martial, supra* n. 1, at II-170.

86. *Id.*; *see also U.S. v. Burleson*, 2011 WL 612058 (Army Crim. App. Feb. 17, 2011) (vacating case *ab initio* due to appellant's suffering a stroke before his court-martial conviction was affirmed on appeal and his continued vegetative state).

87. In *U.S. v. McClain*, 1998 WL 35319624 (Army Crim. App. 1998), for example, appellate defense counsel alleged in his motion requesting a new sanity board that "[t]he appellant has difficulty communicating to appellate defense counsel" and that "[t]he appellant frequently becomes disoriented and is sometimes unable to communicate with appellate defense counsel [and] has experienced auditory hallucinations during consultation." *Id.* at *3 (quoting Appellant's Motion to Direct a Sanity Board and Hold [Appellate] Case in Abeyance). While the Chief of the Psychiatry Service of the U.S. Disciplinary Barracks confirmed the earlier sanity board's paranoid-schizophrenic diagnosis and stated that while appellant cooperated with treatment at the USDB, "it has been somewhat difficult to control his symptoms adequately with antipsychotic medication," the court denied the rehearing because of a lack of "any evidence that appellant lacks mental capacity to understand the appellate proceedings and that appellant has not conducted or cooperated intelligently with appellate defense counsel in these appellate proceedings." *Id.* As a practice point, it is worth noting that the *McClain* court suggested that appellant's "three complete, insightful, fact filled, and logical affidavits, and three well developed *Grostefon* assertions, that he is a paranoid schizophrenic" were counterproductive when the purported reason for filing them was to show that he was "a paranoid schizophrenic, is taking medicine for that condition, heard voices during his trial, did not understand the court-martial proceedings, was forced to plead guilty, hears voices now, and is having a difficult time understanding and aiding the appellate proceedings." *Id.*

88. *See* n. 36, *supra.*

F. Declining or Terminating Representation

It is the extremely rare situation in which the accused is not present in a military trial court when findings and sentencing are announced. Conversely, it is equally unusual for the appellant to be anywhere near the appellate court when it reaches a decision.[89] While the service court's decision does not in itself terminate representation, the attorney-client relationship will typically conclude on the heels of the decision unless CAAF grants review.[90] As a result, it is vitally important that appellate

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89. In many cases, the appellant is still confined and does not have a right to attend any part of the appellate proceeding. When the appellant is not in custody, he or she has typically moved on with life and is unlikely to be in Washington waiting for the court to make a decision even if he or she was present for oral argument. Unlike the Supreme Court, whose members read a summarized version of each decision in open court, the CAAF and the service courts post their decisions on their websites and make them available for review upon request from their clerks' offices.

90. On termination generally, see Rule 1.16:

> *(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 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

counsel notify the client as soon as possible about the decision in the first appeal and whether CAAF has granted review.[91]

Besides the obvious desire on the part of the client to find out if the court has granted relief, other secondary issues arise as a result of the court's decision. In the rare case in which the court sets aside the findings and sentence, the appellant may want to return to active service. In the more common scenario, if the court has approved a discharge and CAAF has not granted review, the appellant's time in service is about to end.[92] Finally, prompt notification is also important if the client decides to retain civilian counsel for further appeals or petitions. All of these major issues are unique to military appellants.[93]

Another significant circumstance common for military appellate defense counsel is their being transferred off cases before conclusion due to Permanent Change of Station moves to new assignments or their leaving active service altogether with their End of Term of Service transitions. While leaving a case before its conclusion should be avoided whenever possible to allow for the attorney-client relationship to mature, there are situations that will necessitate transferring a case to new counsel.[94] Where this is a reality from the initiation of

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payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Army R. Prof. Conduct 1.16.

Also, as the discussion associated with Courts-Martial Rule 1202 notes, the accused may apply for a writ of certiorari to the Supreme Court and continue to receive representation from appellate defense counsel. *See* R. Cts.-Martial 1202-discussion, in *Manual for Courts-Martial*, *supra* n. 1, at II-168 (noting that "[i]f authorized to do so by the accused, appellate defense counsel may prepare and file a petition for a writ of certiorari on behalf of the accused").

91. *See also* Army R. Prof. Conduct 1.3 cmt. (addressing diligence and commanding the lawyer to "advise the client of the possibility of appeal before relinquishing responsibility" when an adverse result occurs). But as noted in Section II(C), *supra*, some clients seemingly disappear and even with diligent effort it is not possible to contact them and update them on the situation.

92. Assuming that the appellant is not in confinement, this will mean that his or her health, commissary, and other benefits will disappear, but also that he or she will receive the DD-214 discharge paperwork that may make seeking employment much easier. *See* §II(A), *supra*.

93. *See generally* U.S. Army Reg. 635-200, *Active Duty Enlisted Administrative Separations* (Dept. of the Army 6 Sept. 2011) (addressing myriad issues related to various types of administrative separations).

94. Situations in which this might occur include appellate counsel who end up transferring early, cases that last longer than expected, or capital cases, which in recent

representation, such as in a capital case, it should be explained to the client at the outset. In all other cases, it should be explained when it becomes apparent counsel will likely have to leave, which should allow for a smooth transition of counsel.

While CAAF has not addressed how this hand-over should occur at the appellate level, *United States v. Hutchins*[95] made it clear that, at least at the trial level, a client's release of counsel has to be a voluntary and informed decision that is not forced upon him or her. While this seems like good guidance for the appellate level as well, the reasoning in *Hutchins* is based at least in part on Rule 505(f) of the Rules for Courts-Martial, which requires "good cause" for substitution of defense counsel at the trial level.[96] There is no corresponding requirement in the appellate section of the Rules, but the closest analogue is in the discussion section of Rule 1202:

> The accused has no right to select appellate defense counsel. Under some circumstances, however, the accused may be entitled to request that the detailed appellate defense counsel be replaced by another appellate defense counsel.[97]

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decades seemingly have no end at all. In *U.S. v. Loving*, 41 M.J. 213 (Armed Forces App. 1994), for example, Judge Wiss noted in dissent the lack of continuity of appellate defense counsel in capital cases. *Id.* at 326–30 (Wiss, J., dissenting). This problem is only growing, as Judge Wiss wrote almost twenty years ago and *Loving*, along with the cases of many others who have received capital sentences, still has not been finally resolved on appeal.

While a couple of capital cases have been reduced to life sentences without parole to resolve appellate issues, the vast majority of military appellants in capital cases wait in limbo at the Disciplinary Barracks in Fort Leavenworth, Kansas. The last servicemember executed in the military judicial system was Army private John Bennett, who was hanged in 1961 for raping and attempting to kill an eleven-year-old Austrian girl. Bennett was sentenced in 1955, and his was the last of just ten executions carried out since implementation of the Uniform Code of Military Justice in 1951.

95. 69 M.J. 282 (Armed Forces App. 2011). More recently, responding to a writ requesting that an appellant's former defense counsel be returned to active duty after retiring and joining a firm that was conflicted out, CAAF provided in great detail what the trial court should review and record for the appellate court if the trial court were to revisit the issue. While CAAF denied the writ, its guidance to the trial court in the context of that denial provides additional insight into the conflicts issue. *See Wuterich v. Jones*, 2011 CAAF LEXIS 258 at *4 n. 2 (Armed Forces App. 2011).

96. *Hutchins*, 69 M.J. at 289.

97. R. Cts.-Martial 1202-discussion, in *Manual for Courts Martial*, *supra* n. 1, at II-168; *see also Parker*, 53 M.J. 631 (indicating what can happen as a practical matter when a client fires successive counsel appointed to represent him at the appellate level); *U.S. v. Jennings*, 49 M.J. 549, 552–53 (Coast Guard Crim. App. 1998) (discussing consequences

G. Meritorious Claims and Contentions

Perhaps the most important concern in writing an appellate brief is the underlying point of which issues, if any, to raise.[98] While this is certainly true in both military and civilian appellate advocacy, military appellate law incorporates a novel twist.

Within military law the appellant has the ability to present matters to the court, even when his or her attorney does not believe that they have merit. Under *United States v. Grostefon*,[99] military courts require 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."[100] The *Grostefon* rule, however, does not require defense counsel to brief frivolous issues on the appellant's behalf. Rather, the court may require appellate defense counsel

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of appellant's refusal to communicate with initial appellate counsel and to endorse initial appellate counsel's motion to withdraw, initial appellate counsel's attempted withdrawal upon appellant's expression of dissatisfaction with his representation, initial appellate counsel's later transfer to a new permanent duty assignment, and role of successor appellate counsel).

98. *See e.g.* Army R. Prof. Conduct 3.1:

> 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.

In the vast majority of cases, there are no meritorious issues and counsel will "P-1" the case, submitting a pro forma one-page brief (i.e., a "P-1") to the appellate court, suggesting that the court act on any issues that the court itself believes appropriate pursuant to its responsibility under Article 66 of the Uniform Code of Military Justice. *See* 10 U.S.C. § 866(c) (providing that a military court of criminal appeals may "[i]n considering the record . . . weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses").

99. *See* n. 73, *supra* (summarizing *Grostefon* requirements).

100. *Arroyo*, 17 M.J. at 225. This deviation from civilian law is based on Articles 66 and 70 of the Uniform Code of Military Justice, *see* 10 U.S.C. §§ 866, 870 (addressing, respectively, review by military courts of criminal appeals and role of appellate counsel), in an effort to eliminate any unlawful command influence because appellate defense counsel are military officers having authority over other servicemembers.

to focus the issue in a legally recognizable format.[101] But 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," which places the onus back on the attorney to highlight the winning issues.[102] Even the unlimited nature of the *Grostefon* rule, which allows appellants to submit literally hundreds—and occasionally thousands—of pages of argument, has recently changed at the CAAF: Its rules now allow only fifteen pages, requiring selectivity even on appeal, although appellate counsel is still required to identify each *Grostefon* issue.[103]

By mandating inclusion of any and all issues raised by appellants as *Grostefon* matters, CAAF endeavored to eliminate the potential for a conflict to arise from the perspective of military appellate counsel, who may otherwise feel pressured to choose between raising issues that might be in a client's best interest and following what seems to be the suggestion of a military superior to avoid a particular issue for some reason. This rule is thus "properly related to the realities of the military community,"[104] which the Supreme Court has recognized as a "specialized community governed by a separate discipline."[105]

H. Dealing with Unrepresented Persons

Military appellate counsel also face special concerns related to the issue of dealings with unrepresented persons

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101. *Id.* at 226 (noting that military appellate counsel's duty is merely to "identify those issues which his client wishes to have raised on appeal").

102. *Id.* (noting in addition that military appellate counsel "has the minimal responsibility of assuring that in the Court of Military Review and in [CAAF], attention is directed to the points which his client desires to have raised").

103. *See* Armed Forces App. R. Prac. & P. 21A(b) (requiring counsel to identify *Grostefon* issues "with particularity" and to include "any argument for each issue"). While the service courts have not implemented a fifteen-page requirement, good judgment should still prevail, and military appellate counsel should be ever mindful that issue selection is important.

104. *Arroyo*, 17 M.J. at 226.

105. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953); *Parker v. Levy*, 417 U.S. 733, 787 (1974) (Stewart, Douglas & Brennan, JJ, dissenting) (quoting *Orloff*); *U.S. v. Trottier*, 9 M.J. 337 (Ct. Mil. App. 1980) (extensively discussing military's need for internal discipline).

because applying the relevant rule[106] in the military practice differs significantly from applying it in civilian practice. Military attorneys are all officers, inherently placing them atop the military rank structure. This results in the military lawyer outranking the vast majority of military witnesses. Servicemembers may thus feel an obligation to answer military attorneys' questions and hesitate to inquire into attorneys' impartiality if the attorneys (who are also officers) do not explain their role in the pending case or the purpose of the questions.[107] Consequently, the added level of compulsion felt by a military member only increases the need for a clear, informative explanation to the unrepresented party by the military officer acting as an attorney, and this obligation applies to military appellate counsel just as it does to military trial counsel.

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106. *See* Army R. Prof. Conduct 4.3:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id.

107. The obligation of a military subordinate to answer an officer's questions prompted the military's provision of increased rights against self-incrimination for servicemembers being questioned by anyone in a position of authority within the military. Article 31 of the Uniform Code of Military Justice indicates that the person being questioned need not be in custody and the questioner need not be a law-enforcement officer for these enhanced rights against self-incrimination to apply:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.
>
> (c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.
>
> (d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

10 U.S.C. § 831; *see also* Mil. R. Evid. 301(f)(3) (providing that the fact of an accused's remaining silent during "official questioning" conducted in the pre-trial period is inadmissible).

III. RESPONSIBILITIES OF SUPERVISORY AND SUBORDINATE LEADERS

Because military lawyers are officers, senior military counsel have special responsibilities for those working under them and junior military counsel have special responsibilities to those in command.[108] In addition to potentially being responsible for a subordinate lawyer's professional responsibility shortfalls, senior counsel are also responsible for the training and competence of their subordinates in whatever role they are assigned.[109] At a minimum, this means making sure that subordinate counsel understand and follow the internal court rules for the appellate court to which they are presenting argument, whether in person or by motion.[110] Rigorous mentorship is necessary to ensure a successful transition from

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108. *See* Army R. Prof. Conduct 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.

Id.; *see also* Army R. Prod. Conduct 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.

109. Army R. Prof. Conduct 5.1(d).

110. *Id.*; *see also* text accompanying n. 11, *supra* (referencing the various military appellate courts).

trial to appellate counsel given the high volume of work military appellate counsel handle on a daily basis.[111]

In addition, military appellate lawyers in supervisory positions must be alert to other issues like avoiding potential conflicts within DAD through proper oversight.[112] Other important practices and procedures, such as caseload management, are not as clearly the sole responsibility of the supervisor, but supervisory counsel must still be aware of them if subordinate attorneys are to be able to avoid undue delay and the adverse affects on clients' cases that can occur through the passage of time.[113] In other areas, such as communication between the senior and subordinate attorney over the division of labor or assignment of responsibility for specific matters, the rules are silent, yet this is still a conversation that must occur.[114] When there is a rank disparity between the senior and the subordinate attorney in the military, this may be a one-sided conversation—even more one-sided than a similar conversation in a civilian firm when the senior partner is interacting with a junior associate—because the senior military attorney's order

111. During 2010, the Army's DAD filed 1143 briefs, which does not include Article 62 appeals, petitions for new trial, extraordinary writs, writ appeals or other motions. Tellitocci Interview, *supra* n. 68.

112. *See* text accompanying n. 69, *supra.*

113. *See e.g.* Army R. Prof. Conduct 1.3 cmt. ("A lawyer's workload should be managed by both lawyer and supervisor so that each matter can be handled adequately."). In *U.S. v. Brunson*, 59 M.J. 41, 43 (Armed Forces App. 2003), the Court quoted the provision in the comment to its version of Rule 1.3 requiring that "[a] lawyer's workload must be controlled so that each matter can be handled competently." *Id.* And in what might be taken as a warning to supervisory counsel in every branch of the service, the *Brunson* court concluded by declaring that it would "consider appropriate sanctions in the event of 'flagrant or repeated disregard of our Rules.'"

114. This is not to assume that the senior attorney will have thoroughly reviewed the entire record of a particular trial or potentially even formed an attorney-client relationship with the appellant in a particular case, but there must be a clear understanding between military supervisory and subordinate counsel about who is responsible for what, just as when military and civilian attorneys are working in tandem on a case. *See* § II(B), *supra.*

According to the DAD Standard Operating Procedure, once the case progresses to the point of briefs being filed and arguments being heard, a senior supervising attorney will "sign as second counsel of record" on any brief filed, *Standard Operating Procedures* 1 (unpublished internal DAD document (undated)) (describing duties of Chief of Defense Appellate Division) (copy on file with author), and a supervising attorney—the branch chief, DAD Deputy Chief, or Chief, depending on availability and conflicts of interest—will also sit second chair for oral arguments. *Id.*

has the imprimatur of legal authority.[115] That said, a subordinate lawyer is responsible for her own conduct in matters of professional responsibility where the question "can reasonably be answered only one way."[116]

IV. CONCLUSION

In order for America's judicial processes—military and civilian—to function properly, a vigorous appellate system is necessary. That system depends on professionally responsible attorneys to help guide the judges and justices to achieve the right end.[117] As the military's highest appellate court has long recognized, while it is "flattering" to think of appellate judges as "infallible," it is the "skillful advocate" who acts as a guide in the court's quest for justice.[118] This article is an attempt to provide some insight into the nuances of the military's appellate system in order to help military appellate counsel meet that skill standard and to help civilian lawyers appreciate the legal protections afforded those who protect America.

In many ways there is little difference between military and civilian appellate advocacy, but where there is a distinction, especially in the area of professional responsibility, counsel must understand the dissimilarity and modify their conduct accordingly. As a distinguished federal judge once stated, "Any notion that the duty to represent a client trumps obligations of professionalism is, of course, indefensible as a matter of law."[119] This point applies as much to military appellate counsel as to their civilian counterparts.

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115. Although the military command structure governs the relationships between co-counsel in the military setting, military lawyers—even when they have a senior-to-subordinate relationship—normally work together with a sense of collegiality.

116. Army R. Prof. Conduct 5.2 cmt.

117. Kay Nord Hunt & Eric J. Magnuson, *Ethical Issues on Appeal*, 19 Wm. Mitchell L. Rev. 659, 681 (1993) (noting that "the appellate lawyer must be candid and forthright at all times not only with clients but also with the court and opposing counsel," and that lawyers' adherence to "[t]he rules of ethical appellate practice . . . is essential to maintain the proper functioning of the appellate system").

118. *U.S. v. Hullum*, 15 M.J. 261, 268 (Ct. Mil. App. 1983).

119. Raymond T. Elligett, Jr. & John M. Scheb, *Professional Responsibility of Appellate Advocates*, 1 Fl. Coastal L. Rev. 101, 118 (1999) (citing Marvin E. Aspen, *Let Us Be "Officers of the Court"*, 83 A.B.A. J. 94, 95 (July 1997)).