

Conquering Competency and Other Professional Responsibility Pointers for Appellate Practitioners

Major Jay L. Thoman*

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

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

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

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

* Judge Advocate, U.S. Army. Presently assigned as a Professor, Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The author thanks Captains Amy DeWitt, Eric Liddick, and Michael Crane for their *bluebooking* assistance and the invaluable input from many friends who are or were assigned to the Government or Defense Appellate Division.

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

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

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

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

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

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

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

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

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

⁹ See Hunt & Magnuson, *supra* note 1, at 659.

Rule 1.1, Competence¹⁰

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

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

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

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

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

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

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

¹¹ Arey, *infra* note 14, at 27.

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

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

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

¹⁵ ALDISERT, *supra* note 14, at 3, quoted in Arey, *supra* note 14, at 29.

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

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

¹⁸ *Oral Arguments*, U.S. NAVY JUDGE ADVOCATE GEN.'S CORPS, http://www.jag.navy.mil/courts/oral_arguments.htm (last visited Jan. 5, 2012).

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

²⁰ *Argument Audio*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Jan. 5, 2012); *Argument Transcripts*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (last visited Jan. 5, 2012).

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

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

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

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

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

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

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

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

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

²⁷ Silberman, *supra* note 14, at 60.

²⁸ See Aldisert, *supra* note 14, at 456.

²⁹ Arey, *supra* note 14, at 37.

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

DC: Were you on drugs that night?

W: Yes.

DC: But [you] have done drugs?

W: Yes.

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

³¹ See Aldisert, *supra* note 14, at 472.

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

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

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

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

³³ Arey, *supra* note 14, at 37.

³⁴ *Id.* at 44.

³⁵ ELLIGET & SCHEB, *supra* note 7, § 2.2.

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

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

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

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

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

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

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

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

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

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

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

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

Rule 1.2, Scope of Representation⁴⁷

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

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

⁴⁶ *Id.* at 686.

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

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

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

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

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

Id.

⁴⁸ *Id.* r. 1.2(a).

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

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

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

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

⁵⁰ AR 27-26, *supra* note 10, r. 1.2 cmt.

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

⁵² *Id.* at 670.

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

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

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

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

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

Rule 1.3, Diligence, and Rule 1.4, Communication⁵⁹

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

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

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

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

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

What do appellate counsel do when they cannot even find their clients? Military appellate counsel face this conundrum far more often than their civilian counterparts, owing to the military's liberal automatic appeal standard.⁶¹ A client who has been released from confinement is on excess leave⁶²—somewhere—maybe not at the address he listed on his release paperwork.⁶³ Appellate counsel have an obligation to attempt to notify their clients of the status of their cases in order to comply with Rule 1.3 (Diligence). But how far does that obligation extend?

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

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

⁶⁰ *Id.* r. 1.4(a).

⁶¹ Article 66, UCMJ provides that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁹ AR 27-26, *supra* note 10, r. 1.3 cmt.

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

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

⁷² 10 U.S.C. § 876a (2006).

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

not intrude into the substance of the attorney-client conversations.⁷⁴

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

Rule 1.6, Confidentiality of Information⁷⁵

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

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

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

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

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

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

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

Id.

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

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

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

⁷⁶ *Id.* r. 1.6(c).

⁷⁷ *Id.* r. 1.6 cmt.

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

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

⁸⁰ AR 27-26, *supra* note 10, r. 1.6 cmt.

⁸¹ *Dupas*, 14 M.J. at 32.

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

Rules 1.7, 1.8 and 1.9, Conflict of Interest⁸³

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

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

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

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

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

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

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

(2) each client consents after consultation.

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

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

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

Id.

⁸⁴ *Id.* r. 1.7 cmt.

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

⁸⁶ Hunt & Magnuson, *supra* note 1, at 671.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.⁹⁶

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

Rule 1.14, Client Under a Disability⁹⁷

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

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

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

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

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

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

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

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

Id.

⁹⁸ *Id.* r. 1.14 cmt.

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

Rule 1.16, Declining or Terminating Representation¹⁰⁰

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

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

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

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

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

(3) the lawyer is dismissed by the client.

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

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

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

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

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

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

(6) other good cause for withdrawal exists.

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

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

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

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

At the trial level, withdrawal of counsel is covered by RCM 505(d). This allows free substitution of appointed counsel by competent authority when no attorney-client relationship has been formed. When the relationship has been formed, withdrawal requires release for good cause or release by the client (which must be a voluntary, informed decision¹⁰³) or excusal by the court for “good cause shown

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

Id.

¹⁰¹ *Id.* r. 1.16(d).

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

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

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

Rule 3.1, Meritorious Claims and Contentions¹⁰⁷

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

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

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

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

Id.

¹⁰⁸ Aldisert, *supra* note 14, at 458.

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

¹¹⁰ Lundberg, *supra* note 49, at 39.

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

¹¹² Supreme Court Justice Robert H. Jackson stated,

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

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

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

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

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

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

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

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

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

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

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

Rule 3.3, Candor Toward the Tribunal,¹²³ and Rule 8.4(a)–(d), Misconduct¹²⁴

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

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

(a) A lawyer shall not knowingly:

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

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

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

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

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

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

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

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

Id.

¹²⁴ *Id.* r. 8.4(a)–(d) (Misconduct).

It is professional misconduct for a lawyer to:

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

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

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

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

Id.

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

¹¹⁴ AR 27-26, *supra* note 10, r. 3.1.

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

¹¹⁶ *Hunt & Magnuson*, *supra* note 1, at 666.

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

¹¹⁸ *Arroyo*, 17 M.J. at 225.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 226.

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

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

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

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

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

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

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

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

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

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

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

¹²⁵ Cummings, *supra* note 32, at 44.

¹²⁶ See Hunt & Magnuson, *supra* note 1, at 673–74.

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

¹²⁸ See Hunt & Magnuson, *supra* note 1, at 673.

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

¹³⁰ See Richmond, *supra* note 57, at 325.

¹³¹ ELLIGETT & SCHEB, *supra* note 14, [§ 2.7].

¹³² See Richmond, *supra* note 57, at 323–24.

¹³³ See *id.* at 325.

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

¹³⁵ See Richmond, *supra* note 57, at 319.

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

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

¹³⁸ See Cummings, *supra* note 32, at 44.

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

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

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

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

including unsupported claim of perjury by trial defense counsel).

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

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

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

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

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

¹⁴⁵ See *Richmond*, *supra* note 57, at 308–09.

¹⁴⁶ See *id.* at 309–10.

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

¹⁴⁸ See *Richmond*, *supra* note 57, at 313.

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

¹⁵⁰ See *id.* at 311.

Rule 3.5, Impartiality and Decorum of the Tribunal,¹⁵¹ and Rule 8.2, Judicial and Legal Officials¹⁵²

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

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

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

A lawyer shall not:

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

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

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

Id.

¹⁵² *Id.* r. 8.2 (Judicial and Legal Officials).

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

Id.

¹⁵³ *Id.* r. 3.5 cmt.

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

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

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

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

¹⁵⁸ *Id.* at 327.

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

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

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

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

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

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

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

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

Rules 5.1 and 5.2, Responsibilities of Supervisory and Subordinate Leaders¹⁶⁴

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

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

¹⁶³ Richmond, *supra* note 57, at 327–28.

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

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

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

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

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

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

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

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

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

Id.

¹⁶⁵ *Id.* r. 5.2 cmt.

¹⁶⁶ See *id.* r. 1.7 cmt.

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

Conclusion

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

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

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

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

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

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

¹⁷¹ Hunt & Magnuson, *supra* note 1, at 681.

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

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