

## Working with Civilian Counsel: A Military Practitioner's Roadmap

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*Illegitimi non carborundum*<sup>1</sup>

### I. Introduction

It is your first day as a defense counsel. You have been counseling clients on administrative separations<sup>2</sup> and non-judicial punishment<sup>3</sup> all day. Your next client sits down and tells you he has been charged with sexual assault<sup>4</sup> and hired a civilian counsel. You call the civilian counsel to discuss the case and learn he has over twenty years of experience in criminal law but has never tried a court-martial.

The relationship with the client and the civilian defense counsel starts off well, but eventually the civilian counsel refuses to share any information or strategy with you prior to the Article 32 hearing.<sup>5</sup> However, during the Article 32 hearing, the civilian counsel knows the facts of the case and does extremely well cross-examining witnesses. As trial approaches, the civilian defense counsel is not returning calls or emails and has missed a couple of pretrial order deadlines, but you know this is not uncommon for civilian defense counsel. You continue to document these issues with the case,

but you are still concerned. You ask the client to come in and discuss your concerns about the civilian counsel, but the client tells you he trusts the civilian attorney and is not worried. You further explain to your client that you have been trying to prepare for his case but the civilian attorney's lack of communication has made it difficult to determine the theory of the case, which impacts whether you can request an expert or file certain motions.<sup>6</sup> You also explain to the client that as associate counsel you are generally bound by the lead counsel's direction in a case.<sup>7</sup>

The lack of communication between you and the civilian counsel continues until three days prior to trial, when he calls to complain about how fast trial approached and does not think he is ready. He wants to file a motion for continuance, but you know it is not likely to be granted if he remains on the case.<sup>8</sup> Your worst fears have been realized and you scramble to prepare to conduct the court-martial yourself. You draft a motion for continuance in case the civilian attorney cannot pull it together in time for trial or, worse, is a no-show.<sup>9</sup> The next

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<sup>1</sup> The phrase "Illegitimi non carborundum" means, roughly, "don't let the bastards grind you down." MARK ISRAEL, ALT-USAGE-ENGLISH, <http://alt-usage-english.org/excerpts/fxillegi.html> (last visited Feb. 18, 2016). The expression "[s]eems to have originated with British army intelligence early in World War II. Various variant forms are in circulation." *Id.*

<sup>2</sup> See U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR, 6 Sept. 2011) (providing authority to involuntarily separate an Enlisted Soldier prior to his term of service for various reasons). See also U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011).

<sup>3</sup> UCMJ art. 15 (2012).

<sup>4</sup> UCMJ art. 120 (2012).

<sup>5</sup> UCMJ art. 32 (2012).

<sup>6</sup> For example, in an Article 120, Uniform Code of Military Justice (UCMJ), case where the defense is consent, a Deoxyribonucleic acid (DNA) expert is not necessary and a request for an expert or motion to compel would most likely be denied. See MANUAL FOR COURTS-MARTIAL, R.C.M. 703 (2012) [hereinafter MCM]. However, if the defense theory is the sex act did not occur, defense would be able to state the grounds or set forth the relief sought to request a DNA expert, should government deny the request. *Id.*; see also *id.* R.C.M. 905.

<sup>7</sup> See MCM, *supra* note 6, R.C.M. 502(d), 505 (concerning withdrawal or substitution of counsel); see also MCM, *supra* note 6, R.C.M. 506; ("Where the conflict concerns defense tactics, the military counsel must defer to the civilian counsel if the accused has made the civilian counsel chief counsel. If counsel are co-counsel, the client should be consulted as to any conflicts between counsel."). U.S. DEP'T OF ARMY, REG. 27-10, para., C-2(b)(3), MILITARY JUSTICE (11 May 2016) [hereinafter AR 27-10]; U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]; U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL (1 Nov. 2013), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/04-SVC\\_VictimAccess/20150116/37\\_ArmyJudiciary\\_RulesofCourt\\_20131101.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20150116/37_ArmyJudiciary_RulesofCourt_20131101.pdf) [hereinafter Rules of Practice].

<sup>8</sup> See MCM, *supra* note 6, R.C.M. 805(c) discussion ("The military judge may, however proceed in the absence of one or more defense counsel, without the consent of the accused, if the military judge finds that, under the circumstances, a continuance is not warranted and that the accused's right to be adequately represented would not be impaired."). See also AR 27-10, *supra* note 7, para., C-1(b)(2) ("Dissolution. An attorney should not normally be assigned as a counsel to a case unless he or she can be expected to remain for the trial or adverse administrative proceeding.").

<sup>9</sup> MCM, *supra* note 6, R.C.M. 506(c) ("Except as otherwise provided in Rules for Courts-Martial. 505(d)(2) and subsection (b)(3) of this rule, defense counsel may be excused only with the express consent of the

day the civilian attorney tells you he has it under control and made the decision as lead counsel to concede some issues and withdraw his previously filed motion for continuance.<sup>10</sup> You again try to discuss a division of labor and the civilian attorney tells you he's "got it."

Trial begins and the civilian counsel turns to you and asks you to handle voir dire. Your fears of him not being prepared return, but you were at least prepared for voir dire since you submitted the list of questions when the civilian attorney also missed that deadline. The civilian attorney delivers a weak opening statement and returns to the defense table, where you ask him what the plan for sentencing is. He responds with a blank look.<sup>11</sup> The train wreck of a trial continues to unfold.

When things go well, military defense counsel can gain tremendous experience from working with civilian counsel. However, when things do not go well, military defense counsel must be prepared for the worst-case scenario so they do not fail their clients.<sup>12</sup> Using the court-martial process as a backdrop, this article examines best practices and lessons learned to help counsel navigate the relationship between military and civilian counsel to allow the defense team to better represent the best interests of their client.<sup>13</sup> This article has four parts, taking the reader from the formation of a military and civilian defense counsel's relationship to its

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accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." Absent good cause, a civilian counsel's unexplained or unexpected absence in a case would no doubt have major implications on their continued ability to practice in military courts. See MCM, *supra* note 6, R.C.M. 109.

Sanctions may include but are not limited to indefinite suspension from practice in courts-martial and in the Courts of Criminal Appeals. Such suspensions may only be imposed by the Judge Advocate General of the armed service of such courts. Prior to imposing any discipline under this rule, the subject of the proposed action must be provided notice and an opportunity to be heard. The Judge Advocate General concerned may upon good cause shown modify or revoke suspension.

*Id.*; see also AR 27-26, *supra* note 7, at i ("Violations by non-government attorneys may result in imposition of sanctions pursuant to RCM 109, Manual for Courts-Martial.").

<sup>10</sup> See MCM, *supra* note 6, R.C.M. 805.

<sup>11</sup> This assertion represents an extreme example and is based on the author's recent professional experiences as Defense Counsel, Trial Defense Service—Hawaii Field Office, from 30 June 2011 to 2 July 2013 [hereinafter Professional Experience]. Civilian counsel unfamiliar with the court-martial process often overlook sentencing and tend to rely heavily on the judge advocate for an explanation of the process and importance of sentencing case preparation. See also Military-Civilian Counsel Survey submitted to all branches of service and civilian attorneys (sixty-two anonymous respondents) to solicit opinions relevant to this article (survey opened 19 Nov. 2015, closed on 18 Feb. 2016) (on file with author) [hereinafter Military-Civilian Counsel Survey]. "The two things that are radically different from civilian practice is voir dire and sentencing." E-mail from Lieutenant Colonel (Retired) Edward J. O'Brien, Defense Counsel Assistance Program, Highly Qualified Expert, to author (Feb. 10, 2016, 15:30 EST) (on file with author). Sentencing in the civilian sector is often accomplished via a sentencing report sixty days after sentencing vice

termination and providing best practices for every stage of the court-martial. Part II of this article outlines a brief overview of an accused's rights, discusses the increase in civilian counsel appearances, examines some of the applicable professional responsibility rules, and offers best practices to help appointed military counsel navigate the often nuanced relationship of military and civilian counsel. Next, Part III explores pre-trial practices, covers issues that often arise between military and civilian counsel, and offers best practices when a civilian counsel is released just prior to trial. Then Part IV addresses common issues during trial, post-trial practices, and lessons learned; finally, Part V presents general best practice tips from current and former military and civilian defense counsel.

## II. Overview

Once charges<sup>14</sup> are preferred,<sup>15</sup> an accused is usually directed to meet with a detailed Trial Defense Service attorney, who has been previously sworn under Article 42(a) and is qualified and certified under Article 27(b) of the Uniform Code of Military Justice (UCMJ).<sup>16</sup> An accused is entitled to detailed counsel and may request individual military counsel<sup>17</sup> of his choosing—if reasonably available—or an accused may hire civilian counsel at his own expense.<sup>18</sup>

a military court-martial, which conducts an adversarial hearing immediately after sentencing. *Id.*

<sup>12</sup> See AR 27-26, *supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> MCM, *supra* note 6, R.C.M. 307(c)(2) ("A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated."). See also MCM, *supra* note 6, R.C.M. 308.

<sup>15</sup> *What is Prefer?*, THE LAW DICTIONARY, <http://thelawdictionary.org/prefer/> (last visited Feb. 18, 2016) ("To bring before; to prosecute; to try; to proceed with").

<sup>16</sup> MCM, *supra* note 6, R.C.M. 502(d)(1).

To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification. When the accused has individual military or civilian defense counsel, the detailed counsel is "associate counsel" unless excused from the case.

*Id.*; see R.C.M. 506(b)(3).

<sup>17</sup> MCM, *supra* note 6, R.C.M. 506.

<sup>18</sup> *Id.*; see also AR 27-10, *supra* note 7, para. C-2(b)(1)(a)-(c). Note, despite recent updates, AR 27-10's regulatory guidance which recommends providing a list of local attorneys seems to be showing its age, as it is now not uncommon for internet-marketed civilian practitioners who focus on military justice cases to fly across the country or overseas to make court appearances.

(1) Military counsel will not recommend any specific civilian counsel. The best method is to show the accused a list of local attorneys. This list should be compiled by personnel in the

## A. Civilian Defense Counsel Courts-Martial Appearances Are on the Rise

In 2001, there were 1,192 total courts-martial and 112 cases involving civilian counsel, which represented 9.40% of the cases.<sup>19</sup> Since 2001, with slight decreases in 2002, 2004, and 2011, the instances of Soldiers hiring civilian defense counsel have been on the rise, and as recently as 2014, the civilian defense counsel representation percentage rose to 19.57% (189 out of 966 courts-martial), more than double the 2001 rate.<sup>20</sup>

While the exact reasons for the increase in civilian representation is beyond the scope of this paper,<sup>21</sup> one possible reason for the increase in civilian defense counsel appearances may be due to the 2012 Department of Defense

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SJA office and representatives of the local bar association. This will ensure that local attorneys who have no interest in such referrals will not appear on the list. The accused must be told that—

- (a) This list is not exclusive.
- (b) He or she is not limited to the services of a local attorney.
- (c) The listing of an attorney is not necessarily an endorsement of the attorney's capability or character. The accused should be reminded that the responsibility for the choice is solely his or hers.

*Id.*

<sup>19</sup> Mr. Homan Barzmehri, United States Army Criminal Court of Appeals Clerk of Court, Courts-Martial Involving Civilian Defense Counsel Calendar Year 2001 through Calendar Year 2014 (forwarded to author from United States Army Trial Defense Service) (Oct. 25, 2015, 10:50 EST) (undated and unpublished Microsoft Excel Spreadsheet) (on file with author).

<sup>20</sup> *Id.* In 2014, civilian defense counsel represented Soldiers 189 times out of a total 966 cases. *Id.*

<sup>21</sup> See Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE (Feb. 18, 2016), <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it> (comparing military counsel to civilian counsel and noting the lack of a career litigation track in the military puts military defense counsel at a disadvantage to their civilian counterparts who "graduate" to sexual assault cases). "Defendants would be represented by learned defense counsel who have handled years of misdemeanor cases, and lower-level felonies, before graduating to sexual assault cases." *Id.* Deployed Soldiers generally have less financial obligations than non-deployed Soldiers, and combat pay entitles Soldiers to certain tax exemptions resulting in significant savings. Professional Experience, *supra* note 11.

<sup>22</sup> See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012 vol. 1 (Apr. 15, 2013), [http://sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

<sup>23</sup> See U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM (23 Jan. 2102).

<sup>24</sup> U.S. DEP'T OF TREASURY, INTERNAL REVENUE SERVICE, PUBLICATION 3 (2014), CAT. NO. 46072M, ARMED FORCES' TAX GUIDE, 8-10 (2014). Deployed Soldiers generally have less financial obligations than non-deployed Soldiers and "combat pay" entitles Soldiers to certain tax exemptions resulting in significant savings. *Id.*

(DoD) report on sexual assault in the military.<sup>22</sup> The DoD report on sexual assault highlighted the issue of sexual assault and resulted in a renewed focus for the DoD and Army's Sexual Assault Prevention and Response (SAPR) Strategic Plan's "commitment to eliminating sexual assault from the Armed Forces."<sup>23</sup> Other potential reasons include: combat deployments that increase Soldiers' cash flow,<sup>24</sup> making hiring civilian counsel affordable for even junior enlisted Soldiers. The internet makes it much easier for Soldiers to seek civilian counsel of their choosing;<sup>25</sup> and Soldiers, especially junior enlisted, have a general mistrust of the appointed military counsel's role and competence.<sup>26</sup> Regardless of the reasons for the increase in civilian defense counsels' representation of Soldiers, both civilian and military defense counsel owe a duty to their client<sup>27</sup> and

<sup>25</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>26</sup> Professional Experience, *supra* note 11. Oftentimes, at an initial client meeting, many Soldiers express mistrust of their appointed Trial Defense Service attorney simply because of their status as a military officer. However, appointed military counsel may overcome a client's skepticism by explaining counsel's role in the process and gaining the trust and confidence of the Soldier throughout the period of representation. *Id.* Despite gaining a client's trust, some Soldiers simply feel better picking and hiring civilian counsel of their choosing even when the civilian counsel he or she chooses has little to no prior court-martial experience. *Id.*; see also Military-Civilian Counsel Survey, *supra* note 11. Soldier-clients also often assume their Trial Defense Service attorney works for, or reports to, the government's chain of command. *Id.*

<sup>27</sup> See *United States v. Wade*, 388 U.S. 218 (1967) (highlighting the differences between a defense counsel's ethical obligation to their client and a government attorney's obligation to the sovereign whose obligation is not to "win a case" but to ensure that "justice be done."). "The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 256.

[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.

*Id.* at 256, 257. It necessarily follows that in order to prevent the "conviction of the innocent" or adequately "defend [their] client," civilian and military counsel must work together towards that end. *Id.*; see also U.S. DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES, JUDGE ADVOCATE LEGAL SERVICES para. 2-5 ("Conflict of Interests: [T]he assistance provided will comply with the policies of superiors responsible for supervising the defense function. . . ."); see also AR 27-26, *supra* note 7, r. 1.1 ("Competence: A lawyer shall provide competent representation to a client."); AR 27-10, *supra* note 7, r. 1.3 ("Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client

because of that duty must work together to represent those interests.

## B. Rules of Practice Before Courts-Martial

### 1. Right to Counsel

While military members have a Sixth Amendment right to counsel,<sup>28</sup> it is not an absolute right.<sup>29</sup> Once a military defense counsel is detailed, he is obligated to begin preparations for an accused's defense immediately, whether civilian counsel is hired or subsequently withdraws from a case.<sup>30</sup> While one approach may be for military counsel to assume the role of a superficial attorney who is often seen as the "potted plant,"<sup>31</sup> this is not advisable. It would be inconsistent with the rules<sup>32</sup> and military defense counsel may find themselves as the lead counsel on the eve of a court-martial if a request for civilian counsel is denied<sup>33</sup> or if a civilian defense counsel's withdrawal request has been approved by the court.<sup>34</sup>

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as soon as practicable and as often as necessary after undertaking representation." *Id.*

<sup>28</sup> U.S. CONST. amend. VI.

<sup>29</sup> *United States v. Rhoades*, 65 M.J. 393 (C.A.A.F. 2008).

[U]nder the Sixth Amendment, the accused in a criminal proceeding has the right to the assistance of counsel for his defense; under the Uniform Code of Military Justice, an accused has the right to representation by military counsel provided at no expense to the accused, and the accused may be represented by civilian counsel; the right to counsel of choice under the Sixth Amendment, as well as under the UCMJ, [*is not absolute*]; the need for fair, efficient, and orderly administration of justice may outweigh the interest of the accused in being represented by counsel of choice; for example, disqualification of an accused's chosen counsel due to a previous or ongoing relationship with an opposing party, even when the opposing party is the government, does not violate the Sixth Amendment.

*See Opinion Digest Right to Counsel*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/digest/IB9.htm> (last updated June 1, 2016); *see also United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997) (applying eleven factors to determine whether a judge abused his discretion in granting a motion for continuance). *But see* Major John W. Brooker, *Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel*, ARMY LAW., Nov. 2010 (arguing a Soldiers' right to civilian counsel should be abrogated in certain instances to promote efficiency of justice and fix the logistical problems associated with conducting courts-martial in theater). The article's scope did not include working with civilian counsel. *Id.*

<sup>30</sup> *See MCM*, *supra* note 6, R.C.M. 506(c).

<sup>31</sup> *Potted*, YOURDICTIONARY, <http://www.yourdictionary.com/potted> (last visited Feb. 18, 2016) ("[C]ondensed or summarized, often to the extent of being superficial, overly terse, etc.").

<sup>32</sup> *See AR 27-10*, *supra* note 7, para. 5-8, Professional Standards. Note, portions struck through were deleted in AR 27-10's most recent update:

a. The Army "Rules of Professional Conduct for Lawyers" (see AR 27-26) are applicable to lawyers involved in court-martial proceedings in the Army.

## 2. Associate Counsel

Absent an excusal,<sup>35</sup> detailed defense counsel assumes the role of associate or assistant counsel once civilian defense counsel has been retained<sup>36</sup> or once a request for individual military counsel is approved.<sup>37</sup> "[C]ivilian counsel is expected to treat an associate military attorney as a professional equal," and both counsel are expected to treat each other with respect and professional courtesy.<sup>38</sup> However, once lead counsel has been established, "Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel."<sup>39</sup> Therefore, it is critical for judge advocates to assess their particular expertise in a given case and communicate that to their civilian counterpart or their senior defense counsel so appropriate measures can be taken in the event the associate counsel has to assume role of lead counsel.<sup>40</sup> In the event of a conflict or disagreement, assuming lead counsel has not violated the Rules of Professional Conduct for Lawyers,<sup>41</sup> military defense counsel must defer to the lead counsel<sup>42</sup> and must follow certain procedures before disclosing that

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~~e. Judges, counsel, and court-martial clerical support personnel will comply with the American Bar Association Standards for Criminal Justice (current edition) to the extent they are not inconsistent with the [Uniform Code of Military Justice], the [Manual for Courts-Martial], directives, regulations, the 'Code of Judicial Conduct for Army Trial and Appellate Judges,' or other rules governing provision of legal services in the Army.~~

~~d. c. Personnel involved in court-martial proceedings are encouraged to look as well to other recognized sources (for example, decisions issued by State and Federal courts or ethics opinions issued by the American Bar Association (ABA) and the States) for guidance in interpreting these standards and resolving issues of professional responsibility.~~

*Id.*

<sup>33</sup> Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

<sup>34</sup> *See MCM*, *supra* note 6, R.C.M. 506(c).

<sup>35</sup> *See MCM*, *supra* note 6, R.C.M. 502(d)(6). *See also MCM*, *supra* note 6, R.C.M. 505(d)(2)(A), (B). Defense counsel may be excused from representing an accused prior to the formation of the attorney-client relationship; however, once an attorney-client relationship is formed, excusal is subject to the provisions of Rule for Court-Martial (RCM) 505(d)(2)(B). *Id.*

<sup>36</sup> *See MCM*, *supra* note 6, R.C.M. 506.

<sup>37</sup> *Id.*

<sup>38</sup> *See AR 27-10*, *supra* note 7, para. C-2(b)(2).

<sup>39</sup> *See MCM*, *supra* note 6, R.C.M. 502(d)(6).

<sup>40</sup> Professional Experience, *supra* note 11; *see also* Military-Civilian Counsel Survey, *supra* note 11.

<sup>41</sup> *See AR 27-26*, *supra* note 7.

<sup>42</sup> *See AR 27-10*, *supra* note 7, para. C-2(b)(3).

disagreement to the accused, the convening authority, or the tribunal, or submitting a request to be relieved of his responsibilities due to such a disagreement.<sup>43</sup>

### 3. Ineffective Assistance of Counsel

If military and civilian defense counsel cannot find a way to resolve their disagreements or work together to represent an accused adequately, both counsel may end up committing errors that lead to ineffective representation or a charge of ineffective assistance of counsel. This is true even if a judge advocate decides to assume the role of potted plant or a civilian counsel chooses to make all of the decisions as lead.<sup>44</sup> *Strickland v. Washington*<sup>45</sup> established the standard for ineffective assistance of counsel. Ineffective assistance exists when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>46</sup> In order to prevail on a claim of ineffective assistance, an appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance.<sup>47</sup> Further, an appellant has the burden of demonstrating that (1) his counsel was deficient, and (2) he was prejudiced by such deficient performance.<sup>48</sup> An appellant must show that his trial defense counsel’s allegedly deficient performance resulted in “[e]rrors so serious that counsel was not functioning as the ‘counsel’

guaranteed the defendant by the Sixth Amendment.”<sup>49</sup> An appellant must also show prejudice, e.g., “demonstrate that any errors made by his trial defense counsel were so serious that they deprived him of a fair trial, ‘a trial whose result is reliable.’”<sup>50</sup> Succeeding on a claim of ineffective assistance of counsel is a difficult task,<sup>51</sup> however; regardless of how much a military counsel is involved with civilian counsel’s performance, both military and civilian counsel succeed or fail as a team.<sup>52</sup> Succeeding or failing as a team is true despite a military attorney’s decision to assume the role of potted plant. Additionally, ineffective assistance of counsel in the military justice system is not just a grounds for appellate relief of an adjudged sentence but also may provide the basis for a standards of conduct review of all members of the trial defense team.<sup>53</sup> The stakes are high.

### 4. Professional Misconduct

In rare cases,<sup>54</sup> military counsel may encounter a civilian counsel who disregards the American Bar Association’s model rules of professional conduct (Model Rules) or his state’s bar rules.<sup>55</sup> In these cases, the military defense counsel must be mindful of the various services’ regulations.<sup>56</sup> The various services typically adopt the Model Rules, therefore, judge advocates must also be aware of the reporting requirements for violations of Model Rule 8.4, which Army Regulation (AR) 27-26 Rule 8.4 incorporates and restates almost verbatim.<sup>57</sup> In extreme cases, The Judge Advocate

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

<sup>44</sup> See Military-Civilian Counsel Survey, *supra* note 11.

I have heard Trial Defense Service (TDS) attorneys say “since [the civilian attorney] is the lead counsel, it’s their case to run with,” or words to that effect. This is a mistake. The TDS attorney needs to be prepared to litigate on his or her own in case the civilian attorney bows out. Even if the civilian attorney is not communicating, the defense is still a joint effort.

*Id.*

<sup>45</sup> *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). See also *Loving v. United States*, No. 06-8006/AR, (C.A.A.F. 2009) (applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>46</sup> *Strickland v. Washington*, 466 U.S. 668, 691-96 (1984).

<sup>47</sup> *Id.*; see also *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987).

<sup>48</sup> *Strickland*, 466 U.S. at 691-96.

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

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

<sup>51</sup> *United States v. Hernandez*, No. 200501599, 2007 CCA LEXIS at 183 (A.F. Ct. Crim. App. June 12, 2007) (“The appellant ‘must surmount a very high hurdle.’”); *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

<sup>52</sup> *United States v. Sickels*, No. 20110110, 2013 CCA LEXIS at 563 (A. Ct. Crim. App. July 23, 2013) (“[D]efense counsels’ failure to investigate and interview such potential witnesses fell below the minimum standard of professional representation; Defense counsels’ failure to present anything in extenuation and mitigation at sentencing was deficient and the result of

deficient preparation for the sentencing hearing.”). The court in *Sickels* did not distinguish between the actions of the civilian and military counsel and applied the standard established in *Strickland* to both counsel. *Id.*

<sup>53</sup> U.S. DEP’T OF DEF., 5500.7-R, JOINT ETHICS REGULATION (JER) (17 Nov. 2011) [hereinafter JER]; see also U.S. DEP’T OF DEF. STANDARDS OF CONDUCT OFF., [http://www.dod.mil/dodgc/defense\\_ethics/](http://www.dod.mil/dodgc/defense_ethics/) (last visited May 3, 2016).

<sup>54</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>55</sup> MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016) [hereinafter MODEL RULES].

<sup>56</sup> AR 27-26, *supra* note 7; see also U.S. DEP’T OF NAVY, JAGINST 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (1 May 2012); U.S. DEP’T OF AIR FORCE, INSTR. 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM atch 2, (5 Aug. 2014); U.S. COAST GUARD, COMMANDANT INSTR.M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (1 June 2005).

<sup>57</sup> See AR 27-26, *supra* note 7, r. 8.4 (following the MODEL RULES, *supra* note 55, r. 8.4 cmt.) (with language stricken). Note, all but the stricken language appears in AR 27-26 rule 8.4:

It is professional misconduct for a lawyer to: (a) violate or attempt to violate the 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; (e) state or imply an ability to influence improperly a government agency or official ~~or to achieve results by means~~

General of each service has the ability to bar a civilian attorney from practicing at courts-martial<sup>58</sup>—a fact of which most civilian attorneys new to representing Soldiers at courts-martial are unaware.

### III. Military and Civilian Defense Counsel Pre-trial Practice

#### A. Competence to Practice

As previously discussed, counsel must be competent<sup>59</sup> to practice, but competence in civilian court does not often translate into competence to practice in a courts-martial.<sup>60</sup> While experience among civilian defense counsel varies, military defense counsel may find themselves detailed to a case with civilian defense counsel who has years of *civilian* criminal defense experience but has little to no *court-martial* experience.<sup>61</sup> Conversely, a military defense counsel may lack the breadth of general courtroom time compared to their civilian counterpart, but have a solid grasp on court-martial procedures and, more importantly, have a relationship with and an understanding of procedures required or desired by their government counterparts.<sup>62</sup>

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that violate the Rules of Professional Conduct or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES, *supra* note 55, r. 8.4.

<sup>58</sup> See *Partington v. Houck*, 723 F.3d 280 (D.C. Cir. 2013), petition denied, (U.S. Dec. 2, 2013) (No. 13-414). Partington, a retired U.S. Army Judge Advocate, was suspended from practice before naval courts for “fil[ing] an appellate brief containing statements Partington knew were false and misleading. . . .” *Id.* at 291.

<sup>59</sup> See AR 27-26, *supra* note 7, r. 1.1. (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”) See also MODEL RULES, *supra* note 55, r. 1.1.

<sup>60</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* This does not suggest or assume that civilian attorneys with more courtroom time than judge advocates will automatically perform better or are more able to represent their Soldier-clients. *Id.*

<sup>63</sup> See *supra* note 56.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>67</sup> E-mail from Lieutenant Colonel (Retired) Edward J. O’Brien, Defense Counsel Assistance Program, Highly Qualified Expert, to author (Feb. 10, 2016, 15:30 EST) (on file with author).

I want to know that [the civilian attorney] has prepared his portion of the division of labor. Our procedures are very similar to procedures in the federal court because of [UCMJ]

Lack of court-martial experience does not render an attorney incompetent per se, but Rule 1.1, both in the Model Rules and AR 27-26 require an attorney to possess the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>63</sup> Lack of thoroughness<sup>64</sup> and preparation reasonably necessary<sup>65</sup> is often where military counsel take issue with civilian counsel.<sup>66</sup> A civilian counsel can certainly satisfy Model Rule 1.1 prior to his or her first court-martial and ignorance of military culture and court-martial procedures do not necessarily constitute incompetence; however, military counsel must be proactive in ensuring civilian counsel is thoroughly prepared.<sup>67</sup> If military counsel either allows or cannot prevent a civilian counsel from appearing at trial unprepared, the possibilities for professional misconduct, violation of competency requirements, and a charge of ineffective assistance *for both counsel* increase exponentially.<sup>68</sup>

Oftentimes, prior to making a decision to hire civilian counsel, a client may ask the military counsel for a recommendation.<sup>69</sup> Military counsel cannot recommend a specific civilian counsel<sup>70</sup> but can provide their client with a non-exclusive list of local attorneys as long as the client understands that the list does not constitute an endorsement of the civilian attorneys’ competence to practice or character.<sup>71</sup>

Article 36 [(2012)]. Most of our procedures are similar to state court procedure, but less so. [C]ivilian counsel can [generally] pull off openings, closings, witness examinations, instructions, etc. The two things that are radically different from civilian practice is voir dire and sentencing. [M]y concerns for competence are really limited to civilian counsel who plan to do voir dire (they need to know we do not select a jury, we deselect members) and sentencing (we do an adversarial hearing immediately after findings, we do not execute a sentencing report 60 days after findings). Civilian counsel who are former judge advocates are fine if prepared. Civilian counsel without any military [court-martial] experience are the ones who [tend to] cause problems.

*Id.*; see also Military-Civilian Counsel Survey, *supra* note 11.

I have seen civilian attorneys essentially take the money and dump the work on Trial Defense Service (TDS) attorneys. It [i]s unfortunate and not as common as we probably think, but it does happen. The best the TDS attorney can do is work the case. When the civilian attorney jumps in at the end and wants to do things like cross-examining the star government witness, but the TDS attorney has done all the cross preparation, then the TDS attorney needs to stand up and confront the civilian counsel. It’s unpleasant to do, but the client is entitled to a prepared attorney.

*Id.*

<sup>68</sup> See AR 27-26, *supra* note 7, r. 1.1, 8.4; MODEL RULES, *supra* note 55, r. 1.1, 8.4; see also Professional Experience, *supra* note 11; Military-Civilian Counsel Survey, *supra* note 11.

<sup>69</sup> *Id.*

<sup>70</sup> See AR 27-10, *supra* note 7, para. C-2(b)(1)(a)-(c).

<sup>71</sup> *Id.*

The client must also be informed that they are not limited to the services of a local attorney, and the decision to hire a civilian attorney rests with the client.<sup>72</sup>

Drawing back to our hypothetical scenario, upon learning a client has hired civilian counsel, military counsel should immediately contact the civilian defense counsel and inquire into their experience generally, and specifically regarding courts-martial. If a civilian counsel has no experience in court-martial matters, it is incumbent upon the military defense counsel to discuss this issue with civilian counsel in order to determine whether counsel can provide competent representation.<sup>73</sup>

If the military counsel develops concerns about the civilian attorney's competence to practice because of inexperience, or more importantly, lack of thoroughness or reasonable preparation,<sup>74</sup> he or she should document those concerns in a memorandum for record<sup>75</sup> and discuss those concerns with civilian counsel.<sup>76</sup> If a disagreement regarding competence to practice still exists, the military counsel should inform civilian counsel of the intent to discuss those concerns with their client but should attempt to do so with the civilian counsel present.<sup>77</sup> If the military counsel still has concerns regarding a civilian counsel's competence to practice or the civilian counsel refuses to discuss the issue with the client,

military counsel must inform the client.<sup>78</sup> If the client is aware of those concerns and the client chooses not to heed the advice of military counsel regarding the civilian counsel's lack of competence, the military counsel should bring the issue to the attention of the senior or regional defense counsel. If the issue still cannot be resolved, military counsel should "inform the convening authority—pre-referral—or request a UCMJ, Article 39(a) session<sup>79</sup>—post-referral, whichever is appropriate, or ask to be relieved of his or her responsibilities as counsel."<sup>80</sup>

Lack of prior courts-martial experience does not render an attorney incompetent per se, but adequate preparation and a willingness to understand the rules and culture in which they are operating will go a long way toward building a competent and effective defense team.<sup>81</sup>

## B. Court-Martial Culture

Again, consider the hypothetical from the introduction. If a civilian attorney tells you he's "got it" and refuses to share information with you, as military counsel, you must continue to work on that relationship—early and often—and insert

<sup>72</sup> *Id.* Note, Army Regulation 27-10's regulatory guidance, which recommends providing a list of local attorneys, seems to be showing its age, as it is now not uncommon for Internet-marketed civilian practitioners who focus on military justice cases to fly across the country or overseas to make court appearances. *Id.*

<sup>73</sup> See AR 27-10, *supra* note 7, para. C-2(b)(2), (3)(a-b). ("Military attorneys and counsel are bound by the law and the highest recognized standards of professional conduct.") *Id.* "The D[e]partment of the A[rmy] has made the Army 'Rules of Professional Conduct for Lawyers' (see AR 27-26), and the 'Code of Judicial Conduct for Army Trial and Appellate Judges' applicable to all attorneys who appear in courts-martial.") *Id.* See also AR 27-26, *supra* note 7, r. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.")

<sup>74</sup> Interview with former Trial Defense Service Attorney (Jan. 4, 2016). During one case, the Trial Defense Service attorney had concerns regarding the mental competency of co-counsel. *Id.* A precarious position to be in, this attorney engaged the civilian attorney and the Trial Defense Service chain of command, yet still found the situation difficult to navigate. *Id.* Ultimately, the best interests of the client were met; however, the attorney stated the following when reflecting on the experience:

Military defense counsel have the responsibility to walk the line between protecting the attorney client relationship between the Soldier and his attorney and protecting the system from clear ineffective assistance of counsel. The defense counsel may not promote nor denigrate the abilities of a particular attorney, and may not communicate their personal feelings about the retained civilian counsel to the client. In this relationship, the military defense counsel takes a secondary seat at the table in every way possible, but still retains great responsibility in the representation. It is a difficult position. A military defense counsel should only contact an outside party if there is a physical or mental condition materially impacting the ability of the civilian counsel to represent the client as a continuing violation of Army Rule 1.16. See also ABA Formal Opinion 03-431: "A

lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16."

*Id.*

<sup>75</sup> See also AR 27-26 *supra* note 7, r. 1.15 ("Safekeeping Property: Complete records of such account funds and [other property] shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation."); U.S. DEP'T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE (17 May 2013) (Administrative Revision 6 July 2015) [hereinafter AR 25-50]; Professional Experience, *supra* note 11. "Contemporaneous notes are as worth their weight in gold" when responding to claims of ineffective assistance of counsel. E-mail from LTC(R) Edward J. O'Brien, DCAP, Highly Qualified Expert (Feb. 9, 2016, 15:32 EST) (on file with author). "Get in the habit of drafting memoranda for records, because you never know what issue will be raised later." *Id.* "One way to ensure contemporaneous records are kept is for counsel to email themselves, which proves when the record was created." E-mail from LTC Franklin D. Rosenblatt, Deputy Chief, U.S. Army Trial Defense Service (Feb. 13, 2016, 22:30 EST) (on file with author).

<sup>76</sup> See AR 27-26, *supra* note 7, r. 1.1. Military defense counsel must carefully approach a conversation about competence to practice with civilian counsel, and it is strongly recommended military counsel first discuss the issue with the technical chain. Professional Experience, *supra* note 11. See also Military-Civilian Counsel Survey, *supra* note 11.

<sup>77</sup> See AR 27-10, *supra* note 7, para. 5-8, app. C-2(3)(a-b); see also AR 27-26, *supra* note 7, r. 1.1; MODEL RULES, *supra* note 53, r. 1.1.

<sup>78</sup> *Id.*

<sup>79</sup> See MCM, *supra* note 6, R.C.M. 803, 804, 805, 901-10.

<sup>80</sup> *Id.*

<sup>81</sup> Military-Civilian Counsel Survey, *supra* note 11.

yourself into the process and document your attempts to do so.<sup>82</sup>

One way military counsel can build the trust of his client and civilian counterpart, who may lack court-martial experience, is to explain the role of a military defense attorney and educate them on the military justice process.<sup>83</sup> Oftentimes, clients and civilian defense attorneys do not trust military counsel.<sup>84</sup> Most clients view military counsel as representatives of the command—the same command that is prosecuting them.<sup>85</sup> Some civilian counsel view appointed counsel in a similar light; however, this perception can be overcome if both the client and the civilian defense counsel understand the process. For example, in civilian courts it is common for multiple continuances to be granted on short notice in a given case, whereas most military judges will require strict adherence to a pre-trial order and docketing timeline.<sup>86</sup> Military counsel should provide civilian counsel with a copy of the rules of court<sup>87</sup> and share their knowledge of, and experience with, a particular military judge, which can prove invaluable to both a client and civilian attorney.<sup>88</sup> It may also be helpful to provide civilian defense counsel with relevant portions of the *Military Judges' Benchbook*<sup>89</sup> and courts-martial script so they can distinguish between military and civilian offenses and know what to expect in court.<sup>90</sup> Perhaps most important, a military defense counsel's relationship with command and government counterparts

often goes a long way to avoid common pre-trial issues, resolve disagreements, and assist in working toward a more favorable outcome for a client.

### C. Division of Labor

Lead and associate counsel are distinct roles that cannot operate independently.<sup>91</sup> Civilian and military defense counsel must establish and clarify their respective roles early and often and determine what the division of labor looks like.<sup>92</sup> Civilian and military defense counsel must be clear on who is responsible for discovery issues, motions practice, and adherence to the pre-trial order.<sup>93</sup> Military defense counsel must also have a plan when the civilian counsel does not adhere to the rules of court<sup>94</sup> (e.g., disregards pre-trial order deadlines) or ignores the established plan.<sup>95</sup> If civilian counsel refuses to establish or adhere to a division of labor, military counsel should prepare for the case as if they were the lone counsel.<sup>96</sup> As pretrial deadlines approach, military counsel should re-engage civilian counsel a few days before to remind him of the deadline. If the civilian counsel is unwilling to comply with a pretrial order or is generally unresponsive to military counsel's requests for information, the military counsel should inform the civilian counsel of any motions he intends to file—if a response is not received from him—and when he intends to file them. The military counsel must also inform the civilian counsel of any actions he intends to take if

<sup>82</sup> *Id.*

<sup>83</sup> See MCM, *supra* note 6, R.C.M. 502(d)(6)(A).

<sup>84</sup> Professional Experience, *supra* note 11. See also Tim Bilecki, *What You're Up Against* (Feb. 16, 2016), <http://www.bileckilawgroup.com/What-Youre-Up-Against.aspx> (discussing the disadvantages of a military defense counsel, "Your Military Defense Attorney Will Be Outnumbered and May Be Outmatched"). See also Michael Waddington, *Select Your Military Lawyer With Care Or Become Another Statistic* (Feb. 13, 2016), <http://www.ucmjdefense.com/> ("Assigned military defense teams are outnumbered 5 to 1 by prosecution teams, and the prosecution will use every tactic they can to manipulate all aspects of a case and thwart the ability to mount an adequate defense"); Military-Civilian Counsel Survey, *supra* note 11. "Upon [civilian counsel's] entrance in the case, he convinced the client to fire me. He told the client that all Trial Defense Service attorneys were terrible, that we were overworked, lacked resources and were generally not as fantastic as he was." *Id.*

<sup>85</sup> Professional Experience, *supra* note 11. Civilian counsels' experiences and perceptions of military counsel vary greatly, e.g., those with prior service as a judge advocate understand and work within the system very well, while others, even with prior service, use their clients' mistrust of the military to keep their client at a safe distance from military defense counsel. *Id.* However, military counsel may serve as the first impression of a civilian counsels' perception of the military and should take care to earn their trust and confidence in order to properly develop that relationship. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 7.

<sup>88</sup> RICHARD A. POSNER, *HOW JUDGES THINK* (2008); see also Major Casey Z. Thomas, *How Judges Think*, *ARMY LAW.*, at 86, Jun. 2009 "[I]f counsel can successfully identify the individual judge's 'zone of reasonableness,' which is 'the area within which [the judge] has discretion to decide a case either way without disgracing himself,' then counsel is more likely to be victorious" *Id.* (quoting POSNER, *supra*).

<sup>89</sup> U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES, *MILITARY JUDGES' BENCHBOOK* (10 Sept. 2014).

<sup>90</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>91</sup> See MCM, *supra* note 6, R.C.M. 502(d), 505, 803 (concerning withdrawal or substitution of counsel); see also MCM, *supra* note 6, R.C.M. 506; AR 27-10, *supra* note 7; AR 27-26, *supra* note 7; Rules of Practice, *supra* note 7.

<sup>92</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

At the beginning of the representation, there needs to be a conversation between the attorneys, and only the attorneys, about their relative experience and their expectations about one another. Lay out early a divvying up of the tasks. Whenever the TDS attorney does work, email that work to the civilian counsel to keep them updated. If the TDS attorney believes civilian counsel is taken advantage of him [or] her, communicate that fact to civilian counsel. Worst case, the TDS attorneys should simply prepare as if the civilian counsel isn't a member of the team—an extreme solution, but one that happens.

*Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Rules of Practice, *supra* note 7.

<sup>95</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

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



the civilian counsel does not act (e.g., negotiate a plea deal, discuss concerns with the client, or request withdrawal from a case).<sup>97</sup> In other words, if military counsel has concerns about a civilian counsel's strategic or tactical direction in a case, he should attempt to resolve those concerns with the civilian counsel, the client, and their technical chain, if necessary. In the absence of a response or resolution of an issue with civilian counsel, military counsel should continue diligent case preparation, which may include drafting motions and maintaining contemporaneous notes throughout in the event civilian counsel is released, withdraws, or arrives unprepared. If civilian counsel withdraws, military counsel will be prepared to try the case as lead counsel or articulate why the court should grant a continuance.

#### D. Release of Civilian Counsel

The most common reason a civilian attorney will withdraw from a case or elect to terminate the representation of an accused is failure of an accused to pay his fees.<sup>98</sup> The release of civilian counsel, especially when done close to trial, can significantly impact a case, especially if the civilian counsel insists on handling all pre-trial matters, or worse, if military counsel assumes the role of potted plant.<sup>99</sup> If the military counsel is truly unprepared to take over a case on the eve of trial, he must request a continuance; however, getting a continuance is not guaranteed.<sup>100</sup> Military counsel must stay in contact with the client and civilian counsel throughout the court-martial process to anticipate and adapt to any issue the presence or absence of civilian counsel presents.<sup>101</sup>

### IV. Military and Civilian Defense Counsel Trial and Post-Trial Issues

#### A. Division of Labor During Trial

Once the trial approaches, if the civilian counsel is still on the case, military counsel must still prepare for and expect the unexpected. Military and civilian counsel must have a clear understanding and delineation of responsibilities during

trial. Military counsel must also have a plan in the event the civilian counsel fails to complete his responsibility on a particular portion of the trial and be prepared to take over if necessary, or bring the issue to the attention of the judge in order to request a continuance or request withdrawal from the case.<sup>102</sup>

#### B. Worst-Case Scenario

Assume it is the day of trial and it is clear the civilian defense counsel is unprepared. Now consider the hypothetical and assume the military counsel has followed the steps recommended above (i.e., previously discussed concerns with civilian counsel, client, senior or regional defense counsel, convening authority and the judge if necessary) and, despite expressing those concerns, proceeds to trial. Assume the military counsel has prepared for every aspect of the trial because of the civilian counsel's lack of preparedness. The military counsel is in a position to discuss his concerns with civilian counsel, and the client again, and is prepared to assume the duties as lead counsel. If the civilian counsel does not allow the military counsel to participate in a meaningful way during trial, and the civilian counsel's performance during the trial approaches ineffective assistance, military counsel should bring the issue to the attention of the judge and seek to withdraw from the case.<sup>103</sup> If the judge refuses to allow the military counsel to withdraw from the case, the military defense counsel should continue to document and maintain contemporaneous notes of the pre-trial, trial, and post-trial decisions of the civilian counsel with which the military counsel disagrees.<sup>104</sup>

#### C. Post-Trial Practice

Civilian counsel rarely, if ever, handle post-trial matters for an accused.<sup>105</sup> Unless an accused retains a civilian counsel for post-trial matters, once a trial concludes, the military counsel is usually left to handle all post-trial

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* See also DEFENSE COUNSEL ASSISTANCE PROGRAM (DCAP) SENDS, Vol. 8-17, WORKING WITH CIVILIAN COUNSEL (12 Jun. 2014) (citing *United States v. Boone*, 42 M.J. 308 (C.A.A.F. 1995)). In *Boone*, the civilian defense counsel informed the court that if he does not receive payment from a client then he does not work on the case. *Id.*

<sup>99</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>100</sup> *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997) (applying eleven factors to determine whether a judge abused his discretion in granting a motion for continuance); Professional Experience, *supra* note 11. For example, on the eve of trial with many witnesses located throughout the globe, a judge denied a client's request for a continuance based on the recent hiring of civilian counsel. Citing the *Miller* factors, the judge determined that: the extremely late hiring of civilian counsel provided inadequate notice to the court, the number and complexity of the motions filed tended to prove military counsel was prepared to argue the case, and

the expense associated with bringing multiple international witnesses to trial outweighed the client's interest in hiring civilian counsel. *Id.*

<sup>101</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>102</sup> See MCM, *supra* note 6, R.C.M. 502(d), 505, 803 (concerning withdrawal or substitution of counsel); see also MCM, *supra* note 6, R.C.M. 506; AR 27-10 *supra* note 7; AR 27-26, *supra* note 7; Rules of Practice, *supra* note 7; Professional Experience, *supra* note 11; Military-Civilian Counsel Survey, *supra* note 11. In one case, after a subpar closing argument by the civilian attorney, the military defense counsel requested to deliver a supplemental closing which was granted. *Id.*

<sup>103</sup> Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

matters.<sup>106</sup> Therefore, military counsel should anticipate this and address post-trial representation with the client multiple times, beginning well in advance of trial. Counsel should meet with the client again after trial to review the post-trial strategy and the client's decision in light of the adjudged sentence. Counsel should use the most current version of Defense Counsel Assistance Program (DCAP) Form 3: Post Trial and Appellate Rights Advise ment Form<sup>107</sup> to guide the discussion and record the client's decisions.

<sup>106</sup> *Id.* Post-trial matters include assisting an accused in the submission of any matter requesting relief pursuant to Article 60 of the UCMJ. MCM, *supra* note 6, R.C.M. 1105, 1106.

<sup>107</sup> The Defense Counsel Assistance Program (DCAP) prescribes various forms designed to assist military defense counsel in advising their clients. *See* Professional Experience, *supra* note 11. Failure to use DCAP forms (where required) may constitute ineffective assistance of counsel. *See* United States v. Axtell, 72 M.J. 662 (A.F. Ct. Crim. App. 2013); *See also* United States v. Mongkeya, 2013 CCA LEXIS 862 (A.F. Ct. Crim. App. 2013); United States v. Riley, 72 M.J. 115 (C.A.A.F. 2013) (findings set aside where the military counsel did not advise client of the consequences of sex offender registration.). The DCAP Sex Offender Registration Advice contains information for military counsel to advise a client of the consequences of a qualifying conviction requiring sex offender registration. *See* Defense Counsel Assistance Program, DCAP Form 1, Sex Offender Registration Advice.

<sup>108</sup> This section represents the author's recent professional experience and input from five civilian attorneys (more than fifteen were queried) and fifty-one Army, Air Force, Navy and Marine judge advocates who answered a multi-question survey, which elicited examples of best practices and general practice tips to assist judge advocates assigned to cases with civilian defense counsel. Some of the more common answers provided were incorporated in this section. None of the suggestions in the paper or this section should act as a substitute for legal advice. Judge advocates are strongly encouraged to consult with their technical chain or the rules to address questions or conflicts with the suggestions provided.

<sup>109</sup> *Id.*

<sup>110</sup> *See* Military-Civilian Counsel Survey, *supra* note 11. "Make sure that a division of labor is in writing. Make sure that the client knows that you are not the lead counsel; they made their choice of counsel and you respect that. Defer to the civilian counsel in front of the client."

Figure out as soon as possible what [the civilian counsel's] level of knowledge is with respect to military tribunals, and supplement as much as possible. Make sure the civilian attorney feels comfortable asking you to work on the case, and coming to you with questions. [G]et a division of labor set up as early as possible in order to minimize the [civilian] attorney dropping work on [military counsel] at the last minute. Make sure to touch base with the civilian attorney a few days before major deadlines to [ensure] deadlines are met.

*Id.*

<sup>111</sup> *See* Military-Civilian Counsel Survey, *supra* note 11. A sample Scope of Representation Memorandum for Record can be found in Appendix. *See also* AR 25-50, *supra* note 74. Military defense counsel should consult AR 25-50's format requirements and modify the sample Memorandum to suit his or her needs. Though the memorandum in the Appendix may help clarify the military counsel's role to the client, it may not protect an attorney from a subsequent charge of ineffective assistance of counsel. The

## V. Best Practices—Judge Advocate and Civilian Defense Counsel Perspectives<sup>108</sup>

The military defense counsel must prepare for a case as if he was the lone counsel.<sup>109</sup> Establish a clear division of labor early and, if possible, reduce the division of labor to writing.<sup>110</sup> Draft a memorandum to the client that addresses your role as associate counsel.<sup>111</sup> Keep your technical chain abreast of any issues and engage Defense Counsel Assistance Personnel sooner rather than later.<sup>112</sup> "Maintain regular communication with civilian counsel throughout the case in order to minimize surprises."<sup>113</sup> A civilian counsel's lack of military affiliation can be advantageous to a client both in court, in front of members, and out of court, when dealing with the government.<sup>114</sup> However, there are also times when

Sample Scope Memorandum for Record was graciously provided by a current Trial Defense Service attorney.

<sup>112</sup> Professional Experience, *supra* note 11. Defense Counsel Assistance Personnel are extremely helpful and accessible day or night. *Id.* Many Highly Qualified Experts are former military judges, who, oftentimes provide their personal cell phone number to assist with a variety of issues encountered by military counsel. *Id.*

<sup>113</sup> *See* Military-Civilian Counsel Survey, *supra* note 11.

<sup>114</sup> *See also id.* "In some instances, civilian counsel may get away with asking tough or harsh questions of a particular witness in front of members, e.g., a junior enlisted Soldier or an officer senior in rank to the defense counsel." *Id.* "As a civilian attorney, I was not going to have to [Permanently Change Station] to another legal job that was not litigation. Second, I can hire an investigator. An investigator is an essential tool to defending a criminal case." *Id.* *But see id.* "The military attorney should handle any portion of the case in which the civilian may use incorrect terminology or show a lack of understanding of the military system, especially in front of members." *Id.* *But see id.*

No matter how much updating I tried to do as a civilian attorney regarding military law, the TDS attorney always had the most up-to-date information on the law. The TDS attorney also knew the local legal environment, both on the command side and [Office of the Staff Judge Advocate] side. Trial Defense Service knew the trial counsel's proclivities (good and bad) regarding litigation, the local [Military Judge's] stance on issues and pet peeves, and the makeup of the panel. Trial Defense Service counsel also had access to military resources that civilian counsel had a tougher time accessing, for example access to witnesses through the military chain of command.

*Id.*; *see also* "[As a civilian] I'm not worr[ie]d about rank structure, unlawful command influence, or UCMJ authority over me personally. I'm not bucking for a trial counsel slot or promotion, or the next judge advocate assignment." *Id.* Civilian attorneys who completed the survey noted an overall advantage in using the media to publicize his or her case, where appropriate. "[Use] of the media called public attention to command unreasonableness, with good fallout for the client." *Id.* Military members must receive approval through their technical chain prior to speaking with, or release of, official information:

Department of Defense policy requires any official information intended for public release that pertains to military matters, national security issues, or subjects of significant concern to the DOD be cleared by appropriate security review and P[ublic] A[ffairs] offices prior to release. This includes materials placed on the Internet or released via similar electronic media.

*see* DEP'T OF DEFENSE DIRECTIVE 5230.9, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE (22 Aug. 2008); *see also* U.S. DEP'T

a military counsel may be in a better position to handle a certain part of a trial.<sup>115</sup> Military and civilian counsel should discuss their strengths and weaknesses and use those to the defense team's advantage.<sup>116</sup> "Learn, be open minded, and take an active role in the case."<sup>117</sup> "Don't be afraid to express your opinion."<sup>118</sup>

## VI. Conclusion

For military defense counsel, there are many rules to be mindful of. The skilled practitioner must be cognizant of these rules and be proactive in finding solutions when problems arise in order for military and civilian counsel to make their representation of clients most effective. Military and civilian defense counsel owe it to their clients to find ways to work around cultural differences and professional disagreements. When civilian and military counsel have a plan and work together, everyone is better off. When disagreements between civilian and military counsel occur, it is important to document those concerns, address them with the appropriate people, and always remember to act in the client's best interest. The defense is effective or ineffective as a team.

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OF ARMY, REG., 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM (15 Sep. 2000). Military counsel should address a civilian's lack of access to classified evidence early since the process to gain a clearance can be cumbersome. A unit's designated intelligence officer is responsible for assisting with this process. See U.S. DEP'T OF ARMY, REG., 380-5, SECURITY, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sep. 2000).

As a prosecutor[,] I had a case involving a civilian attorney who needed access to secret documents. It was a pain because they had to fill out an application for a security clearance and were missing documents. There was also a lag in the processing time. Ultimately, the civilian attorney never obtained a security clearance. [G]etting access to classified documents is tedious.

Military-Civilian Counsel Survey, *supra* note 11. "[R]equesting a clearance is a [d]ouble edged sword [because requesting a clearance for civilian counsel] makes prosecution harder for the government, but it is still a pain for the defense, logistically." *Id.* *But see id.* ("[R]equesting a security clearance or access to classified documents] could be a benefit because the prosecution might give up trying").

<sup>115</sup> See Military-Civilian Counsel Survey, *supra* note 11.

[V]oir dire and sentencing should be handled by the uniformed counsel. Voir dire because I want them to feel comfortable answering questions, and I think there is a greater comfort level speaking with a fellow uniformed person. I think that the uniformed counsel should handle sentencing because I usually try to portray my client as "one of us," and I think that [comes] better from a military member. Also, if we are in sentencing, the panel is probably tired of hearing from the civilian attorney.

*Id.* *But see id.* "If a client is paying for a civilian counsel, I believe the client should get his [or] her money's worth and have the civilian counsel handle the most significant portions of the trial, which generally include voir dire, closing, and primary, significant witnesses." *Id.*

<sup>116</sup> See Professional Experience, *supra* note 11; see also Military-Civilian Counsel Survey, *supra* note 11.

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

<sup>118</sup> See Military-Civilian Counsel Survey, *supra* note 11.

Communicate consistently and clearly. Figure out what the [civilian defense counsel's] expectations and experience are and let them know what your limitations and strengths are. Take advantage of civilian defense counsel's knowledge, experience, and expert networks, but don't be afraid to voice your opinion—[t]he same goes for working with detailed counseled. Military and civilian counsel bring different expectations, strengths, and resources to the table so use those to your team's advantage. If you don't communicate clearly, those things get lost and can negatively impact your client.

*Id.*; see also *id.* "Call and set up a meeting if civilian defense counsel has not already done so. If possible meet in person and go to each other's respective offices. Offer to be part of the team. Have lunch with co-counsel and talk shop." *Id.* "Communication seems to be the trickiest issue, and it usually seems to be that the civilian attorney is not communicating well with the TDS attorney or, sometimes, the client. The best the TDS attorney can do is keep up the emailing/phone calling as much as possible." *Id.*

OFFICE SYMBOL

## MONTH 201#

MEMORANDUM FOR RANK FIRST LAST, XXXX Company, XXXX Battalion, XXXX Brigade, Fort XXXX, XX ZIP

SUBJECT: Retention of Civilian Defense Counsel—Scope of Representation

1. On \_\_\_\_\_, I was detailed to represent you concerning the charges preferred against you. On \_\_\_\_\_, we met and established an attorney-client relationship. During that initial meeting, we also discussed the scope of my representation of you pertaining to this matter (recorded on DCAP Form 7a).

2. On \_\_\_\_\_, we met in my office to review your case and allow me an opportunity to hear your recollection of the matters concerned in this case. During that meeting, I also advised you of various rights concerning the court-martial process (recorded on a Memorandum for Record).

3. On \_\_\_\_\_, I received notice via electronic mail that you have retained \_\_\_\_\_, civilian defense counsel, to represent you in this matter. During a phone conversation that same day, you verified that you had retained \_\_\_\_\_ to represent you and we discussed your wishes concerning my continued participation and role in your case.

4. In accordance with Army Regulation 27-26, Rules of Professional Conduct for Lawyers, Rule 1.2, "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. . . . In a criminal case, . . . 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."

5. It is my understanding that you wish to have me continue to assist in your representation concerning this matter. However, you have retained \_\_\_\_\_ to serve as lead counsel. That is, \_\_\_\_\_ will have primary responsibility for communicating the status of your case with you. He will also be responsible for communicating with the court, requesting any necessary delays, making motions, interviewing and requesting experts and witnesses, negotiating with counsel for the government, developing a tactical case plan for trial, and presenting your case at trial.

6. I will continue to serve as associate counsel for your case. That is, I will follow \_\_\_\_\_'s lead while providing him the full measure of my own legal analysis and experience. I will relay messages from \_\_\_\_\_ to you concerning the status of your case, as necessary. I will also participate in the preparation and presentation of your case, and otherwise assist, as we deem necessary and appropriate.

7. If you have any questions concerning the scope of my representation of you in this matter, you may reach me at DSN XXX-XXXX or by email at \_\_\_\_\_.

NAME  
CPT, JA  
Defense Counsel

I have read and understood the memorandum above concerning the scope of representation.

Date \_\_\_\_\_.

NAME  
RANK, USA  
Accused