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A House Divided: The Unique Ethical Dynamic of Civilian and Military Co-Counsel Relations in Court-Martial Defense

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A HOUSE DIVIDED: THE UNIQUE ETHICAL DYNAMIC OF CIVILIAN AND MILITARY CO-COUNSEL RELATIONS IN COURT-MARTIAL DEFENSE

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I. INTRODUCTION

Captain ("CPT") Andrew Hampton rubs his eyes.[1] He is not looking forward to his next appointment. Along with his co-counsel, CPT Clara Franklin, CPT Hampton has been diligently trying to prepare for Sergeant ("SGT") Tyler Jackson's court-martial. SGT Jackson stands accused of two specifications of sexual assault,[2] to which he has steadfastly maintained his innocence. His detailed military defense counsel ("MDC"), CPT Hampton and CPT Franklin, believe there are some flaws in the prosecution's case, but their client is continually unwilling or unable to answer straightforward questions, complicating their trial preparation. As a result, the relationship has become strained. When SGT Jackson arrives, he walks into the office with a small grin on his face. "Hey, sir," he says, "You should know I hired Joe Smith."

CPT Hampton winces. Joe Smith is a civilian lawyer with a slick-looking website and an office within walking distance of the post's main gate. He brags, publicly and often, about his past military service and his courtroom prowess. Soldiers apparently believe him enough to keep him in business, but the defense attorneys in the local field office of

* Major, United States Army. The opinions expressed in this Article are solely the author's in his personal capacity and do not reflect the official position of the Department of Defense, Department of the Army, or any organization or official thereof. The author thanks Lieutenant Colonel Aimee Bateman and Michael Millios, Esq. for their help in proofreading this Article and recommending edits.

1. The hypothetical scenario presented is not based on any particular case or cases but drawn in general from the author's personal experience and observations as a supervisory defense counsel in the United States Army Trial Defense Service. All of the names are fictitious, and any resemblance to any particular individual is entirely coincidental.

2. Uniform Code of Military Justice ("UCMJ") art. 120, 10 U.S.C. § 920.

the trial defense service[3] have a decidedly different opinion, and they all dread working with him. With trepidation, CPT Hampton and CPT Franklin meet with Mr. Smith and SGT Jackson to plan their strategy going forward. At the meeting, Mr. Smith assures SGT Jackson how hard he will fight. CPT Hampton provides Mr. Smith a copy of the 400-page casefile, which Mr. Smith sticks in a briefcase. The attorneys draft a plan to divide the workload among the three of them; both CPT Hampton and CPT Franklin know that three defense lawyers are too many for this case.

Over the next few weeks, CPT Hampton grows more concerned. The military judge grants a continuance to allow Mr. Smith time to prepare. But after filing his notice of appearance, Mr. Smith does not respond to phone calls or emails, either from his co-counsel or the military judge. As deadlines approach, CPT Hampton seeks guidance and input from Mr. Smith; however, with no answers from Mr. Smith, CPT Hampton eventually responds on behalf of the defense to every request and direction from the judge. He and CPT Franklin file all the defense motions—with SGT Jackson's verbal consent on the record—and Mr. Smith is absent from oral arguments. Behind the scenes, SGT Jackson grows increasingly agitated as trial gets closer. Finally, Mr. Smith sets a meeting in his office to go over the case the Friday before trial. During the meeting, it is clear that Mr. Smith has not interviewed any of the witnesses he said he would, is still unaware of several significant details, and has not developed a consistent theory of the case.

Although Mr. Smith did little preparation, as lead counsel, he personally handles the most critical elements of the trial. The defense case begins with Mr. Smith's confusing opening statement. His off-the-cuff cross-examination of the alleged victim creates several

3. The United States Army Trial Defense Service is an independent field operating agency that provides defense counsel services to the United States Army. *See* U.S. DEP'T OF ARMY, REGUL. 27-10, MIL. JUST. ch. 6 (May 11, 2016) [hereinafter AR 27-10]. In the Air Force, the Trial Defense Division performs the same function. U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-204, U.S. AIR FORCE JUDICIARY AND AIR FORCE TRIAL JUDICIARY para. 2.2.3 (Sept. 10, 2018). Within the Department of the Navy, the United States Navy Defense Service Offices and United States Marine Corps Defense Service Organization provide defense counsel support to their respective services. U.S. DEP'T OF NAVY, NAVAL LEGAL SERVS. COMMAND INSTRUCTION 5800.1G, NAVAL LEGAL SERVS. COMMAND MANUAL ch. 11 (Feb. 25, 2013); U.S. MARINE CORPS, ORD. 5800.16, 3 LEGAL SUPPORT ADMIN. MANUAL (Feb. 20, 2018) [hereinafter MCO 5800.16-V3]. The United States Navy Defense Service Offices also support the United States Coast Guard. *See* Memorandum of Understanding Between the Deputy J. Adv. Gen., U.S. Coast Guard, and the Commander, Naval Legal Serv. Command, Regarding Mutual Support in Military Justice Matters (Aug. 31, 2016), https://www.uscg.mil/Portals/0/Headquarters/Legal/mj/MJ_Docs/Chapter%2012%20Reference%20-%20CG%20-%20Navy%20MOU%20for%20Defense%20Support.pdf; *see also CG Defense Services*, U.S. COAST GUARD, https://www.uscg.mil/Resources/legal/LMA/Defense-Counsel (last visited Nov. 7, 2020). Collectively, this Article further refers to these organizations of military defense counsel ("MDC"), roughly analogous to civilian public defenders' offices, as "military trial defense organizations."

openings for the prosecutors to exploit, which they do devastatingly well. He stumbles through a closing argument that misstates key evidence, drawing two sustained "facts not in evidence" objections. The verdict takes just under two hours. By the end of the day, SGT Jackson is a convicted sex offender with a dishonorable discharge starting a ten-year prison term. With tears in his eyes, SGT Jackson asks CPT Hamilton, "What happened?"

CPT Hamilton wants to reply, "You hired Mr. Smith," but instead he mumbles an apology and promises to stay in touch during the post-trial process.

The military justice system is unique in that *every* servicemember tried at a court-martial is entitled to a defense lawyer detailed to represent him at government expense,[4] whereas civilian jurisdictions provide a government-funded lawyer only to those criminal defendants[5] who cannot afford to pay for their own defense counsel.[6] Under Article 38 of the Uniform Code of Military Justice ("UCMJ"), servicemembers facing trial by court-martial may be represented by MDC detailed at government expense, by military counsel of their own selection if "reasonably available," or by civilian counsel obtained at no expense to the government.[7] The first and last of these rights are not exclusive; unless the accused affirmatively releases her detailed MDC, that MDC remains assigned to the defense team even after the accused hires a civilian defense counsel ("CDC").[8] This creates a unique dynamic on a court-martial defense team, where the accused retains *both* the government-funded counsel that someone else chose for her and the retained counsel of her choice. The military is the only jurisdiction where such a forced co-counsel relationship is possible.[9] This dynamic presents an acute ethical dilemma for an MDC: What is his obligation to his client when it appears that the CDC is failing to perform the responsibilities for which the client retained him?

Most CDC, like most attorneys in general, understand their professional responsibilities to their clients, and most relations between

4. UCMJ art. 27, 10 U.S.C. § 827.

5. The UCMJ and the Rules for Courts-Martial use the term "the accused" rather than the "the defendant," which is the term typically used in civilian jurisdictions. Similarly, whereas civilian public defenders are commonly "appointed" to represent a client, MDC are "detailed." In order to maintain consistency with the authorities cited herein, this Article follows these conventions. UCMJ art. 1, 10 U.S.C. § 801.

6. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (stating that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours").

7. UCMJ art. 38, 10 U.S.C. § 838.

8. *Id.*

9. *See id.*; *cf. Gideon*, 372 U.S. at 344 (recognizing that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

military and civilian defense attorneys are civil and effective. But some MDC find themselves unwilling members of a defense team that approaches constitutionally ineffective assistance.[10] Under the current laws and policies concerning forming and terminating attorney-client relationships, an MDC may find himself forced to work under a CDC[11] who not only disagrees with the MDC's views of the case, but whose conduct actively harms the client. This places the MDC in a difficult position that the military's ethical rules and service policies do not adequately address. In practice, an MDC is expected to compensate for a CDC's shortcomings and carry the workload themselves if necessary; this perpetuates the problem by masking it. Furthermore, the statutory and regulatory system by which MDC form and terminate attorney-client relationships exacerbates this method of accommodation.

The military justice system puts its uniformed MDC in this position, and therefore, the military services should provide their MDC with more comprehensive ethical standards and guidelines to include explicitly permitting, if not directing, MDC to share concerns about a CDC's performance with their client. Congress and the President should reform Article 38 and its implementing regulations to ensure CDC cannot assume that MDC will shore up their inadequate performance.[12] Addressing these unique ethical problems will better serve defense counsel and more importantly will enhance the military justice system's ability to provide competent representation, and thus a fair trial, for the accused.

II. MILITARY DEFENSE LAWYERS NEED CLEARER POLICY GUIDANCE TO ESCAPE THE ETHICAL VICE OF AN INCOMPETENT OR INDILIGENT CDC

Every accused servicemember facing a court-martial has the right to representation by a civilian attorney at no expense to the government.[13] Unlike in civilian criminal defense, when a client retains private (civilian) counsel, her government-funded MDC will remain on the case as "associate counsel" unless the client excuses her.[14] The selection of a CDC is personal to the accused; the military services vary

10. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing the constitutional standard for determining ineffective assistance of counsel).

11. If a servicemember hires a civilian defense counsel ("CDC"), the CDC serves as lead counsel while the detailed or individually-requested MDC, if obtained, becomes the "associate" defense counsel, unless excused from the case. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(2)(A) discussion (2019) [hereinafter MCM].

12. *See supra* Part III.

13. *See supra* notes 7-9 and accompanying text.

14. *See supra* note 11; *see also infra* notes 46-48 and accompanying text.

in the degree to which they restrict the MDC from advising the client on whether to hire a CDC or recommend a particular CDC.[15]

The MDC and CDC who represent servicemembers at courts-martial must be licensed to practice law in at least one territory, a federal court, or the highest court of a U.S. state.[16] Furthermore, each military department promulgates rules of professional conduct, generally modeled after the American Bar Association's Model Rules of Professional Conduct.[17] All attorneys, military and civilian, who appear before a court-martial must comply with the rules for that particular military service.[18] Therefore, CDC and MDC alike are subject to the ethical rules of both their licensing authorities and the military department in which they try cases.

Authorities in at least two jurisdictions have held that attorneys have a duty to inform their clients directly when they reasonably believe their co-counsel's performance could constitute malpractice.[19] Additionally, the Army and the Navy explicitly direct military attorneys to discuss with their clients when they believe a CDC's actions violate the rules of professional conduct.[20] This is fairly straightforward regarding the exceedingly rare CDC who, for example, knowingly presents false evidence[21] or unlawfully destroys documents with potential evidentiary value.[22] But adherence to this policy presents a

15. *Compare* AR 27-10, *supra* note 3, app. C, para. C-2(b)(1) ("Military counsel will not recommend any specific civilian counsel."), *with* MCO 5800.16-V3, *supra* note 3, § 011801 ("[Defense Service Organization] attorneys are obligated to honestly answer any and all questions posed to them by their clients, but will typically avoid recommending to a client which attorney among a group of two or more the client should select."); *see also* 5 C.F.R. § 2635.702(c) (2019) (prohibiting federal employees from endorsing private business enterprises).

16. UCMJ art. 27(b)(1), 10 U.S.C. § 827(b)(1); MCM, *supra* note 11, R.C.M. 502(d)(2)(B).

17. *Compare* U.S. DEP'T OF ARMY, REGUL. 27-26, RULES PRO. CONDUCT FOR LAWYERS (June 28, 2018) [hereinafter AR 27-26], *and* U.S. DEP'T OF NAVY, JUDGE ADVOC. GEN. INSTRUCTION 5803.1E, PRO. CONDUCT ATT'YS PRACTICING UNDER COGNIZANCE AND SUPERVISION JUDGE ADVOC. GEN. (Jan. 20, 2015) [hereinafter JAGINST 5803.1E], *and* U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-110, PRO. RESP. PROGRAM attach. 2 (Dec. 11, 2018) [hereinafter AFI 51-110], *with* MODEL RULES PRO. CONDUCT (AM. BAR ASS'N 2018).

18. AR 27-26, *supra* note 17, para. 7.a(1); JAGINST 5803.1E, *supra* note 17, para. 4; AFI 51-100, *supra* note 17, attach. 2, intro.

19. Curb Records v. Adams & Reese, L.L.P., No. 98-31360, 1999 WL 1240800, at *1 (5th Cir. Nov. 29, 1999) (per curiam) ("[U]nder Louisiana law, there is an inherent and nondelegable duty of care that requires local counsel to inform its client of any known malfeasance or misfeasance on the part of lead counsel, which, to an objective reasonable attorney, would result in serious prejudice to the client's interests."); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1092 (2016) ("A lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim.").

20. AR 27-10, *supra* note 3, app. C, para. C-2(b)(3); JAGINST 5803.1E, *supra* note 17, encl. 4, para. 3. Both services direct the military attorney to first attempt to resolve the issue directly with the CDC and to seek to withdraw from the case if the client endorses the CDC's conduct.

21. AR 27-26, *supra* note 17, app. B, r. 3.3(a)(3); *accord* JAGINST 5803.1E, *supra* note 17, encl. 1, r. 3.3(a)(3); AFI 51-110, *supra* note 17, attach. 2, r. 3.3(a)(3).

22. AR 27-26, *supra* note 17, app. B, r. 3.4(a); *accord* JAGINST 5803.1E, *supra* note 17,

greater quandary when applied to more subjective standards like competence[23] and diligence.[24]

As the defense team readies itself for trial, the point at which co-counsel's lack of preparation becomes professionally irresponsible is not easily identified except in hindsight. The military directs the MDC to consult with their supervisory attorneys in these instances.[25] But the supervisory attorneys, while more experienced, have no additional policy guidance to help address the crucial question of when the client must be informed that the CDC's demonstrated lack of competence or diligence is harming her interests. It is difficult in the best of circumstances for an attorney to realize, in advance of trial, that his co-counsel is going to be ineffective. Yet keeping silent does not aid the client in making informed decisions about her representation,[26] may harm her interests, and could place the MDC in contravention of both service policy and his licensing authority.[27]

The military trial defense organizations have adopted various best practices and common techniques to address this situation.[28] These typically include maintaining written records of trial preparation and concerns with the CDC, but these organizations also caution the MDC that they must be ready to grit their teeth and do all of the work themselves.[29] This is primarily because military appellate courts evaluate

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encl. 1, r. 3.4(a)(1); AFI 51-110, *supra* note 17, attach. 2, r. 3.4(a).

23. AR 27-26, *supra* note 17, app. B, r. 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."); *accord* JAGINST 5803.1E, *supra* note 17, encl. 2, r. 1.1; AFI 51-110, *supra* note 17, attach. 2, r. 1.1.

24. AR 27-26, *supra* note 17, app. B, r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *accord* JAGINST 5803.1E, *supra* note 17, encl. 1, r. 1.3; AFI 51-110, *supra* note 17, attach. 2, r. 1.3.

25. *See, e.g.*, JAGINST 5803.1E, *supra* note 17, encl. 4, para. 3; E-mail from Eric B. Neuman, Major, U.S. Marine Corps, Off. Chief Def. Couns., Def. Couns. Assistance Program, to Robert E. Murdough, Major, U.S. Army (Dec. 6, 2019, 12:15 PM) (on file with author) ("If [M]DCs are having issues that aren't covered by policy [including concerns over the CDC's preparation], they are told to contact their supervisor or [the Defense Counsel Assistance Program].").

26. *See* Curb Records v. Adams & Reese, L.L.P., No. 98-31360, 1999 WL 1240800, at *5 (5th Cir. Nov. 29, 1999) (per curiam) (quoting LA. RULES OF PRO. CONDUCT r. 1.4 (2018)).

27. *See supra* notes 19-20 and accompanying text.

28. *See infra* note 29 and accompanying text.

29. *See* Major Michael G. Botelho, *Working with Civilian Counsel: A Military Practitioner's Roadmap*, ARMY LAW., May 2016, at 23, 29 n.74 (citations omitted) (quoting "former Trial Defense Services Attorney") ("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."); *id.* at 28 n.67, 24 n.11 (quoting a survey of sixty-two anonymous MDC and CDC) ("I have seen civilian attorneys essentially take the money and dump the work on Trial Defense Services' (TDS) attorneys . . . The best the TDS attorney can do is work the case."); *id.* at 30 n.92 ("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."); *see also* e-mail from Timothy Grammel, Esq., U.S. Army, Trial Def. Servs. Def. Couns. Assistance Program, to Robert E. Murdough, Major, U.S. Army (Nov. 22, 2019, 3:35 PM) (on file with author) ("[B]e ready to do everything in the case until you get some assurances that the CDC is actually prepared to perform

claims of ineffective assistance of counsel ("IAC") by examining the performance of the defense team as a whole.[30] Thus military trial defense organizations, not unreasonably, focus on ensuring their own members' effectiveness regardless of the performance of a CDC. These organizations acknowledge that there are times when the MDC must (tactfully) discuss issues concerning lack of preparation or lack of communication with her client.[31]

Yet many additional considerations militate against taking the bold step of informing the client about a CDC's potentially ineffective performance. MDC start from a position of deference to the CDC,[32] and most will want to retain a civil working relationship while they share a client. An MDC may not want to upset his client, who is already under significant strain and is paying for the CDC's services. More significantly, some MDC are wary of accusations of tortious interference with the attorney-client relationship.[33] An accused servicemember whose MDC explains to her that her CDC is not performing his duties might infer that the MDC recommends terminating the relationship with the CDC. The CDC could very well consider this improper interference with his own attorney-client relationship.[34] Unlike a traditional co-counsel

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his tasks."); E-mail from Stuart T. Kirkby, Commander, Dir., U.S. Navy Def. Couns. Assistance Program, to Robert E. Murdough, Major, U.S. Army (Dec. 20, 2019, 10:54 AM) (on file with author) ("[W]e encourage written communications and written affirmation of conversations.").

30. United States v. Boone, 42 M.J. 308, 313 (C.A.A.F. 1995) (citing United States v. Walker, 45 C.M.R. 150, 154 (C.M.A. 1972)); *see also infra* note 54 (discussing a lower court's opinion on remand evaluating the defense's collective performance).

31. *See* Grammel, *supra* note 29 ("If the CDC will not return your calls or e-mails, and you hear nothing about motions and witness requests . . . talk to the client and see if he is communicating with the CDC. Do this in a way that does not alarm the client. . . . If the matter is one of the client's decisions or bears on one of the client's decisions, you should take the matter to the client."); Kirkby, *supra* note 29 ("[W]hen communications break down, either over strategy or through lack of response . . . we encourage military counsel to involve the client."); Botelho, *supra* note 29, at 29 ("[D]ocument those concerns in a memorandum for record and discuss those concerns with civilian counsel. 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.").

32. *See supra* note 11 and accompanying text.

33. In the author's professional experience, this is the overwhelming reason an MDC is reticent to express his concerns about a CDC's performance to his clients and why better service policy is necessary. *But see* Kirkby, *supra* note 29 ("[The United States Navy's Defense Counsel Assistance Program] do[es] not see this as interfering with the contractual relationship between the client and the civilian counsel.").

34. *See, e.g.*, Abrams & Fox, Inc. v. Briney, 114 Cal. Rptr. 328, 331 (1974) ("General principles regarding tortious interference with contractual relations are applicable to interference with attorney-client relations."); Callis v. Norfolk Southern Corp., 686 N.E.2d 750, 754 (Ill. App. Ct. 1997) ("Illinois recognizes a cause of action for interference with the professional relationship between attorney and client. This tortious interference claim is based upon interferes with the attorney-client relationship irrespective of contract." (citation omitted)); Gorayeb & Assocs., P.C., v. Toledo, No. 656590/2017, 2018 WL 2739432, at *2-3 (N.Y. Sup. Ct. June 7, 2018) (holding that persuading a client to discharge retained attorneys constitutes tortious interference with prospective economic relations); *see also* Brant Young, Note, *Inducing a Breach of Attorney-Client Relationship*, 2 U. ALA. J. LEGAL PRO. 203, 209-10 (1977) (noting that lawyers who induce a breach of the attorney-client relationship can be liable both in tort and to their professional licensing

relationship in civilian court, a CDC and an MDC probably did not choose to work with each other. Thus, a CDC would likely be less reticent about leveling an accusation, either as a tort suit or a bar complaint, than among co-counsel who chose to associate. This lack of familiarity, coupled with basic human pride, also makes misunderstandings more likely—while the MDC and CDC may both believe they are acting appropriately, they misinterpret the other's conduct as hostile. Powerful countervailing concerns and cultural norms make the MDC unlikely to assume the risk of an errant decision based solely on their subjective assessment of a CDC's performance.

It is a bold step for one co-counsel to impugn another's professionalism in front of their mutual client. The military services' current policies, at best, provide only oblique guidance that does not aid counsel in deciding when to take that step and does not account for the conflicting pressures on the MDC.[35] This has the secondary effect of masking the ethical problem by underwriting an incompetent or indiligent CDC's lack of preparation with the government-funded MDC whose foremost concern is keeping the defense team from failing. The UCMJ creates a unique co-counsel dynamic that civilian public defenders do not encounter; therefore, the military service regulations must unambiguously authorize the MDC to communicate concerns about their co-counsels' case preparation to their clients. Without such clarity, MDC remain caught in the vice between the possibilities of an IAC allegation or a bar complaint from an angry co-counsel, fending for themselves as they prepare for trial.

III. ARTICLE 38 OF THE UCMJ AND THE RULES FOR COURTS-MARTIAL EXACERBATE THIS PROBLEM

Article 38 provides that an accused, although she is entitled to a military counsel detailed to her defense, may personally request an individual military counsel of her own selection if such counsel is "reasonably available."[36] Article 38 further provides that if such a

authorities). Note that in the civilian context, tortious interference by one lawyer against another lawyer normally involves situations where the tortfeasor is attempting to gain the client's business, and not a co-counsel representing the same client. Civilian tort jurisprudence therefore may be inapplicable to this situation, though likely no military attorney would want to personally test this theory.

35. *See* Botelho, *supra* note 29, at 26-28, 29 n.74 (quoting "former Trial Defense Service Attorney") ("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.").

36. UCMJ art. 38(b)(3), 10 U.S.C. § 838(b)(3). Each military department promulgates its own regulations establishing the procedures for detailing MDC and determining whether individually-requested counsel is "reasonably available." *See* UCMJ arts. 27(a)(1), 38(b)(7), 10 U.S.C. §§ 827(a)(1), 838(b)(7); *see also* AR 27-10, *supra* note 3, paras. 5-7, 6-9 (prescribing

request for individual military counsel is approved, any previously detailed military counsel will be excused unless the detailing authority, "in his sole discretion," allows them to remain on the case.[37] This Article of the UCMJ expressly states: "The accused is not entitled to be represented by more than one military counsel."[38]

This was not always the case. As originally enacted in 1950, Article 38 read: "Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel."[39] Congress amended this provision in 1981, providing for excusal of detailed counsel if the accused obtains military counsel of his own selection and adding the presumptive restriction on "more than one military counsel" that still exists today.[40]

The legislative history shows that Congress and the leadership of the military services, to include the Court of Military Appeals,[41] were concerned, *inter alia*, with the inefficient use of resources when a servicemember obtained both military counsel of her own selection and retained her detailed MDC.[42] Chief Judge Robinson Everett of the Court

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detailing and individual request procedures for the United States Army); U.S. DEP'T OF NAVY, NAVAL LEGAL SERVS. COMMAND INSTRUCTION 5800.7F, MANUAL JUDGE ADVOC. GEN. paras. 0130-31 (June 26, 2012) (detailing procedures for the United States Department of the Navy); U.S. DEP'T OF AIR FORCE, INSTRUCTION 51-201, ADMIN. MIL. JUST. paras. 10.3.1.1, 10.4 (Jan. 18, 2019) (detailing procedures for the United States Air Force).

37. UCMJ art. 38(b)(6), 10 U.S.C. § 838(b)(6).

38. *Id.*

39. Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, art. 38, 64 Stat. 107, 120 (1952) (codified as amended at 10 U.S.C. § 838).

40. Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4, 95 Stat. 1085, 1088 (1981) (codified as amended at 10 U.S.C. § 838). At the time, the decision to excuse or allow the detailed MDC to remain on the case resided with the military commander who convened the court-martial. In 1983, Congress changed this provision to its current language, "the person authorized under regulations prescribed under [Article 27 of the UCMJ] to detail counsel," as part of a comprehensive reform of the UCMJ that, among other changes, removed defense counsel from the direct supervision of the military chain-of-command. Military Justice Act of 1983, Pub. L. No. 98-209, § 3(e)(1), 97 Stat. 1393, 1394 (1983). Notwithstanding that presumption, today many accused servicemembers receive two detailed MDC for a contested court-martial, especially in complex trials—however that decision belongs to the detailing authority, not the accused. *See, e.g.*, MCO 5800.16-V3, *supra* note 3, at para. 011002 ("The detailing of assistant defense counsel to contested and/or complex cases is encouraged.").

41. The Court of Military Appeals was later renamed the Court of Appeals for the Armed Forces. *The History of the U.S. Army Court of Criminal Appeals*, JAGCNET (Apr. 3, 2013, 4:59 PM), https://www.jagcnet.army.mil/ACCA.

42. *Hearing on H.R. 4689 to Amend the Uniform Code of Military Justice Before the Mil. Pers. and Comp. Subcomm. of the Comm. on Armed Servs.*, 97th Cong. 21 (1981) [hereinafter *Hearing Report*] (statement of Hon. Robinson O. Everett, C.J., United States Court of Military Appeals) ("[I]t would be nice, of course, to be able to furnish two lawyers. It would be nice to furnish a lot of other things . . . I just do not think the services have the resources to provide it."); *id.* at 50 (statement of Major General Hugh J. Clausen, J. Advocate General of the United States Army) ("The Department of Defense strongly supports the amendment . . . pertaining to individual military counsel. This provision will result in a cost and manpower saving without impairing the rights of accused service personnel."); *id.* at 77 (letter of retired General Russell E. Dougherty, United States

of Military Appeals testified, "[I]f you give the man a choice . . . and he is assigned a counsel of his choice, he really cannot complain if he does not have two lawyers."[43] The Judge Advocate General of the Army, Hugh J. Clausen, testified, "[P]roviding the accused with two free military lawyers is a burden the Government should not be required to assume except when it is necessary."[44]

Rules for Courts-Martial 505 and 506 implement Article 38, excusing detailed MDC unless the appropriate detailing authority elects to keep them on the case.[45] Currently, regardless of whether an accused receives one, two, or even three detailed MDC, if she receives the *military* counsel she personally chooses, the detailing authority can terminate the attorney-client relationship for any or all of the detailed MDC.[46] Otherwise, the detailed MDC who have formed an attorney-client relationship must remain part of the defense team unless the military judge presiding over the court-martial permits the MDC to withdraw, either for good cause or with the consent of the accused.[47] In other words, if the accused receives the *civilian* counsel she personally chooses, the *accused*, rather than the detailing authority, decides whether any or all detailed MDC remain part of the defense team.

This arrangement is unique to the military. In civilian jurisdictions, where the right to publicly-funded counsel is based on indigence, when a criminal defendant obtains counsel of his own selection (thus disproving indigence) the trial court can terminate any prior appointment of publicly-funded defense counsel.[48] The supporters of the 1981 UCMJ amendments, in the name of efficiency and conservation of resources, advocated giving military detailing authorities similar discretion to end

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Air Force) ("I do not believe there should be any obligation on the part of the government to provide more than one military counsel."); *id.* at 96 (letter of Hon. Robinson O. Everett, C.J., United States Court of Military Appeals) ("The amendments [to Article 38] . . . insure that each member will have competent representation by military counsel free of charge, but at the same time insure that such representation is being provided at a reasonable cost to the government and that military legal manpower is being utilized in an economic fashion."). *But see id.* at 40 (statement of Eugene R. Fidell, Esq., American Civil Liberties Union) ("[T]he notion that there is something basically wrong with our statutory scheme because it permits two lawyers in some circumstances, puzzles me.").

43. *Id.* at 20.

44. *Id.* at 50.

45. MCM, *supra* note 11, R.C.M. 505(d)(2)(B)(i), 506(b)(3).

46. *Id.* 506(b)(3) discussion ("Among the factors that may be considered in the exercise of discretion [to excuse or permit retention of detailed MDC] are the seriousness of the case, retention of civilian defense counsel, complexity of legal or factual issues, and the detail of additional trial counsel [i.e. prosecutors].").

47. *Id.* 505(d)(2)(B), 506(c).

48. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, GUIDE TO JUDICIARY POLICY §§ 220.55.30, 220.60 ("In any case in which appointment of counsel has been made under the [Criminal Justice Act] and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated.").

an MDC's attorney-client relationships if a client obtains the military attorney he wants.[49] Yet Congress left in place a system whereby an accused can keep multiple detailed MDC *and* the attorney he wants by choosing a CDC rather than requesting a particular military counsel.[50]

In the military, a detailing authority may decide that a case merits a second defense counsel and detail an assistant MDC to the case.[51] The accused may then hire a CDC, in which case the detailing authority cannot remove even one of the detailed MDC after an attorney-client relationship has been formed, even if that case does not require three attorneys to present an effective defense.[52] More is not always better; not only does this present the same concerns about inefficiency that led Congress to amend Article 38 with regard to individually-requested military counsel, it exacerbates the potential ethical problem described above in Part II by ensuring every CDC can be backstopped by at least one, if not more, MDC.[53]

IV. SOLUTIONS—GIVE MDC AND THEIR SUPERVISORS THE COVER AND FLEXIBILITY THEY NEED

Currently, the military services give MDC little specific guidance for situations when a CDC appears to be failing their mutual client beyond "talk to the CDC," "talk to your supervisor," and (maybe) "talk to your client." The supervisors likewise have few guideposts, and ultimately, the MDC and supervisors must weigh their qualitative judgment of the CDC's performance against the likelihood it will damage the relations among counsel and client and expose the MDC to an accusation of malfeasance. All the while, the MDC still remains part of the defense team preparing for trial, under the expectation that he can be held professionally responsible for everything the defense does or fails to do.

The military services should reduce this uncertainty and concomitant anxiety by prescribing clear guidance for when an MDC must communicate to her client when co-counsel's performance is

49. *Hearing Report*, *supra* note 42, at 50-52 (statement of Major General Hugh J. Clausen, J. Advocate General of the United States Army).

50. *See supra* text accompanying notes 46-47. Incidentally, one of the strongest opponents to the "only one military defense counsel" rule had no quarrel with such a rule when the accused obtained a CDC. *Hearing Report*, *supra* note 42, at 73 ("Where civilian counsel is retained, I am not bothered by providing only one military lawyer.") (letter of Jack B. Zimmerman, Association of Trial Lawyers of America, appended to the record of the hearing).

51. *See* sources cited *supra* note 40.

52. *See* MCM, *supra* note 11, R.C.M. 505(d)(2)(B), 506(b)(3), 506(c) (providing that, after the formation of the attorney-client relationship, "detailed defense counsel shall normally be excused" if the accused is represented by an individual MDC, but not requiring the same procedure if the accused is represented by a CDC).

53. *See supra* text accompanying notes 41-44; *supra* Part II.

unacceptable. Case law defining when counsel's performance reaches IAC provides a helpful framework. The hypothetical case of SGT Jackson, above, illustrates some of the clearest and most likely situations—failure to investigate, failure to prepare, and failure to meet deadlines from the court.[54]

In *United States v. Gibson*,[55] the defense (CDC and MDC together) failed to identify and follow investigatory leads in the law enforcement report that would have led to witnesses who could have challenged the alleged victim's credibility.[56] The Court of Appeals for the Armed Forces held that "failure to investigate . . . was a serious oversight caused by [co-counsels'] failure to carefully read the final CID report" and constituted IAC.[57] In *United States v. Scott*,[58] a lay volunteer identified multiple witnesses who may have supported the accused's alibi defense.[59] Despite presenting alibi as the theory of the defense, the CDC did not follow up on any information from the volunteer investigator, "did not prepare [his key witness] or any other witness for trial," and did not prepare his own client for direct or cross-examination.[60] In *United States v. Boone*,[61] the MDC interviewed three potential presentencing witnesses who could have testified about his client's rehabilitative potential.[62] Once the accused hired a CDC, the MDC turned his notes over to the CDC.[63] The CDC did not contact these witnesses and they did not testify at trial, which the court held constituted IAC.[64] The appellate court also cautioned the MDC:

> We recognize the delicate situation military defense counsel confront when the client exercises his right to civilian defense counsel and also retains military counsel on the case. However, this case demonstrates why military counsel must not be lulled into inactivity and complete deference to their civilian counterpart. The presence of civilian counsel

54. *See supra* Part I; *see also* United States v. Brunson, 59 M.J. 41, 43 (C.A.A.F. 2003) (castigating appellate counsel for multiple late filings and noting that counsel risks "compromising their client's rights and protections" when they fail to comply with court rules). Note that all defense counsel are equally at fault if the defense team fails to meet court deadlines of which all counsel are aware.

55. 51 M.J. 198 (C.A.A.F. 1999).

56. *Id.* at 199-200, 202.

57. *Id.* at 201-02 (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)) ("[C]ounsel has a duty to make reasonable investigations.").

58. 24 M.J. 186 (C.M.A. 1987).

59. *Id.* at 189-90.

60. *Id.* at 191.

61. 44 M.J. 742 (A. Ct. Crim. App. 1996).

62. *Id.* at 743-744.

63. *Id.*

64. *Id.* at 744, 746.

> does not relieve military defense counsel of their professional and ethical obligations toward their client.[65]

The phrase "delicate situation" accurately describes the unique predicament that MDC face, which their counterparts in civilian public defenders' offices almost never encounter: subjection to professional consequence for the ineffective performance of the retained counsel whom they had no choice in selecting. The military services should aid their MDC in navigating this delicate situation and clearly direct them to notify their clients when it appears their co-counsel[66] are failing to adequately investigate or prepare for their cases. This will aid counsel in fulfilling their ethical obligations, including the duty to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[67] It will also provide reassurance to the MDC by underwriting their reasonable decisions to communicate concerns with their clients, reducing their potential exposure to accusations of wrongful interference by a scorned CDC.[68]

Even a minor clarifying addition to existing regulations would significantly reduce the uncertainty present in the current dynamic—for example, amending the Army Military Justice regulation to read: "If the military counsel determines that the civilian counsel is conducting himself or herself contrary to the Army 'Rules of Professional Conduct for Lawyers' (see AR 27-26) *including the duties of competence, diligence, and communication* . . . ."[69] A more comprehensive solution would provide a list of situational examples, including those discussed above (failure to investigate, to talk with witnesses, or to prepare for witness examinations).[70] Rather than relying on military trial defense organizations' internally-developed best practices and informal guidance, this directive should be in publicly-available service regulations,[71] so that CDC, MDC, prosecutors, and even the lay public can be aware of them.

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65. *Id.* at 746 n.4.

66. While this Article focuses on civilians as lead counsel assisted by MDC, such guidance would apply as forcefully to situations involving, for example, two military co-counsel, an individually-requested MDC, and a detailed MDC.

67. AR 27-26, *supra* note 17, app. B, r. 1.4(b); *accord* JAGINST 5803.1E, *supra* note 17, encl. 1, r. 1.4(b); AFI 51-110, *supra* note 17, attach. 2, r. 1.4(b). This phrase also provides a key limitation—lack of diligence or communication is not failing to respond to every email or return every phone call from co-counsel, but a protracted dereliction of counsel's responsibility to the point that the *client* cannot meaningfully participate in his defense.

68. *Cf.* AR 27-26, *supra* note 17, app. B, r. 5.2(b) ("A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."); *accord* JAGINST 5803.1E, *supra* note 17, encl. 1, r. 5.2(c); AFI 51-110, *supra* note 17, attach. 2, r. 5.2(b).

69. AR 27-10, *supra* note 3, para. C-2(b)(3) (italicized text indicates proposed addition).

70. *See supra* text accompanying notes 54-66.

71. *See, e.g.*, AR 27-10, *supra* note 3; MCO 5800.16-V3, *supra* note 3. Alternatively, adding

Furthermore, Congress should amend Article 38 and the President should amend the implementing Rules for Courts-Martial[72] to give detailing authorities the ability to remove detailed MDC if an accused obtains representation from a CDC. The provision of qualified counsel at government expense, regardless of indigence, is a positive cornerstone of military justice. However, if the accused opts for civilian counsel of his own selection, military detailing authorities should have the same flexibility they do when the accused opts for military counsel of his own selection. This would allow the supervisory attorneys in military trial defense organizations the ability to serve their clients' interests while efficiently managing their personnel.[73] Additionally, it would reduce the incentive for unscrupulous CDC to shirk their responsibilities to their clients because they would not be guaranteed a government-funded MDC to compensate for their ineffectiveness.

This Article describes ethical dilemmas that are practically nonexistent in civilian criminal defense practice but, thankfully, are also uncommon in military criminal justice. Nonetheless, the unique system by which accused servicemembers obtain and retain court-martial defense attorneys sets the conditions for *some* CDC's dereliction of their professional responsibility, which the military services' current guidance both facilitates and obfuscates. In the end, the accused servicemembers paying for this deficient representation are the ones who suffer the most. Clear direction and revised policy will mitigate the likelihood of such deficiency, elevate the quality of the court-martial defense bar, and thereby enhance the fairness of military justice.

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such a provision to the services' respective Rules of Professional Conduct would be sufficient; *see* sources cited *supra* note 17.

72. The President establishes the rules of procedure and evidence for courts-martial through executive order. *See* UCMJ art. 36, 10 U.S.C. § 836.

73. If nothing else, the statute and rules should allow a detailing authority discretion to excuse one MDC in situations where he originally detailed multiple MDC based on her assessment of the case. This would also reinforce the legislative decree of Article 38, that one MDC is an entitlement, but any additional MDC is discretionary. *See supra* note 38 and accompanying text.